COURT OF APPEALS
DECISION
DATED AND FILED

November 18, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP1969-CR **Cir. Ct. No. 2006CF229**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL H. LASCHUM,

DEFENDANT-APPELLANT.

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

Before Vergeront, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Paul LaSchum[1] appeals from a conviction for two counts of repeated sexual assault of his stepdaughter, Jennifer, and an order denying his motion for postconviction relief. LaSchum seeks a new trial on grounds of ineffective assistance of counsel in two regards: (1) for allegedly presenting expert testimony from a psychologist in terms of whether LaSchum fit the "profile" of sex offenders; and (2) for not specifically eliciting the psychologist's opinion that LaSchum lacked "a diagnosable sexual disorder" and therefore was unlikely to commit the charged offense. LaSchum also seeks a new trial in the interests of justice. We reject his arguments and affirm.

¶2 LaSchum testified he began dating Jennifer's mother when Jennifer was three years old. Several years later he married her mother. When Jennifer was fifteen years old, her mother separated from LaSchum. Jennifer testified LaSchum began engaging her in sexual contact when she was about ten years old and in fifth grade. The sexual contact consistently occurred "on an average of every two weeks on the weekends mostly" when her mother went out.[2] The assaults occurred "[a] lot" before she was thirteen and "it was pretty consistent throughout the years" even after she reached the age of thirteen.

¶3 Following a three-day trial,[3] a jury found LaSchum guilty of one count of repeated sexual assault of the same child under the age of thirteen and one count of repeated sexual assault of the same child between the ages of thirteen

[1] We note that portions of the record spell LaSchum's name as "Laschum." We use "LaSchum" in this opinion because that is how the appellant signs his name.

[2] LaSchum acknowledged that Jennifer's mother routinely went out drinking on Friday nights or "every other Friday."

[3] A first trial ended in a mistrial attributable to an attorney's illness.

and sixteen. The circuit court imposed an indeterminate sentence of twelve years on count one. On count two, the court imposed a consecutive sentence of twelve years which was stayed in favor of consecutive twenty years' probation. A postconviction motion was denied, and LaSchum now appeals.

¶4 LaSchum concedes his counsel's overall trial strategy was reasonable, but takes issue with the implementation of the defense expert's psychological testimony. LaSchum argues his trial counsel was ineffective for presenting expert testimony from psychologist Eugene Braaksma in terms of whether LaSchum's psychological character was consistent with the psychological "profile" of sex offenders. Specifically, LaSchum claims his counsel erred "by putting his penultimate question to [Braaksma] in the following form: 'And in your opinion, does Mr. LaSchum fit the profile of someone who is a sexual deviant or who would commit a sexual assault?'"

¶5 LaSchum contends the State's opposing expert, Dr. Charles Lodl, was "essentially limited to an attack on the concept of sex offender 'profiles.'" According to LaSchum, if defense counsel had not injected the concept of a sex offender "profile" into the trial, then Braaksma's testimony could not have been discredited. Furthermore, "if [defense] counsel had questioned Dr. Braaksma in terms of whether LaSchum has a diagnosable disorder and the corresponding likelihood that LaSchum would commit the alleged crimes, then Dr. Lodl would have been hard-put to offer any credible criticism."

¶6 To establish ineffective assistance of counsel, a criminal defendant "must show (1) that his or her counsel's representation was deficient and (2) that this deficient performance resulted in prejudice to the defense." ***State v. Franklin***, 2001 WI 104, ¶11, 245 Wis. 2d 582, 629 N.W.2d 289 (citing ***Strickland v.***

Washington, 466 U.S. 668 (1984)). Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. ***Strickland***, 466 U.S. at 690. The "performance" inquiry is whether counsel's assistance was reasonable under prevailing professional norms. ***Id.*** at 688.

