COURT OF APPEALS
DECISION
DATED AND FILED

May 20, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1194-CR **Cir. Ct. No. 2004CF128**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT HAROLD MAGEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Pierce County: JAMES J. DUVALL, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Robert Magee appeals a judgment, entered upon a jury's verdict, convicting him of first-degree sexual assault of a child, contrary to

WIS. STAT. § 948.02(1).[1] Magee also appeals the order denying his motion for postconviction relief. Magee argues he is entitled to a new trial because the trial court erroneously allowed a videotaped interview of the victim to be viewed in the jury room during deliberations. Although Magee concedes he waived this issue by failing to object at trial, Magee nevertheless urges this court to address his argument directly. We decline to do so. Alternatively, Magee seeks a new trial in the interest of justice or on the basis of ineffective assistance of trial counsel. We reject Magee's arguments and affirm the judgment and order.

BACKGROUND

¶2 Magee was charged with first-degree sexual assault of a child, arising from allegations that he sexually assaulted his girlfriend's ten-year-old daughter, Kathleen V. Relevant to this appeal, the State presented Kathleen's version of events through her own testimony on the witness stand, as well as two videotaped interviews. The first videotape, lasting approximately forty-six minutes, showed Kathleen's initial report of the incident to Officer Dennis Kreuziger of the River Falls Police Department and Tim Markgraf of Pierce County Human Services. The second videotape, lasting approximately thirty-nine minutes, showed Kathleen being interviewed by Beth Ann Carter, a registered nurse. A defense expert, Harlan Heinz testified out of order due to a scheduling conflict. Heinz, who testified before the second videotape had been completely shown to the jury, offered an evaluation of the techniques law enforcement and child abuse counselors used to interview the victim. Heinz opined that leading

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

questions, examiner bias and previous discussions with other individuals could "contaminate the evidence" garnered when assessing a child regarding sexual abuse.

¶3 After the jury began deliberating, the court reconvened when the jury submitted a note asking to see the first videotape—Kathleen's interview by the social worker and detective. The court suggested, "[I]f they ask for one, we'll send them all." Neither the prosecutor nor defense counsel objected. The court sent to the jury room two videotaped interviews of Kathleen, as well as a redacted forty-five-minute videotape of Magee's interrogation that had been shown to the jury at trial. Because the first videotape included an interview with Kathleen's brother that had not been admitted at trial, the court instructed the bailiff "to be present when the jury watches it and do not let them watch [the videotape] after the point where the interview with [Kathleen] ends." Thirty-nine minutes after the videotapes were sent into the jury room, the court reconvened and the jury returned its verdict. Magee was convicted upon the jury's verdict and sentenced to five years' initial confinement and fifteen years' extended supervision.

¶4 Magee filed a postconviction motion challenging the trial court's decision to allow the jury to view the videotape in the jury room and alleging ineffective assistance of trial counsel for failing to object. After a ***Machner***[2] hearing, the court denied the postconviction motion and this appeal follows.

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

DISCUSSION

¶5 Magee argues he is entitled to a new trial because the trial court erroneously allowed the videotapes to be viewed in the jury room during deliberations. The State concedes that pursuant to ***State v. Anderson***, 2006 WI 77, 291 Wis. 2d 673, 717 N.W.2d 74, the trial court should have required the jury to watch the videotapes in the courtroom. Magee, however, has waived this issue by failing to object at trial. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. Emphasizing that the waiver rule is one of judicial administration, Magee nevertheless urges this court to address his argument directly. We have discretion to directly address an unpreserved issue when it involves a question of law, has been briefed by the opposing parties, and is of sufficient public interest to merit a decision. *See* ***State v. Moran***, 2005 WI 115, ¶31, 284 Wis. 2d 24, 700 N.W.2d 884. Here, the important issue of law has been decided in ***Anderson***, so the issue presents nothing novel. We, therefore, decline Magee's invitation to overlook his waiver of the issue.

