COURT OF APPEALS
DECISION
DATED AND FILED

August 1, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-2608-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROGER H. SPLITT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

Before Nettesheim, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Roger H. Splitt appeals from the judgment of conviction entered against him, and from the order denying his motion for postconviction relief. He argues on appeal that he received ineffective assistance

of trial counsel, that his right to a fair trial was violated by certain remarks made by the State during closing arguments, that WIS. STAT. § 948.025 (1999-2000)[1] is unconstitutional, and that the prior offense used to establish that he was a repeat offender was under an Illinois statute which is not comparable to the Wisconsin statute, and therefore the sentence must be vacated. We conclude that Splitt did not receive ineffective assistance of counsel, that while the prosecutor's closing remarks were offensive, they did not violate Splitt's right to a fair trial, that the statute is constitutional, and that the repeat offender penalty enhancer was properly applied. We, therefore, affirm the judgment and the order.

¶2 Splitt was convicted after a jury trial of one count of sexual contact with a child as a persistent repeat offender, and one count of repeated acts of sexual contact with a child. Splitt was charged for having sexual contact with the young daughter of his niece. After the jury verdict was returned but before sentencing, Splitt, represented by new counsel, moved for a mistrial based on certain comments made by the prosecutor during closing argument. At the sentencing hearing, the court denied the motion for a mistrial.

¶3 The court sentenced Splitt to a mandatory life sentence without the possibility of parole on count one, and forty years to be served concurrently on count two. Splitt filed a motion for postconviction relief challenging his conviction and sentence. The court held a hearing on the motion, and then denied it. Splitt appeals from the judgment of conviction and the order denying his motion for postconviction relief.

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1 All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶4 Splitt first argues that his trial counsel was ineffective. To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. *See* ***id.*** at 697. We will not "second-guess a trial attorney's 'considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.' A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) (citations omitted).

¶5 Splitt argues that his trial counsel was ineffective because he did not object to, or seek to have redacted, certain portions of a transcript. The transcript was of an interview Splitt had with the police in which Splitt admitted that he suffered from alcoholic blackouts and did not always remember what he had done. Prior to trial, Splitt moved to suppress the statement, but the motion was denied. The court eventually ordered portions of the transcript concerning uncharged matters to be redacted.

¶6 The transcript was read to the jury by the prosecutor and a police officer, and included repeated statements by the officer that he believed Splitt to be guilty, to be lying, and that he believed Splitt was a pedophile. Splitt does not object to the fact that the transcript was read. Splitt argues instead that these statements were objectionable and otherwise inadmissible, and that counsel's failure to object to these statements deprived Splitt of effective representation. We disagree.

¶7 Since the court had already ruled that the transcript could be read, the jury would hear Splitt's statements that he suffered from alcoholic blackouts. Counsel, therefore, needed a strategy for minimizing the effect of the transcript. The defense argued that the police were haranguing Splitt in an attempt to get him to confess. The statements that Splitt now finds objectionable support that theory. This was a reasonable strategy and did not constitute ineffective assistance of counsel.

¶8 Splitt also argues that counsel was ineffective for failing to object to a statement made by the prosecutor when he voiced an objection during defense counsel's cross-examination of the victim's father. Specifically, the prosecutor stated: "When we tried to get in other acts of the defendant, they quickly objected, rightly so, but they haven't brought any motion on this." Splitt argues that this statement was objectionable because it informed the jury that the State had additional evidence of other acts committed by the defendant, and it suggested that it was the defendant's fault that the jury did not get to hear about these other acts.

¶9 While it certainly would have been preferable for the prosecutor to have limited his objection to the applicable law, we cannot conclude that Splitt was denied due process of law based on this episode. First, the prosecutor prefaced his remarks by stating that he may look as if he "were obstructing." Secondly, it is unlikely the jury understood what the prosecutor meant by "other acts" in this context, and the prosecutor stated that the defense was right in objecting to the evidence. Finally, the court told the jury that it was not to consider the arguments of counsel or the objections which they had interposed during the trial. Even assuming defense counsel was ineffective for failing to object to this statement, we do not see any prejudice to Splitt.

