COURT OF APPEALS
DECISION
DATED AND FILED

July 13, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1589-CR **Cir. Ct. No. 2004CF84**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS A. NOMMENSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: DAVID C. RESHESKE, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Thomas A. Nommensen appeals from a judgment convicting him of repeated sexual assault of the same child and from the order denying his motion for postconviction relief. Nommensen seeks a new trial in the interest of justice because he claims that unfair evidentiary rulings prevented the

real controversy from being fully tried. He also contends that his trial counsel was ineffective for failing to more forcefully discredit his second ex-wife's damaging testimony. Nommensen's arguments are unpersuasive. We affirm.

¶2 Nommensen and his first wife divorced in 1991. Per a 1994 court order, Nommensen had physical placement of Kayla and her younger sister. In 2004, sixteen-year-old Kayla claimed that Nommensen had sexually assaulted her from 1994 to 2000. The 1994-98 assaults allegedly occurred in Washington county where Nommensen and the girls lived and the later assaults allegedly took place in Fond du Lac county, where they moved when Nommensen remarried. Charges were filed against Nommensen in both counties.

¶3 In February 2005, a Washington county jury found Nommensen guilty and he was sentenced to twenty-four years in prison. The court later vacated the judgment of conviction when Nommensen produced newly discovered evidence in the form of testimony by Zachary Swiger, Kayla's boyfriend in 2003 and 2004. Swiger claimed that Kayla had told him about the sexual abuse, then later admitted she had lied and that it never happened. The court ordered that a new trial be held after the still-pending Fond du Lac county trial.

¶4 A Fond du Lac county jury acquitted Nommensen in June 2006. In September 2008, a Washington county jury once again convicted him and, after a new sentencing hearing, the court reimposed the original twenty-four-year sentence. With new counsel, Nommensen moved for postconviction relief, seeking a new trial in the interest of justice because the real controversy had not been tried due to various evidentiary rulings and the ineffective assistance of trial counsel. After a hearing and a review of the parties' supplemental filings, the trial

court denied the motion on both grounds. Nommensen appeals, raising the same issues. Additional facts will be supplied as necessary.

¶5 The defense theory was that Kayla fabricated her claims of sexual assault because she wanted to live with her less-strict mother. The plan was to show that Kayla bypassed myriad opportunities over the six years to disclose any abuse and made the allegations only when Nommensen threatened to seek custody upon discovering that, while living for a time with her mother, Kayla was skipping school and had been arrested for auto theft. Nommensen contends several of the trial court's evidentiary rulings foreclosed him from presenting substantive evidence of Kayla's failure to divulge the claimed abuse to a social worker and two guardians ad litem and permitted the State to introduce "other-acts" evidence through the testimony of Tracy Berginz, Nommensen's second ex-wife. Accordingly, he argues, his defense was so watered down as to not be a defense at all and the real controversy—Kayla's credibility—was not tried. Nommensen therefore contends he should have been[1] granted a new trial in the interest of justice.

¶6 Absent a clear showing of an erroneous exercise of discretion, we uphold the trial court's decision not to grant a new trial. *See* ***Larry v. Commercial Union Ins. Co.***, 88 Wis. 2d 728, 733, 277 N.W.2d 821 (1979). Similarly, in reviewing evidentiary issues, we will uphold the trial court's determination where

[1] Elsewhere, Nommensen phrases the issue to be that he *should be* granted a new trial. These are not the same requests. The first invokes our standard of review and calls us to determine whether the trial court properly exercised its discretion when it denied Nommensen's postconviction motion under WIS. STAT. § 805.15(1) (2009-10). The second is a remedy, and asks that we exercise our discretion under WIS. STAT. § 752.35.

All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

the court exercised its discretion consistent with accepted legal standards and the facts of record. ***State v. Fishnick***, 127 Wis. 2d 247, 257, 378 N.W.2d 272 (1985). This court determines as a matter of constitutional fact whether exclusion of evidence offered by a defendant violated the constitutional right to present a defense. ***State v. Muckerheide***, 2007 WI 5, ¶18, 298 Wis. 2d 553, 725 N.W.2d 930. We review questions of constitutional fact independently, while benefitting from the trial court's analysis. ***Id.***

¶7 Nommensen asserts that he was precluded from more fully presenting the report of a social worker, Sharon Burns. Kayla had told Burns that she had acted out, including threatening suicide, because she wanted to live with her mother, where she felt she would have "more freedom and more fun." He contends the court limited him to reading a portion of Burns' report out of context and asking Kayla about these incidents.

