COURT OF APPEALS
DECISION
DATED AND FILED

July 21, 2021

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2019AP2404 **Cir. Ct. No. 2007CF17**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JAVIER REYES OTERO,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: MARIA S. LAZAR, Judge. *Affirmed*.

Before Reilly, P.J., Gundrum and Davis, JJ.

¶1 PER CURIAM. The State of Wisconsin appeals a circuit court order granting Javier Reyes Otero a new trial. The court concluded that Otero was entitled to a new trial on multiple grounds, including ineffective assistance of counsel. We agree that Otero's trial counsel was ineffective. Accordingly, we affirm.[1]

¶2 In 2007, Otero was charged with sexually assaulting his autistic ten-year-old daughter, T.O. T.O. first disclosed the alleged assaults to her autism therapist. This was reportedly done after T.O. asked why her bottom itched, and the therapist told her that it must be because either T.O. touched herself there or someone else did.[2] The matter proceeded to trial.

¶3 At trial, the jury heard from several witnesses regarding the potential presence of bruising and petechiae (small hemorrhaging of capillaries in the skin, similar to a bruise) around T.O.'s anus. It was the only possible physical evidence in what was otherwise a he-said, she-said case.

¶4 One such witness was Linda Wentworth, a nurse who assisted in the initial examination of T.O. the night of the disclosure. Wentworth testified that the attending physician showed her an area near T.O.'s anus that appeared to be a bruise with scattered petechiae. In Wentworth's experience, that type of injury

[1] Because we affirm on the basis of ineffective assistance of counsel, we need not address the circuit court's other reasons for granting Otero a new trial (i.e., an alleged violation of ***Brady v. Maryland***, 373 U.S. 83 (1963), a claim of newly discovered evidence, and in the interest of justice).

[2] As noted by Otero, T.O.'s autism therapist has a troubling history of false accusations, including for sexual assault. Although not directly relevant to the ground that we decide (ineffective assistance of counsel), it would be relevant to another ground (interest of justice) were we to reach it.

results from the application of force to the area and does not result from poor hygiene, bowel habits, or any other nontraumatic factors.

¶5 Another witness was Margaret Herrmann, the lead detective who was present during T.O.'s initial examination. She similarly testified that she saw a "reddish bluish type bruising area around [T.O.'s] anal area."

¶6 Yet another witness was Dr. Angela Carron, a pediatrician who performed a follow-up examination of T.O. approximately thirty-six hours after the initial one. Unlike Wentworth and Herrmann, Carron did not report seeing evidence of trauma or petechiae. During the examination, she used a colposcope (a magnifying instrument designed to facilitate visual inspection) and recorded the result on video. However, that video was not introduced into evidence or provided to Otero before trial.

¶7 Finally, the jury heard from Dr. Edward Friedlander, a pathologist who testified on behalf of Otero. Upon review of the medical records, Friedlander opined that bruising and petechiae were unlikely and that the blueness and redness around T.O.'s anus may simply have been veins and a rash. However, he wished there were pictures to know for certain. He remarked, "I wish we had photographs," and "[i]t would be nice if all exams were recorded." Additionally, he explained that "[T]he best way to get photographs is through the Colposcope."

¶8 In closing argument, the prosecutor revisited the subject of bruising and petechiae, focusing on Wentworth's testimony. The prosecutor observed:

> We don't have to speculate, because Linda Wentworth was here, and she's been a nurse and an RN for 24 years. I have a feeling based on her testimony and what she's told you she's been around the block. She knows what she saw. She knows what she looked at. And Linda Wentworth told you I saw this blue and red bruising. I know what I saw. It

> was petechiae. That's what [the attending physician] and I saw. And petechia is caused from some blunt force ….

The prosecutor went on to discount Friedlander's testimony, noting, "He has no personal knowledge in this case."

¶9 Ultimately, the jury found Otero guilty of three counts of first-degree sexual assault of a child.

¶10 Before sentencing, Otero, through new counsel, moved to compel the production of the video of the colposcope examination. The circuit court granted the motion and ordered Children's Hospital of Wisconsin, which possessed the video, to make it available to Otero's expert, Friedlander. Despite this order, the video was not produced, and the matter proceeded to sentencing.

¶11 After sentencing, Otero pursued postconviction relief and a direct appeal. Among other things, he complained that his trial counsel was ineffective for failing to obtain a medical report documenting a rash in T.O.'s genital-anal area approximately three weeks after the last alleged assault. We rejected this argument for lack of prejudice, reasoning that even if the report had been presented to the jury, Friedlander's rash opinion, which was not based on pictures, was insufficient to counter Wentworth's testimony that T.O. had anal bruising. *See* ***State v. Otero***, No. 2010AP1622-CR, unpublished slip op. ¶¶18-19 (WI App June 26, 2013).

¶12 In November 2014, Otero filed a pro se petition for habeas corpus relief in federal court. Again, he sought the production of the video of the colposcope examination. The federal court granted Otero's motion for an order directing Children's Hospital of Wisconsin to release the video. The hospital eventually did so in October 2016.