¶10 Splitt next argues that he was denied due process and a fair trial as a result of prejudicial remarks made by the prosecutor during his closing argument. During his closing argument, the prosecutor was discussing the statement Splitt made to the police and the fact that he never expressly confessed to the crimes charged. The prosecutor stated: "You know what's in the news lately. Police let a man go for Yosemite murders because he didn't confess the first time, and then he killed another person. I guess we know people don't always admit things even though they're not guilty."

¶11 We agree with Splitt that this remark was offensive and completely improper. The remark carried the terribly sinister suggestion to the jury that if it did not convict him, Splitt would sexually assault some other child. As Splitt argues, prosecutors are permitted to strike hard blows, but not foul ones. *See* ***State v. Neuser***, 191 Wis. 2d 131, 139, 528 N.W.2d 49 (Ct. App. 1995). The prosecutor should not have made this comment during closing argument.

¶12 At the ***Machner***[2] hearing, defense counsel testified that he realized the remark was objectionable, but he chose not to draw attention to it by objecting to it. This was a reasonable strategic decision by defense counsel and his decision not to object did not constitute ineffective assistance of counsel.

¶13 The issue presented in this appeal, therefore, is whether the real controversy was fully tried. We may grant a new trial in the interests of justice when the real controversy has not been fully tried or there is a substantial degree of probability that a new trial will produce a different result. ***Neuser***, 191 Wis. 2d

[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

at 140. The controversy may not have been fully tried when the jury had before it evidence "not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." ***State v. Wyss***, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985). We cannot conclude that the prosecutor's remark so tainted the trial that the real controversy was not tried, nor that there is a substantial degree of probability that a new trial will produce a different result.

¶14 Splitt next argues that WIS. STAT. § 948.025 is unconstitutional on its face and as applied to him. While this appeal was pending, the Wisconsin Supreme Court decided the same issue in ***State v. Johnson***, 2001 WI 52, 243 Wis. 2d 365, 627 N.W.2d 455. The court ruled that the statute was constitutional. ***Id.*** at ¶28.

¶15 Splitt also argues that the repeater portion of the first count must be dismissed and the sentence vacated because the prior offense which gave rise to the repeater status was based on an Illinois statute which is not comparable to the Wisconsin statute. The court is required to sentence persistent repeat offenders to life imprisonment without the possibility of parole. WIS. STAT. § 939.62(2m)(c). The State may establish that a person is a persistent repeat offender by proving that the defendant is currently being sentenced for a "serious child sex offense" and has a previous conviction for a serious child sex offense. Sec. 939.62(2m)(b)2. A serious sex offense includes second-degree sexual assault of a child. Sec. 939.62(2m)(a)1m.a. Second-degree sexual assault of a child penalizes anyone who has sexual contact with a person "who has not attained the age of 16 years." WIS. STAT. § 948.02(2). A serious sex offense also includes "[a] crime at any time under federal law or the law of any other state or, prior to July 16, 1998, under the law of this state that is comparable to a crime specified in subd. 1m.a." Sec. 939.62(2m)(a)1m.b.

¶16 Splitt argues that his previous Illinois conviction was under a statute which penalized sexual contact with a person who was at least thirteen years of age but under seventeen years of age. 38 Ill. Comp. Stat. sec. 12-16(d) (1987).[3] Splitt argues that these are not comparable statutes because the Wisconsin statute does not penalize sexual contact with a person who is sixteen years of age while the Illinois statute does. Splitt argues, in essence, that the elements of the statutes must be identical. WISCONSIN STAT. § 939.62(2m)(a)1m.b, however, requires only that the statutes be comparable. We conclude that the Illinois and Wisconsin statutes are comparable within the meaning of § 939.62(2m)(a)1m.b, and that the circuit court properly applied the penalty enhancer.

¶17 For the reasons stated, we affirm the judgment of conviction and the order denying Splitt's motion for postconviction relief.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[3] Currently, 720 Ill. Comp. Stat. Ann. 5/12-16(d) (1993).