¶7 The test for prejudice is whether counsel's errors were so serious as to deprive the defendant of a fair and reliable trial. ***Strickland***, 466 U.S. at 687. The defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. ***Id.*** at 694. The "performance" and "prejudice" requirements are conjunctive, so a reviewing court need not reach the prejudice prong if the defendant has failed to show deficient performance, and vice versa. *See* ***id.*** at 697; ***State v. O'Brien***, 223 Wis. 2d 303, 324, 588 N.W.2d 8 (1999). Findings of fact concerning counsel's performance will be upheld unless clearly erroneous, while the ultimate question of effective assistance is one of law that we review independently. ***O'Brien***, 223 Wis. 2d at 324-25.

¶8 In ***State v. Richard A.P.***, 223 Wis. 2d 777, 589 N.W.2d 674 (Ct. App. 1998), we determined that character traits relating to a defendant's propensity to commit sexual assault may be admissible when supported by competent underlying expert testimony. In that case, the defendant's expert planned to testify that the defendant's "sexual history and his responses to specific testing about his sexual behavior did not show evidence of any diagnosable sexual disorder." ***Id.*** at 791. Additionally, the expert planned to testify that absent such a diagnosable disorder, it was unlikely such a person would molest a child. ***Id.***

¶9 Our supreme court upheld the admissibility of ***Richard A.P.*** evidence in ***State v. Davis***, 2002 WI 75, ¶16, 254 Wis. 2d 1, 645 N.W.2d 913. The court stated: "The circuit court must closely scrutinize such evidence, however, for its relevancy, its probative value, and its potential for danger of unfair prejudice or confusion to the jury" under WIS. STAT. § 904.03 (2007-08).[4] ***Id.***, ¶2. Thus, admissibility "depends on the qualifications of the expert" and whether the proffered testimony will assist the trier of fact to understand evidence or to determine a fact in issue. ***Id.***, ¶17.

¶10 We conclude LaSchum's counsel was not deficient in the manner in which he elicited Braaksma's testimony. First, LaSchum fails to establish there is a meaningful difference between whether a person exhibits "characteristics" typical of sex offenders and whether a person fits a "profile" typical of sex offenders. Here, the crucial aspect of the expert testimony was not the label "profile" versus "characteristic" but, rather, the purpose of the psychological analysis. The record establishes the purpose of Braaksma's testimony was to elicit whether LaSchum's personal characteristics made it more or less probable he would engage in the sexual assault of Jennifer.

¶11 Even if we were to assume there was some scientifically meaningful difference between "characteristics" and "profile" in the psychological analysis of sex offenders such that the term "profile" should be avoided, defense counsel largely did avoid that term. Over the course of more than fifty pages of trial transcripts, defense counsel used the term "profile" only three times, all on direct

[4] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

examination. Even then, counsel used the term in a non-technical, colloquial sense. In our view, defense counsel used the term "profile" as a shorthand expression for a set of psychological or personal characteristics, much as this court and our supreme court used the term "profile" in ***Richard A.P.***, 223 Wis. 2d at 794, 795 n.9, and ***Davis***, 254 Wis. 2d 1, ¶¶18-19.[5]

¶12 Regardless, LaSchum insists the problem is "that it took only one 'profile' question to raise a real possibility that all of Dr. Braaksma's testimony might be discredited by the jury." We are not persuaded. Braaksma did not testify in terms of whether LaSchum fit any sex offender "profile." Rather, he testified in terms of whether LaSchum exhibited psychological or personality "characteristics" commonly found in sexual offenders. Braaksma summarized his conclusions as follows:

> Q: Okay. Could you kind of summarize what your evaluation, what you learned in your evaluation of [LaSchum]?
>
> A: Well, in summary, I mean there were not personality characteristics that were unusual or that were kind of out of the norm, that he approached responding to things in an open manner, wasn't being defensive and so on so that, you know, I talked about some of those things already. But then some of those other characteristics, personality characteristics and so on or other characteristics related to, you know, lifestyle things and so on were all within a normal range, so to speak, and were not indicative of someone who was having any significant mental health or personality disorders or issues going on for them.