¶13 Upon obtaining the colposcope video, Otero retained two experts—Friedlander, from his trial, and Dr. Suzanne Rotolo, a certified sexual assault nurse examiner—to review it. Friedlander's conclusion regarding the video was as follows:

> The video is well-made and is almost as good as actually watching in person. At 3:43, the perianal region was revealed. Surrounding the anus on all sides are dark specks that closely resemble petechiae seen clinically. The resemblance is, in fact, striking. However, the anus is also heavily soiled with semiliquid feces. As it is wiped away, the 'petechiae' also disappear. It is clear from the video that they are simply particulate matter that happened to be a component of the child's feces. Petechiae are microhemorrhages, red blood cells in the tissue. They're not a common characteristic feature of child abuse, and they also do not simply disappear overnight, any more than a bruise does. The video also makes clear that there is no bruise, and that means there was no bruise on the previous day. The area suspicious for a bruise, observed by the nurse and police officer but not noted by the initial physician, must simply have been one of the three groups of deep veins that surround the anus and are visible as a blue color through a child's thin skin. In the video, the visibility of these structures changes moment to moment with their distention, like the veins on the hands. I suggested this in my testimony, but the video proves it. There is no bruising in this video and if there had been bruising when she was first evaluated, it would have appeared on the colposcope video.

Meanwhile, Rotolo's conclusion regarding the video was as follows:

> The colposcope exam showed no signs of petechiae. Additionally, it shows no signs of anal bruising. While it is possible that petechiae, if actually present, could have resolved between the initial exam and when the colposcope was used, the anal bruising would not have healed in those two days. Having the colposcope video, prior to and at trial, would have been very helpful bordering on necessary to make a determination that there were no signs of sexual trauma in this patient.

¶14 With these conclusions in hand, Otero filed the WIS. STAT. § 974.06 (2019-20)[3] motion that is the subject of this appeal. In it, he sought a new trial on four grounds: (1) his trial counsel was ineffective for not obtaining the colposcope video; (2) the State's failure to turn over the video violated ***Brady v. Maryland***, 373 U.S. 83 (1963); (3) the video was newly discovered evidence; and (4) the interest of justice required a new trial. After multiple hearings and briefing from the parties, the circuit court granted the motion on all four grounds. This appeal follows.

¶15 On appeal, the State contends that the circuit court erred in granting Otero's motion. It maintains that the colposcope video was cumulative evidence and that there is no reasonable probability that its absence affected the jury's verdict.

¶16 We begin our discussion with the claim of ineffective assistance of counsel. To establish such a claim, a defendant must show both that counsel's performance was deficient and that such performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To show deficient performance, the defendant must point to specific acts or omissions by counsel that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. To show prejudice, the defendant must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

[3] All references to the Wisconsin Statutes are to the 2019-20 version.

¶17 Our review of an ineffective assistance claim presents a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). We uphold the circuit court's findings of fact unless they are clearly erroneous. ***Id.*** However, the ultimate determinations of whether counsel's performance was deficient and prejudicial are questions of law that we review de novo. *See* ***id.***

¶18 Here, we agree with the circuit court that trial counsel's performance was deficient. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." ***Strickland***, 466 US. at 691. There is no indication that Otero's trial counsel fulfilled this duty with respect to the colposcope video. He never investigated or sought out the video. Indeed, it is unclear that he even knew what a colposcope is.[4] This was likely due to his failure to file any discovery demand before trial, thereby leaving him unprepared when the matter arose.

¶19 We also agree that trial counsel's performance was prejudicial. The State's case against Otero was primarily based upon two pieces of evidence. The first was T.O.'s accusations against him, which at times varied and seemed implausible.[5] The second was the testimony of bruising/petechiae around T.O.'s anus by Wentworth and Herrmann—testimony that is now undermined by the

[4] During cross-examination of Carron, trial counsel seemed confused about her use of the colposcope, saying: "You had indicated at the start of your testimony that it appears that they didn't measure, I think it's measure is that what the—is it the—I wrote it down, colposcope?"

[5] T.O. gave multiple accounts of the alleged assaults. In one of those accounts, she accused her brother and sister of touching her private areas before adding that Otero did too. She also said that her brother and sister had been present for more than one assault, which they both denied.

colposcope video (along with expert witness testimony interpreting it). Given these facts, we cannot say that the video, the absence of which Friedlander lamented in the course of his testimony, would not have affected Otero's trial. Indeed, it would have bolstered Friedlander's suspicion that there was no bruising/petechiae to corroborate the alleged assaults.

¶20 As for the State's argument that the colposcope video was cumulative, we disagree. In doing so, we echo the federal court's remarks in its order granting Otero's motions to amend his habeas petition and stay those proceedings. The court observed:

> [P]rejudice—is the source of respondent's main argument, which goes like this: the video wouldn't have made a difference at trial because Carron testified that she saw no signs of trauma during the colposcopy exam, so the video would be cumulative evidence. But documentary evidence supporting one witness's testimony and discrediting another's would not be cumulative. Without the video, the jury was faced with competing narratives based on medical professionals' memories; with the video, Otero would have had evidence undermining Wentworth's testimony, supporting Carron's testimony, and allowing Friedlander to testify without speculation.

Otero v. Richardson, No. 14-CV-760-JDP, 2018 WL 1525717, at *4 (W.D. Wis. Mar. 28, 2018).

By the Court.—Order affirmed.

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