¶6 Alternatively, Magee seeks a new trial under WIS. STAT. § 752.35, which permits us to grant relief if we are convinced "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." Magee invokes the first basis for relief, that the real controversy was not fully tried. In order to establish that the real controversy has not been fully tried, Magee must convince us "that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoting ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996)). An appellate court will exercise its discretion to grant a new trial in the interest of justice "only

in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶7 Comparing his case to ***Anderson***, Magee argues that the prejudice inherent in allowing the jury to view Kathleen's interview in the jury room warrants a new trial. ***Anderson***, however, is distinguishable on its facts. There, the child victim's direct testimony was presented at trial primarily through the victim's videotaped interview with a social worker. ***Anderson***, 291 Wis. 2d 673, ¶7. The defendant testified on his own behalf and denied engaging in sexual contact with the victim. *See* ***id.***, ¶9. During jury deliberations, the jury requested that all trial exhibits, including the victim's videotaped interview, be sent to the jury room, along with a television and VCR. Over defense counsel's objection to sending any of the exhibits into the jury room, the trial court granted the jury's request. Although the trial court allowed the jury to view the videotape of the victim's interview, it denied the jury's subsequent request to have the victim's and the defendant's testimony read to it. *See* ***id.***, ¶¶10-16, 23.

¶8 Our supreme court held that the trial court erred by allowing the deliberating jury to view the victim's videotaped interview while denying the jury's request to have the testimony read back. In contrast to ***Anderson***, Magee did not testify at trial. His statements came into evidence through a videotaped interrogation in which Magee "continually insisted that he did not inappropriately touch Kathleen." When the deliberating jury asked to view the videotape of Kathleen's interview, the court sent all of the videotapes to the jury, including Magee's interrogation. This jury, unlike that in ***Anderson***, had the opportunity to review the statements of both the defendant and the victim. Additionally, as Magee concedes, it was not just the error of sending the videotape to the jury, but

a combination of trial court errors that justified a new trial in ***Anderson***. *See* ***id.***, ¶¶117-20, 126.

¶9 Magee nevertheless argues that in a case such as this, in which the victim's credibility was a crucial issue, allowing the jury to re-watch Kathleen's interview unduly emphasized her statements. As the State argues, however, Magee has not established a sufficient factual basis for this claim. The record is silent as to which, if any, of the videotapes the jury actually watched during deliberations. Magee contends that given the lengths of the three videotapes and the time that elapsed between sending the videotapes to the jury room and the jury's verdict, the only reasonable inference is that the first interview with Kathleen was viewed. Another reasonable inference, however, is that the jury watched a portion of Kathleen's interview and a portion of Magee's interrogation. Because the record is silent, there is no basis for concluding the jury overemphasized Kathleen's videotaped statements during deliberations.

¶10 Even were we to conclude, however, that the jury viewed Kathleen's interview, we agree with the trial court that "the defense had as much interest in the jury paying attention to the recorded statements as the State … because it [gave] the jury the chance to, again, review the interview in light of the information they gained during the trial on interview techniques and the impact of it." Ultimately, Magee's argument for a new trial in the interest of justice is not based on whether the jury was allowed to view the videotape during deliberations but, rather, where the jury was allowed to view it. While this particular procedure was improper pursuant to ***Anderson***, it is not sufficient under the circumstances of this case to convince us that the real controversy has not been fully tried. Accordingly, we conclude there is no reason to exercise our discretionary authority under WIS. STAT. § 752.35 to grant Magee a new trial.

¶11 As another alternative, Magee claims his counsel was ineffective for failing to object to the admission of the videotapes into the jury room. The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. ***Strickland***, 466 U.S. at 687. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. ***Id.*** at 697.

¶12 This analysis requires a mixed standard of review. We review the trial court's findings of fact regarding counsel's conduct under a clearly erroneous standard. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). Whether those facts constitute deficient performance and prejudice are questions of law that we review independently. ***State v. Tulley***, 2001 WI App 236, ¶5, 248 Wis. 2d 505, 635 N.W.2d 807.

¶13 Turning to the present case, we conclude that regardless of whether counsel was deficient for failing to object to admission of the videotapes into the jury room, Magee has failed to establish how he was prejudiced. As discussed above, at most, Magee can only argue that sending the videotapes to the jury room presented the "possibility" of overemphasis. *See supra*, ¶9. Because the record is silent as to which, if any, of the videotapes the jury viewed, Magee fails to

establish that the jury gave undue emphasis to Kathleen's videotaped interview. Even were we to assume the jury actually watched the subject video during deliberations, it bears repeating that Magee's complaint is not that the jury saw the video again, but that it was viewed in the jury room. As the trial court noted, sending in the videotapes gave the jury an opportunity to apply the testimony of the defense expert regarding interview techniques—something that might have helped Magee. We therefore reject Magee's ineffective assistance of counsel claim and affirm the judgment and order.

By the Court.—Judgment and order affirmed.

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