¶8 The record satisfies us that the evidence was sufficiently presented. Burns was unavailable to testify. Her supervisor appeared in her stead and brought with her Burns' subpoenaed report. The parties disputed whether the report could be read into the record and the court took the matter under advisement. The following ensued:

> THE COURT: … Then, ladies and gentlemen, one additional matter. I'm sure you recall there was some discussion about some records that were brought in the other day that I have reserved ruling on. I have determined that a portion of those records may be read to you. They are portions created by an individual identified as Sharon Burns.
>
> So, Mr. O'Malley [defense counsel], do you wish to read those portions to the jury? Those are—you may consider those as evidence in this case, even though the witness is not here. Even though you're not seeing the

> actual document, you are to consider it as evidence the same as any other evidence in the case.
>
> Mr. O'Malley?
>
> MR. O'MALLEY: Thank you.
>
> [Reading from record] Kayla admits that most of the problems are related to her wanting to be with her mom. She states that she has a hard time separating from her mom after visits, and that she and dad fight a great deal after she returns.
>
> Basically Kayla feels that she would have a better life, more freedom and more fun, if she could live with her mom in Michigan. She doesn't want her dad to feel badly about this, but she would really like to go there.

¶9 Nommensen also complains that he was foreclosed from presenting evidence at his second Washington county trial that Kayla had not told court-appointed guardians ad litem in 1994 about sexual abuse. The GALs, Sarah Lessman in Illinois and Alana Busch-Ell in Wisconsin, were appointed in connection with a postdivorce placement evaluation. Busch-Ell testified at the first Washington county trial that she did not recall anything of her meeting with Kayla. Lessman's deposition testimony was to the same effect. Neither testified at the Fond du Lac county trial, but the parties stipulated that Kayla did not report any sexual abuse to either of them.

¶10 The Washington county court refused to admit the Fond du Lac county stipulations and the testimony mainly because the evidence would be cumulative to the undisputed fact that Kayla had not reported any abuse before 2004. The court noted that defense counsel could effectively alert the jury on Kayla's cross-examination to the numerous reporting chances she bypassed. It is a proper exercise of a court's discretion to exclude evidence it deems cumulative. *See* WIS. STAT. § 904.03. Moreover, while billing records indicated that both

GALs had met with Kayla ten years earlier, neither could recall anything about the meetings or about Kayla. Their testimony would have added nothing helpful.

¶11 Nommensen contends the trial court also erred during pretrial motions in ruling that Berginz could testify. Berginz testified at the first Washington county trial that when she, Nommensen and the girls were living in Fond du Lac, Nommensen made comments about Kayla's developing breasts and would apologize for touching Kayla's breasts while wrestling. She testified similarly at the second Washington county trial,[2] with the added comment that Nommensen would come up and give Kayla "titty twisters." Nommensen argues that this "other-acts" evidence that he had "groped" Kayla's breasts should have been excluded because it was outside of the charges in the Washington county case, it postdated facts leading to the Washington county charges and it was more prejudicial than probative.

¶12 In ruling to allow Berginz's testimony, the court reasoned that going beyond the Washington county charges to "fill[] out the picture" was appropriate because of the delayed reporting, that Berginz's testimony would describe behavior she claimed to have witnessed and that it had "some probative value" because it went to Nommensen's "state of mind, lack of accident, intent, circumstantially, at least to the extent that the jury wishes to consider it one way or the other." The trial court applied the relevant law to the applicable facts and reached a reasoned conclusion. We conclude that the trial court's evidentiary rulings all resulted from a proper exercise of discretion.

[2] Berginz did not testify at the Fond du Lac county trial.

¶13 Still, under WIS. STAT. § 805.15(1), the trial court could have set aside the verdict and ordered a new trial if it determined that the real controversy was not fully tried. *See* ***State v. Harp***, 161 Wis. 2d 773, 775, 469 N.W.2d 210 (Ct. App. 1991). That court's authority under § 805.15(1) is comparable to our own under WIS. STAT. § 752.35. *See* ***Harp***, 161 Wis. 2d at 779, 782. The real controversy has not been tried if either the jury was prevented from considering "important testimony that bore on an important issue" or improperly received evidence "clouded a crucial issue" in the case. *See* ***State v. Darcy N. K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (citation omitted). We look for reasons to sustain that discretionary decision, setting it aside only if the trial court failed to provide a reasonable explanation for the decision or grounded it upon a mistaken view of either the evidence or the law. *See* ***Sievert v. American Family Mut. Ins. Co.***, 180 Wis. 2d 426, 431, 509 N.W.2d 75 (Ct. App. 1993).

