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DISTRICT I

June 25, 2024

To:

Hon. Jean M. Kies
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Michael J. Conway
Electronic Notice

Marcella De Peters
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2022AP1906-CR State of Wisconsin v. Michael Phillip Barbian
(L.C. # 2017CF4783)

Before White, C.J., Donald, P.J., and Geenen, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Michael Phillip Barbian appeals a judgment convicting him of child enticement. Barbian additionally appeals an order denying his motion for postconviction relief without a hearing.[1] Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2021-22).[2] We affirm.

[1] The Honorable Jeffrey A. Conen presided over Barbian's trial and sentenced him. The Honorable Jean M. Kies issued the decision and order denying Barbian's postconviction motion.

[2] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Background

The State charged Barbian with two counts of exposing genitals to a child, one count of child enticement with the intent to have sexual contact, and one count of false imprisonment. The false imprisonment allegedly occurred on October 15, 2017, while the other counts allegedly occurred between August 31 and September 5, 2017. During the latter timeframe, the sixteen-year-old victim in this matter, T.P., lived with Barbian, her great-uncle, while her mother was in jail.

According to the complaint, on October 15, 2017, around midnight, T.P. went to Barbian's home to retrieve some of her belongings. Specifically, T.P. needed her laptop computer for school. Barbian was there when she arrived. Barbian told T.P. he would only return her belongings after she completed housework for him. Barbian did not allow T.P. to leave when she attempted to do so.

A family friend called the police after T.P. contacted her. The family friend could hear Barbian screaming at T.P. in the background. After the officers arrived at the scene, T.P. disclosed two prior incidents where Barbian exposed himself to her and tried to get her to engage in sexual contact with him. Specifically, the complaint alleged:

> 1. The first time, the defendant said to [T.P.], "I'm gonna watch a video, do you want to come join me?" [T.P.] walked over to the bedroom where the defendant was. The defendant had no pants on and he was masturbating his erect penis. The defendant said to [T.P.], "why don't you come finish me off?" [T.P.] also observed that there was pornography playing on the television in the defendant's bedroom. [T.P.] stood in the doorway for a few seconds before she realized what was happening, and then she walked away. The defendant said to her, "you are no fun."

> 2. The second time, the defendant was sitting in a chair in the living room. He did not have on pants. His penis was exposed and erect. He was looking at pornography on his cell phone. The defendant said to [T.P.], "let me do a painting on your face." [T.P.] understood this to mean that he wanted to ejaculate on her face.

Prior to trial, the State moved to admit evidence of Barbian's 2002 convictions for sexual exploitation of a child and for causing a child between the ages of thirteen and eighteen to view sexual activity. Barbian's convictions stemmed from reports to police by a twelve-year-old girl and a fifteen-year-old girl that Barbian had video recorded them nude in his basement. The girls said that Barbian gave them chocolate syrup and videoed them squirting it on each other's naked bodies and licking it off.

Based on the reports from the two girls, police searched Barbian's home and found a VHS recording consistent with what the two girls described. Barbian could be seen in parts of the video and also was heard in the background giving the girls direction. Police additionally recovered handwritten notes listing various websites for child pornography. The State argued that the evidence was offered to show Barbian's intent, motive, modus operandi, context, and to support T.P.'s credibility.

In ruling on the motion, the circuit court determined the evidence went to Barbian's motive, noting "the motive isn't just for sexual gratification, the motive is that he's got a thing for teenage girls performing sex acts in front of him[.]" The court further found that the evidence had probative value as to opportunity and plan and held that limiting the other-acts evidence the State could present and issuing a cautionary jury instruction alleviated the risk of undue prejudice.

The video recording had been destroyed by the time of Barbian's trial. The State opted to introduce the other-acts evidence through the testimony of a retired police detective who investigated the 2002 crimes, had watched the video, and had recovered the handwritten list of child pornography websites. Before the jury began deliberating, the circuit court gave a cautionary instruction relating to the other-acts evidence.

The jury ultimately found Barbian guilty of child enticement and not guilty as to the other charges. Barbian filed a postconviction motion arguing that the circuit court erred when it admitted the other-acts evidence. He additionally argued that his trial counsel was ineffective for not objecting to the admission of evidence that police found a list of child pornography websites during the search of his home that led to his 2002 convictions.

The postconviction court denied the motion without holding a hearing. The postconviction court ruled that the circuit court properly exercised its discretion in admitting the other-acts evidence. The postconviction court additionally rejected Barbian's ineffectiveness claim because trial counsel's complete objection to the other-acts evidence necessarily included an objection to the evidence that police found a list of child pornography websites.

Barbian now renews his postconviction arguments. Additional facts relevant to Barbian's claims are provided below.

Discussion

(1) The circuit court properly admitted the other-acts evidence.

Barbian claims that the circuit court erred when it admitted other-acts evidence. This court reviews the decision to admit other-acts evidence for an erroneous exercise of discretion.

