COURT OF APPEALS
DECISION
DATED AND FILED

April 9, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2237-CR **Cir. Ct. No. 00 CF 866**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WARREN A. MOFFETT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Warren A. Moffett appeals from a judgment of conviction entered after a jury found him guilty of three counts of second-degree

sexual assault of a child, contrary to WIS. STAT. § 948.02(2) (1999-2000).[1] Moffett also appeals from an order denying his postconviction motion for a new trial. Moffett claims that he is entitled to an evidentiary hearing because his trial counsel was ineffective when counsel: (1) failed to object to a lack of verdict specificity; and (2) failed to request a supplemental jury instruction on unanimity. We affirm.

I. BACKGROUND

¶2 Warren A. Moffett was tried for sexually assaulting then fifteen-year-old Sheena L. At trial, Sheena testified that she went over to Moffett's house around 7:00 p.m. to visit Moffett's son. When Sheena arrived, Moffett's son was not there, but Moffett told Sheena that she could wait upstairs. Sheena and Moffett watched television in Moffett's bedroom until 9:00 p.m., when Sheena got up to leave. Sheena testified that Moffett stood up, closed the bedroom door, and told Sheena: "You are not going anywhere."

¶3 Sheena told the jury that Moffett threatened her with a knife and took her pants and underwear off. Sheena testified that Moffett performed oral sex on her with his "mouth to my vagina." When Moffett was finished, he took her shirt and her bra off and caressed her breasts with "[h]is hands and his mouth."

¶4 Sheena further testified that Moffett rubbed his flaccid penis against her vagina. Moffett then told Sheena that he was "going to get [his penis] in before [the] night is over" and watched a "porno" videotape. Sheena testified that

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

around 1:00 in the morning, Moffett achieved an erection and penetrated her vagina with his penis.

¶5 Moffett was charged with four counts of second-degree sexual assault of a child: (1) mouth-to-vagina contact; (2) hand-to-breast contact; (3) penis-to-vagina contact; and (4) penis-to-vagina intercourse. Counts three and four of the Information alleged:

> COUNT 03: **SEXUAL ASSAULT OF A CHILD, SECOND DEGREE**
>
> On or between February 12, 2000 and February 13, 2000, at 5421 North Green Bay Avenue, Milwaukee, Wisconsin, [the defendant] did have sexual *contact* (penis to vagina) with Sheena L[.] (d.o.b. 7/1/84), a person who had not attained the age of 16 years, contrary to Wisconsin Statutes section 948.02(2).
>
> COUNT 04: **SEXUAL ASSAULT OF A CHILD, SECOND DEGREE**
>
> On or between February 12, 2000 and February 13, 2000, at 5421 North Green Bay Avenue, Milwaukee, Wisconsin, [the defendant] did have sexual *intercourse* (penis to vagina) with Sheena L[.] (d.o.b. 7/1/84), a person who had not attained the age of 16 years, contrary to Wisconsin Statutes section 948.02(2).

(Emphases added.)

¶6 Before the jury retired for deliberations, the trial court read the pattern unanimity instruction: "This is a criminal case, not a civil case; therefore, before a jury may return a verdict which may legally be received[,] such verdict must be reached unanimously. In a criminal case[,] all twelve jurors must agree in order to arrive at a verdict." *See* WIS JI—CRIMINAL 515. Moffett's trial counsel did not object to the jury instructions.

¶7 The jury found Moffett guilty on counts one (mouth-to-vagina contact), three (penis-to-vagina contact), and four (penis-to-vagina intercourse). The jury found Moffett not guilty on count two (hand-to-breast contact). The verdict forms for counts three and four were identical:

> CHARGE: SEXUAL ASSAULT OF A CHILD, SECOND DEGREE (PENIS TO VAGINA)
>
> We, the jury, find the defendant, Warren Moffett, guilty of Sexual Assault of a Child, Second Degree, as charged in the Information.

¶8 Moffett filed a postconvistion motion seeking a new trial. He alleged that his trial counsel was ineffective for failing to object to the lack of specificity in the Information and verdict forms for counts three and four. Moffett also alleged that his trial counsel was ineffective because counsel failed to request a jury instruction informing the jury that it had to be unanimous about the specific act that formed the basis for each count. Thus, Moffett claimed that the lack of specificity, when combined with counsel's failure to request a supplemental jury instruction, violated his right to a unanimous jury and his due-process right to verdict specificity. The trial court denied the motion without an evidentiary hearing.

