COURT OF APPEALS
DECISION
DATED AND RELEASED

JULY 25, 1995

No. 95-0366-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOMAS M. KAWALSKI,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Barron County: JAMES C. EATON, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Thomas Kawalski appeals his conviction for five counts of first degree sexual assault of child and one count of disorderly conduct after a trial by jury. He argues that his trial counsel rendered ineffective representation by: (1) failing to call Cindy Shields as a defense witness; (2) failing to elicit exculpatory testimony from William and Char Beach; (3) inadequately preparing Kawalski to testify on his own behalf; and (4) failing

to object to hearsay testimony by Rose B., the victim's mother, recounting the victim's statements. Kawalski also argues that the trial court wrongly denied the request Kawalski made on the second day of the trial seeking the discharge of his trial counsel and the appointment of new counsel. We reject these arguments and therefore affirm Kawalski's conviction.

We use a two part process to determine whether an accused received ineffective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). First, the accused must show that his trial counsel's performance was deficient. ***Id***. Second, the accused must show that the deficient performance prejudiced his defense. ***Id.*** The second component requires a showing that trial counsel's errors were so serious they deprived the accused of a fair trial. ***Id***. Counsel's performance is measured against the standard of a reasonably competent attorney, an objective standard of reasonableness. ***Id.*** at 687-88. In order to show prejudice, an accused must demonstrate 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. For the following reasons, we are satisfied that none of Kawalski's arguments meet the ***Strickland*** criteria.

Kawalski is not entitled to a new trial on the ground that his trial counsel never called Cindy Shields as witness. First, Kawalski expressly waived her testimony. At a pretrial hearing, Kawalski, his trial counsel and the trial court thoroughly examined the question. Kawalski understood that by virtue of a conflict of interest, Kawalski's counsel was unable to call Shields. Kawalski had two choices: he could have Shields testify and obtain new trial counsel or he could keep his trial counsel and forego Shields' testimony. Kawalski expressly chose the latter. The trial court found that Kawalski knowingly and voluntarily waived Cindy Shields' testimony, ***Harvey v. McGaughtry***, 11 F.3d 691, 695 (7th Cir. 1993), which we conclude was not a clearly erroneous finding. ***State v. Harris***, 189 Wis.2d 162, 174, 525 N.W.2d 334, 338 (Ct. App. 1994). As a result, Kawalski cannot cite his counsel's conflict of interest as proof of ineffective representation. ***Harvey***, 11 F.3d at 695. Moreover, Kawalski never called Shields as a witness at the postconviction hearing. Without Shields' testimony at the postconviction hearing, he has never shown that she had relevant, admissible, and outcome shaping testimony. ***State v. Wirts***, 176 Wis.2d 174, 184-85, 500 N.W.2d 317, 320 (Ct. App. 1993). Kawalski therefore has not shown that he suffered any prejudice from Shields' nonappearance.

We reject Kawalski's argument that his trial counsel was ineffective because he failed to elicit testimony from William and Char Beach. According to Kawalski, these witnesses would have testified that Rose B., the victim's mother, attempted to intimidate them and influence their testimony. According to Kawalski, they also would have testified that Kawalski had spent time alone with their own daughter, without incident. At the postconviction hearing, the trial court listened to testimony regarding Rose B.'s and her representatives' alleged intimidation. After examining the evidence, the trial court found that Rose B. had not attempted to intimidate the Beaches. The trial court's finding was not clearly erroneous; the hearing furnished no evidence supporting the intimidation theory. ***Harris***, 189 Wis.2d at 174, 525 N.W.2d at 338. Likewise, the Beaches' testimony concerning their own daughter would not have aided Kawalski's defense. Litigants may not use other acts to demonstrate that someone acted in conformity in the incident that is the subject of the litigation. ***State v. Tabor***, 191 Wis.2d 483, 494, 529 N.W.2d 915, 920 (Ct. App. 1995). This means that Kawalski could not use his nonassaultive behavior with the Beaches' daughter to prove that he acted similarly with Rose B.'s daughter. As a result, Kawalski's trial counsel acted competently in failing to elicit this testimony, and Kawalski suffered no prejudice from its omission.

Kawalski also has not shown that his trial counsel was inadequate because he failed to object to Rose B.'s hearsay testimony or inadequately prepared Kawalski as a witness. Trial counsel never objected to the hearsay, which recounted the victim's statements. Kawalski states that his counsel's inadequate preparation resulted in Kawalski giving contradictory testimony on his whereabouts at the time of the incidents. These allegations are not meritorious. First, Rose B.'s hearsay testimony recounted the victim's excited utterances, which were admissible under the excited utterance hearsay exception. ***State v. Patino***, 177 Wis.2d 348, 364, 502 N.W.2d 601, 607 (Ct. App. 1993). In addition, the hearsay was not necessarily harmful, ironically somewhat helping Kawalski's defense theory — that Rose B. had fabricated the sexual assault in retaliation for Kawalski's threat to criminally prosecute her for forgery for taking and cashing his worker's compensation check. According to Rose B., the victim's excited utterances occurred shortly after Kawalski threatened Rose B.'s forgery prosecution. This sequence of events, in which Kawalski's threats preceded the claimed excited utterances, was consistent with his fabrication theory. Second, Kawalski has not explained precisely what he considered contradictory in his own testimony, how his trial counsel should have prepared him to avoid such contradictions, or why these contradictions influenced the verdict. He therefore has not proven ineffective representation.

Finally, we reject Kawalski's claim that the trial court inadequately considered and wrongly denied Kawalski's motion for new counsel on the second day of the trial. The trial court made a discretionary decision. ***State v. Lomax***, 146 Wis.2d 356, 359, 432 N.W.2d 89, 90 (1988). Trial courts should not allow new counsel in the absence of a timely request and good cause. ***Id***. Good cause requires a complete breakdown in communication, ***State v. Clifton***, 150 Wis.2d 673, 684, 443 N.W.2d 26, 30 (Ct. App. 1989), an alienation between counsel and client that prevents an adequate defense and frustrates a fair presentation of the case. ***Lomax***, 146 Wis.2d at 359-60, 432 N.W.2d at 90-91. As grounds for new counsel, Kawalski cited his current counsel's failure to file a notice of alibi, his counsel's conflict of interest over Cindy Shields, his general discomfort with his counsel, his counsel's decision to have witness James Wakefield arrested when Wakefield did not honor a subpoena, and two other grounds Kawalski now admits were irrelevant. None of these required new counsel. The trial court allowed Kawalski's alibi testimony, Kawalski waived the Shields conflict of interest, Kawalski has not shown that the Wakefield matter harmed his defense, and Kawalski's intangible discomfort with his counsel was no basis for substitution. Under these circumstances, Kawalski has not demonstrated good cause for substitution of counsel during the trial.

By the Court.—Judgment and order affirmed.

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