State v. Marinez, 2011 WI 12, ¶17, 331 Wis. 2d 568, 797 N.W.2d 399. "An appellate court will sustain an evidentiary ruling if it finds that the circuit court examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach." ***State v. Hunt***, 2003 WI 81, ¶34, 263 Wis. 2d 1, 666 N.W.2d 771. We "look for reasons to sustain a [circuit] court's discretionary decision." ***State v. Gutierrez***, 2020 WI 52, ¶27, 391 Wis. 2d 799, 943 N.W.2d 870 (citation omitted).

Wisconsin courts use a three-step framework when determining the admissibility of other-acts evidence. ***State v. Sullivan***, 216 Wis. 2d 768, 771-72, 576 N.W.2d 30 (1998). First, the evidence must be offered for a permissible purpose under WIS. STAT. § 904.04(2). ***Sullivan***, 216 Wis. 2d at 772. Second, the evidence must be relevant under WIS. STAT. § 904.01. ***Sullivan***, 216 Wis. 2d at 772. Third, the evidence's probative value must not be substantially outweighed by the danger of unfair prejudice. ***Id.*** at 772-73; *see* WIS. STAT. § 904.03. The proponent of the other-acts evidence must show the evidence is being offered for a permissible purpose and is relevant; the opponent then must prove the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. ***Marinez***, 331 Wis. 2d 568, ¶19.

In prosecutions for crimes under chapter 948 of the Wisconsin Statutes, such as exposing genitals to a child and child enticement, the now-codified greater latitude rule applies. WIS. STAT. § 904.04(2)(b)1. By making "evidence of any similar acts by the accused" admissible, § 904.04(2)(b)1., this rule "allows for more liberal admission of other-acts evidence." ***State v. Dorsey***, 2018 WI 10, ¶32, 379 Wis. 2d 386, 906 N.W.2d 158.

As detailed in the postconviction court's written decision, the issue of the other-acts evidence was extensively litigated before trial. The record reflects that the circuit court

repeatedly applied the proper legal standard (i.e., the ***Sullivan*** test and the associated greater latitude rule) to the facts of record (i.e., the conduct underlying the 2002 convictions and the allegations underlying the charges in this case). The circuit court reasonably concluded that the other-acts evidence went to Barbian's motive for sexual gratification from teenage girls and was relevant. The circuit court explained that it felt "very strongly about the fact that these type of events that are going on here are … somewhat similar." Additionally, the circuit court reasonably concluded that limiting what the State could present and providing the jury with a cautionary instruction alleviated the risk of unfair prejudice.

We also note our agreement with the State that while it was not specifically mentioned by the circuit court, the evidence was also permissible for the purpose of bolstering T.P.'s credibility. *See* ***Hunt***, 263 Wis. 2d 1, ¶59. We account for the greater latitude rule and the fact that in a "he-said-she-said" case such as this one, the accusing witness's credibility is "particularly probative[.]" ***Dorsey***, 379 Wis. 2d 386, ¶50. Here, Barbian's history of seeking sexual gratification from teenage girls provided "additional context to [T.P.'s] allegations … and more information with which the jury could assess [T.P.'s] credibility[.]" *See* ***Marinez***, 331 Wis. 2d 568, ¶28.

Because we conclude that the circuit court properly admitted the other-acts evidence, we need not address the State's alternative harmless error argument. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989).

(2) Trial counsel was not ineffective for failing to object to the list of websites.

Next, Barbian argues that his trial counsel was ineffective for not specifically objecting to the inclusion of the list of child pornography websites in the other-acts evidence. To establish

the ineffectiveness of counsel, a defendant must prove both (1) "that counsel's performance was deficient" and (2) "that such performance prejudiced the defense." ***State v. Roberson***, 2006 WI 80, ¶24, 292 Wis. 2d 280, 717 N.W.2d 111 (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)). A defendant cannot sustain an ineffectiveness claim on counsel's alleged failure to do something that he or she actually did. *See* ***State v. Cooks***, 2006 WI App 262, ¶38, 297 Wis. 2d 633, 726 N.W.2d 322 (rejecting the claim that trial counsel was ineffective for not objecting to sending police reports to the jury because "[trial counsel] did object to the submission of the police reports"). Moreover, even if the argument is that trial counsel "did not object with sufficient vigor," an ineffective assistance of counsel claim premised on objecting to a correct ruling of the circuit court cannot establish either deficient performance or prejudice. *See* ***id.***, ¶39.

The State's other-acts motion clearly described its intent to introduce evidence of the websites, and its offer of proof letter also referenced the police detective's proposed testimony regarding the websites. Trial counsel expressed his wholesale opposition to the other-acts evidence. This opposition necessarily included an objection to the child pornography website list.

Trial counsel, therefore, cannot be ineffective on this basis. *See* ***Cooks***, 297 Wis. 2d 633, ¶38. Moreover, we have already concluded that the circuit court's decision to admit the other-acts evidence was properly within its discretion. Consequently, Barbian cannot establish either deficient performance or prejudice. The postconviction court properly concluded that Barbian was not entitled a hearing. *See* ***State v. Sholar***, 2018 WI 53, ¶50, 381 Wis. 2d 560, 912 N.W.2d

89 ("A defendant is entitled to a ***Machner*** hearing only when his motion alleges sufficient facts, which if true, would entitle him to relief.").[3]

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals

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