II. DISCUSSION

¶9 In a criminal case, defendants have a Sixth Amendment right to a unanimous verdict and a Fifth Amendment due-process right to verdict specificity. *See* ***State v. Marcum***, 166 Wis. 2d 908, 923, 480 N.W.2d 545, 553 (Ct. App. 1992). When a defendant is charged with multiple crimes, he or she has a constitutional right to have a unanimous jury determination as to which act

supports a guilty verdict as to which charge. ***Id.***, 166 Wis. 2d at 919, 480 N.W.2d at 551.

¶10 Here, Moffett never objected to the verdict forms or the jury instructions at trial. Generally, we are prohibited from reviewing a claim regarding the instructions and verdict forms absent a timely objection by the defendant. ***Marcum***, 166 Wis. 2d at 916, 480 N.W.2d at 550. Thus, we will not review Moffett's claims in the context of whether the trial court erred. We can review these claims, however, if the defendant alleges ineffective assistance of trial counsel. *See* ***State v. Schumacher***, 144 Wis. 2d 388, 408–409 n.14, 424 N.W.2d 672, 680 n.14 (1988). Moffett does so here. Thus, we review his ineffective-assistance-of-counsel claims.

¶11 The familiar two-pronged test for ineffective-assistance-of-counsel claims requires a defendant to prove: (1) deficient performance; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. There is a "strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990).

¶12 To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Strickland***, 466 U.S. at 687. In order to succeed, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

¶13 Our standard for reviewing this claim involves a mixed question of law and fact. ***Johnson***, 153 Wis. 2d at 127, 449 N.W.2d at 848. Findings of fact will not be disturbed unless clearly erroneous. ***Id.*** The legal conclusions, however, as to whether counsel's performance was deficient and prejudicial, present a question of law. ***Id.***, 153 Wis. 2d at 128, 449 N.W.2d at 848. Finally, we need not address both ***Strickland*** prongs if the defendant fails to make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

¶14 The trial court has discretion to deny a postconviction motion without an evidentiary hearing "if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief." ***State v. Bentley***, 201 Wis. 2d 303, 309–310, 548 N.W.2d 50, 53 (1996) (quoted source omitted). "Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review *de novo*." ***Id.***, 201 Wis. 2d at 310, 548 N.W.2d at 53 (italics added).

¶15 Moffett relies on ***State v. Marcum***, 166 Wis. 2d 908, 480 N.W.2d 545 (Ct. App. 1992), to argue that his trial counsel was ineffective "for failing to request that the standard instruction on unanimity be supplemented with an instruction that the jury had to be unanimous about the specific act that formed the basis for each count and for failing to object to the lack of verdict specificity." Specifically, Moffett alleges that his right to verdict specificity was violated because, in the words of ***Marcum***, there "was nothing to focus the jury on a specific act." ***Id.***, 166 Wis. 2d at 919, 480 N.W.2d at 551. Thus, Moffett claims that the lack of verdict specificity deprived him of his right to a unanimous verdict on counts three and four. We disagree.

¶16 In ***Marcum***, the defendant was charged with six counts of sexual assault of a child. ***Id.***, 166 Wis. 2d at 913, 480 N.W.2d at 548. Three of the counts in the information were phrased identically: "[The defendant had] sexual contact with a person who has not attained the age of 13 years." ***Id.***, 166 Wis. 2d at 913, 480 N.W.2d at 548. The jurors heard confused and conflicting versions of the assaults and the verdict forms for the three counts in question were also phrased identically. ***Id.***, 166 Wis. 2d at 913, 915, 480 N.W.2d at 548–549. The trial court gave the standard instruction on unanimity and the defendant's trial counsel did not object. ***Id.***, 166 Wis. 2d at 917–918, 480 N.W.2d at 550. The jury found the defendant guilty on one of the three counts, but found him not guilty on the other two. ***Id.***, 166 Wis. 2d at 915, 480 N.W.2d at 549.

¶17 We determined that the defendant's rights to verdict specificity and a unanimous verdict were violated. We explained:

> [W]e do not know which of the several alleged acts led to [the defendant's] conviction on count six. Nor do we know which acts the jury acquitted him of in counts four and five…. [T]here was … confusion about what acts took place and on which occasion…. [T]here was nothing to focus the jury on a specific act or alternative forms of a specific act. Nor does the unanimity instruction tell the jurors that they have to agree on which act forms the basis for their verdict.

Id., 166 Wis. 2d at 913, 919, 480 N.W.2d at 549, 551. We distinguished ***Marcum*** from "most cases involving multiple charging" because in most cases:

> no problem would arise from the use of the standard jury instruction because the defendant's illegal acts would be distinguished from each other in either the information or the verdict forms.… So long as the *verdict* properly focuses the jury as to what facts occurred in what slice of time, there [is] no prejudice.