[5] LaSchum concedes this court used the term "profile" on several occasions in our decision in ***Richard A.P.***, as did our supreme court in ***Davis. State v. Davis***, 2002 WI 75, 254 Wis. 2d 1, 645 N.W.2d 913; ***State v. Richard A.P.***, 223 Wis. 2d 777, 589 N.W.2d 674 (Ct. App. 1998).

> Q: Were the characteristics that you identified in Mr. LaSchum, were those consistent or similar in any way to those that are usually found in sexual offenders?
>
> A: They were not consistent with, with what is often found.

¶13 Braaksma concluded both his direct and redirect examination by opining that LaSchum does not fit the characteristics typically identified in sex offenders. On redirect examination, defense counsel asked Braaksma, "Do you stand by your opinion that Mr. LaSchum does not fit the characteristics of a sexual predator?" Braaksma replied:

> I stand by that, the statement that the, in looking at [LaSchum's] personality characteristics, and in looking at the characteristics that we, that we know to exist with people who have committed sexual offenses that [LaSchum] does not fit that pattern.

¶14 Furthermore, psychologist Lodl's rebuttal testimony on behalf of the State did not depend on the label "profile" versus "characteristics." Lodl himself testified "there [are] no characteristics of … a sex offender." Lodl also opined that "there is no single set of characteristics that are stereotypical to a sex offender." We therefore reject LaSchum's suggestion that the jury could have placed enough weight on Braaksma's testimony to support a reasonable doubt "until [defense] counsel carelessly injected the 'profile' concept, thereby creating an artificial basis for impeachment."

¶15 LaSchum also argues his counsel was ineffective for not specifically eliciting Braaksma's opinion that LaSchum lacks "a diagnosable sexual disorder." LaSchum "concedes this is a close question," as Braaksma testified on direct examination that LaSchum evinces "personality characteristics … within a normal range, … not indicative of someone who was having any significant mental health

or personality disorders or issues going on for them," and "not consistent with … what is often found" in convicted sex offenders.

¶16 Nevertheless, LaSchum argues "that this single fragment of Dr. Braaksma's testimony was not sufficient to permit a lay jury to find that LaSchum does not have a diagnosable sexual disorder, such as pedophilia, in particular." LaSchum further contends that even if Braaksma's testimony were sufficient in that regard, defense counsel failed to develop any expert opinion concerning the unlikelihood that LaSchum would have committed the charged offense. LaSchum insists "it is precisely this reduced likelihood that is the essential point of the expert psychological testimony."

¶17 However, Braaksma testified at length concerning numerous psychological evaluation tests he employed to determine that LaSchum does not exhibit the characteristics of a typical sex offender, thus decreasing the probability that LaSchum would sexually assault Jennifer. Furthermore, Braaksma specifically summarized his opinions by stating that LaSchum evinced personality characteristics not indicative of someone with significant mental health or personality disorders. We conclude Braaksma's testimony assisted the jury in determining whether LaSchum committed the charged offense. *See* ***Richard A.P.***, 223 Wis. 2d at 792. We discern no deficiency in the manner in which defense counsel elicited expert testimony.

¶18 Alternatively, LaSchum asks this court to exercise its power of discretionary reversal and order a new trial in the interests of justice. *See* WIS. STAT. § 752.35. Reversal in the interest of justice is to be exercised "infrequently and judiciously." ***State v. Ray***, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992). A reviewing court "will exercise its discretion to grant a new trial in the

interest of justice 'only in exceptional cases.'" ***State v. Chu***, 2002 WI App 98, ¶55, 253 Wis. 2d 666, 643 N.W.2d 878 (quoting ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983)). We are not persuaded that this is such a case. We see no indication that the real controversy has not been tried or that it is probable that justice has miscarried.

By the Court.—Judgment and order affirmed

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