¶14 The trial court noted that this was fundamentally a credibility case. It found that the jury was aware of the substantial delay in reporting despite Kayla's multiple opportunities; of the dynamics between Kayla and her parents; that Berginz had a strong motive to testify against Nommensen; that this trial was the result of a successful motion for a new trial to allow Swiger and another witness[3] to testify about Kayla's recantation; and that, even with the additional testimony, the jury still found Kayla more credible. We see no erroneous exercise of discretion in denying Nommensen another new trial.

[3] The State's theory was that Swiger made the recantation claim in retaliation for a painful breakup with Kayla. To counter that position, a friend of Swiger's testified that Swiger told him about Kayla's retraction before Swiger's and Kayla's relationship ended.

¶15 As noted, however, Nommensen also asks that we grant him a new trial because the real controversy was not fully tried. We construe his request to be made pursuant to WIS. STAT. § 752.35, although he cites the trial court analog statute, WIS. STAT. § 805.15. The real controversy was whether Nommensen or Kayla was telling the truth. The jury could have believed that the reason Kayla said nothing for six years was because nothing, in fact, happened, that she concocted the allegations to free herself from her father's stricter parenting and then stuck to her claims through three trials because, as Swiger testified, she feared repercussions for committing perjury. Or the jury could have believed—as it evidently did—that Kayla at first trusted Nommensen's explanation to her that the activity was "a learning experience that every father and daughter goes through" and that "[i]t's something that is kept quiet" between the two of them, "not something that you would talk about in a normal conversation"; that Kayla wanted to live with her mother to escape the abuse; and that she threatened suicide out of desperation, not manipulation. The trial court's evidentiary rulings did nothing to prevent the jury from fully deciding the credibility issue. We see no reason to order a new trial.

¶16 Nommensen next argues that he was prejudiced by counsel's failure to take a number of actions that would have discredited Berginz's testimony. To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To show deficient performance, a defendant must allege specific omissions or acts by trial counsel that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. To demonstrate prejudice, the 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. ***Id.*** at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.***

¶17 We review the denial of an ineffective assistance claim as a mixed question of fact and law. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). We will not reverse the trial court's factual findings unless they are clearly erroneous but review the two-pronged determination of trial counsel's performance independently as a question of law. ***Id.*** at 127-28. We will not "second-guess a trial attorney's 'considered selection of trial tactics or the exercise of 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).

¶18 Nommensen argues that O'Malley, his trial counsel, should have more vigorously cross-examined Berginz to show that she was mentally unstable and hostile to him. He contends that O'Malley failed to ask about Berginz's mental health history, to ask about an incident in which she smashed his television with a baseball bat, to impeach her "titty twisters" comment with her prior testimony that did not mention such conduct and to call Berginz's sons as witnesses to testify that they never observed sexually inappropriate behavior between Nommensen and Kayla but did observe Nommensen and Berginz fight frequently.

¶19 O'Malley testified at the postconviction motion hearing that his strategy was to show that Berginz was hostile to Nommensen. He explained that, while the TV-smashing incident might be relevant to show that hostility, he thought her trial testimony already had established that she disliked Nommensen.

Further, O'Malley considered Berginz "a real hot potato as a witness" and deemed it wiser to limit her time on the stand. Accordingly, his decision to curtail Berginz's cross-examination was consistent with the reasonable trial strategy of limiting her ability to hurt Nommensen. As to attempting to probe Berginz's mental health history, the court had sustained the State's objections to that line of questioning at the first Washington county trial. With the same judge presiding at both Washington county trials, it was reasonable to assume that such questioning again would be disallowed.

¶20 O'Malley also explained the decision not to call Berginz's two sons to testify that when they were with the family in Fond du Lac, they did not observe any "titty twisters" or other sexual assaults. O'Malley explained that his investigator had difficulty locating and gaining access to the sons, their testimony was of dubious value because he was unsure exactly what they would say, and that he and Nommensen jointly discussed and agreed upon that approach.

¶21 O'Malley effectively brought out on Berginz's cross-examination that Berginz disliked Nommensen, did not report her alleged concerns to the family therapist and never observed the conduct Kayla described; that Kayla did not report any abuse to her; and that her sons never reported observing any sexual conduct. O'Malley also elicited testimony from Nommensen's father contradicting Berginz's claim that she had shared her concerns with Nommensen's parents. O'Malley's actions constituted a reasonable trial strategy. Seeing no deficient performance, we need not address the prejudice prong. *See* ***Strickland***, 466 U.S. at 697.

By the Court.—Judgment and order affirmed.

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