Id., 166 Wis. 2d at 918–919, 480 N.W.2d at 551. We concluded that the defendant was prejudiced by his trial attorney's failure to object to the verdict forms and the instructions because the defendant did not know which act he was convicted for and because his guilty verdict could have been based upon an act for which the jury found him not guilty. ***Id.***, 166 Wis. 2d at 925, 480 N.W.2d at 553–554.

¶18 In contrast to the situation in ***Marcum***, Moffett fails to show that he was prejudiced by his trial counsel's failure to object to the lack of verdict specificity. Unlike ***Marcum***, the record in this case shows that there was always a clear distinction at trial between the act underlying count three (penis-to-vagina contact) and the act underlying count four (penis-to-vagina intercourse).

¶19 First, the Information in this case distinguished count three from count four. Count three alleges that Moffett had "sexual *contact* (penis to vagina) with Sheena L[.]," while count four alleges that Moffett had "sexual *intercourse* (penis to vagina) with Sheena L[.]" (Emphasis added.)

¶20 Second, the prosecutor distinguished count three from count four in his opening statement: "There's a count of, ah, sexual assault by a mouth to vagina, hand to breast, penis to vagina *contact*, and, um, penis to vagina, what's called *intercourse*, where there was the insertion of the penis into the vagina." (Emphasis added.) The prosecutor further distinguished the charges for the jury in his closing statement:

> [Moffett] rubbed his penis on [Sheena's] vagina. It was soft, couldn't get it hard, but at some point during the course of the evening he did insert his penis into the vagina so there's sexual *contact* of the penis-that the judge read [to] you and the one count of the sexual *intercourse*, the penetration of the penis-of the vagina with the penis.

(Emphasis added.)

¶21 Finally, Sheena's trial testimony described distinct acts of sexual assault. Sheena testified that during the evening Moffett "rubb[ed] his [flaccid] penis against my vagina" for at least several minutes. Sheena further testified that in the early morning, after watching a video, Moffett finally achieved an erection and inserted his penis into her vagina.

¶22 Thus, it is clear from the record that there was no confusion about what acts took place or when they took place. The Information, the prosecutor's opening and closing statements, and the victim's testimony, made a clear distinction between Moffett's flaccid sexual contact with Sheena and his much later erect sexual intercourse with Sheena. Therefore, unlike ***Marcum***, the jurors in this case were properly focused as to what acts occurred in what slice of time.

¶23 Moreover, Moffett fails to show that he was prejudiced by his trial counsel's failure to request a supplemental jury instruction on unanimity. In addition to the standard unanimity instruction, the trial court instructed the jury:

> There are four verdicts which the court just read to you. It's for you to determine whether the defendant is guilty of one and/or two, three, four or none of the offenses charged. You must make a finding of guilt or innocence as to each count in the information. Each count charges a separate crime. You must consider each one separately.
>
> The defendant's guilt or innocence of the crime charged in one count does not affect your verdict on the other count.

These instructions could not have made it more clear to the jury that it was to consider each count separately. Thus, we presume that the jury followed these instructions and considered the act that formed the basis for count three (penis-to-vagina contact) and the act that formed the basis for count four (penis-to-vagina

intercourse) separately and arrived at a unanimous verdict for each count. *See* ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432, 436 (Ct. App. 1989) (jury is presumed to follow instructions).

¶24 Accordingly, Moffett has failed to show that but for his trial counsel's failure to object to the specificity of the verdict form or the jury instructions "the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. The jury was presented with information that significantly distinguished count three from count four; the trial court instructed the jury that it had to consider each count separately; and the court instructed the jury that it had to be unanimous on each charge. Therefore, it is clear that Moffett's flaccid penis-to-vagina contact was the basis for a unanimous guilty verdict on count three, and Moffett's erect sexual-intercourse was the basis for a unanimous guilty verdict on count four.

¶25 Moffett also alleges that he was prejudiced "because of the very real possibility that if the errors were corrected that he might have been acquitted of one or both penis to vagina counts." Again, we disagree.

¶26 In ***Marcum***, the jury found the defendant guilty on one of the three counts in question and not guilty on the other two counts. ***Id.***, 166 Wis. 2d at 915, 480 N.W.2d at 549. Thus, ***Marcum*** concluded that the defendant was prejudiced because the defendant's guilty verdict could have been based upon an act for which the jury found him not guilty. ***Id.***, 166 Wis. 2d at 925, 480 N.W.2d at 553–554. As discussed above, in this case, there was no "confusion" as to which act formed the basis for which count. The jury found Moffett guilty on both count three and count four. Therefore, there is no possibility that Moffett's convictions

on counts three and four could have been based on an act for which the jury found him not guilty.

¶27 Accordingly, Moffett has not presented a claim upon which relief can be granted and the trial court properly denied Moffett's postconviction motion without an evidentiary hearing.

By the Court.—Judgment and order affirmed.

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