COURT OF APPEALS
DECISION
DATED AND FILED

December 13, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1397-CR **Cir. Ct. No. 2008CF1670**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EUGENE CRISLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: DAVID T. FLANAGAN III, Judge. *Affirmed*.

Before Lundsten, P.J., Sherman, J., and Charles P. Dykman, Reserve Judge.

¶1 PER CURIAM. Eugene Crisler appeals a criminal judgment of conviction and an order denying his postconviction motion for a new trial. He

contends that trial counsel provided ineffective assistance in several respects. We reject each of Crisler's claims, and affirm.

BACKGROUND

¶2 The State charged Crisler with second-degree sexual assault by use of force based on allegations that he entered the bedroom of an acquaintance, pulled down her pants, and attempted to have intercourse with her while she struggled with him. After the jury found Crisler guilty, he moved for a new trial based on ineffective assistance of counsel. The circuit court denied the motion following an evidentiary hearing, and Crisler appeals. We will set forth additional facts specific to each of the ineffective assistance claims in our discussion below.

STANDARD OF REVIEW

¶3 Claims of ineffective assistance of counsel present mixed questions of law and fact. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). We will not set aside the circuit court's factual findings about what actions counsel took or the reasons for them unless those findings are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's constitutional right to have effective assistance of counsel is ultimately a legal determination, which this court decides de novo. ***Id.***

DISCUSSION

¶4 A claim of ineffective assistance of counsel has two parts: (1) deficient performance by counsel and (2) prejudice resulting from that deficient performance. ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. To prove deficient performance, a defendant must overcome a strong presumption that counsel acted reasonably within professional norms, and

must show that his or her attorney made errors so serious that counsel was essentially not functioning as the counsel guaranteed the defendant by the Sixth Amendment of the United States Constitution. ***Id.*** To prove prejudice, the defendant must additionally show that counsel's errors rendered the resulting conviction unreliable in light of the other evidence presented. ***Id.*** We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. ***Id.***

¶5 Crisler claims that trial counsel performed deficiently in four respects: (1) by failing to object to testimony that Crisler had crashed his car while driving drunk the day after the alleged assault; (2) by failing to object to testimony about what the victim's roommate had told a coworker about whether the roommate believed the victim was lying or telling the truth; (3) by failing to object to testimony from the roommate's employer that the roommate had an untruthful character; and (4) by failing to introduce a photograph of the defendant and the victim taken at a bar the night after the incident. Crisler further contends that he was prejudiced by the cumulative effect of these alleged errors.

Deficient Performance

¶6 We begin by noting that the State does not dispute Crisler's contention that the testimony about Crisler's driving drunk was irrelevant other act evidence, and we will assume for our discussion that trial counsel should have objected to its admission. *See generally* WIS. STAT. § 904.04(2)(a) (2009-10)[1] and

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

State v. Sullivan, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). Accordingly, on this topic we assume deficient performance.

¶7 As to the second claim of ineffective assistance, it is true that a witness is generally not permitted to express an opinion as to whether another witness is telling the truth. *See* ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984). However, we disagree with Crisler's characterization of the testimony at issue here from the victim's roommate and the roommate's coworker as ***Haseltine*** evidence.

¶8 The victim's roommate, L.C., testified for the defense that she had seen the victim kissing the defendant earlier in the evening. During the State's cross-examination of L.C., the prosecutor asked whether L.C. had told a coworker, A.S., that L.C. believed the victim was "lying and making up everything in order to get attention." L.C. agreed that she had made that statement to her coworker. The prosecutor then asked L.C.:

> A day later did you then tell [your coworker] that you believed [the victim] and that you didn't think that [the victim] made up the story, and that you needed to tell the police that you believed [the victim] had told the truth about what had happened?

After L.C. denied ever telling her coworker that she believed the victim had told the truth, the State called A.S. in rebuttal. A.S. testified that, when L.C. had initially told her about the incident, L.C. said she "didn't know if [the victim] was telling the truth or not," but that, when discussing the incident later, L.C. said "she felt that she needed to tell the truth now because she had lied about it before."

¶9 We view the State's elicitation of this testimony, not as an attempt to have L.C. present the jury with a present-tense opinion that the victim was telling

the truth in order to bolster the victim's credibility, but rather as an attempt to show that L.C.—who was, after all, a defense witness—had in the past given different accounts of what she believed happened that night. In other words, the questioning of L.C. was designed to elicit classic impeachment evidence, while the questioning of A.S. was designed to show that L.C. had made a prior inconsistent statement. Because we conclude that there was not a ***Haseltine*** violation, it follows that counsel did not perform deficiently by failing to object to the testimony.

¶10 Regarding the third claim of ineffective assistance, there is no dispute that WIS. STAT. § 906.08(1) allows the limited use of character evidence that refers "only to character [of a witness] for truthfulness or untruthfulness." Crisler argues that a State witness—L.C.'s employer—exceeded the permissible scope of this rule when she testified that she "would say that the majority of the time [L.C.] is untruthful." However, Crisler offers no authority for the proposition that testimony regarding a characterization for untruthfulness cannot include any sort of quantification or other qualifier, and we are not persuaded that is the case. To the contrary, the Wisconsin Supreme Court has held that an allegation of a single falsehood should not be interpreted as a general attack on the truthful character of a witness, since character traits are by their nature "a pattern of behavior or method of conduct demonstrated by an individual over the course of time." ***State v. Eugenio***, 219 Wis. 2d 391, 404, 579 N.W.2d 642 (1998). If multiple instances of falsehood are a prerequisite for testimony that a witness has a character for untruthfulness, we see no impropriety in applying a quantifier to the term. Accordingly, there was no deficient performance in this respect.

¶11 Crisler's final allegation of ineffective assistance is that counsel should have introduced a photograph that showed the victim in close proximity to

the defendant at a bar the day after the incident, smiling and showing no apparent signs of discomfort. Crisler contends that the photograph would tend to show that the victim's behavior was inconsistent with what one would expect from someone who had been sexually assaulted the day before. Trial counsel explained that he did not offer the photograph because he did not think it would make any difference to the outcome of the case. We are satisfied that that was a reasonable view within professional norms because the victim herself had acknowledged going out drinking with a group that included the defendant the following day, and returning to the apartment with him. Therefore, we once again find no deficient performance.

Prejudice

¶12 Since we have determined that only one of the alleged errors by counsel—namely, the failure to object to the mention of Crisler's drunk driving accident—arguably constituted deficient performance, we need only examine the potential prejudice from that testimony. *See* ***State v. Thiel***, 2003 WI 111, ¶61, 264 Wis. 2d 571, 665 N.W.2d 305.

¶13 Prejudice can arise from facts that arouse the jury's hostility or sympathy for one side without regard to the probative value of the evidence, thus risking an improper basis for a decision. *See* ***Weborg v. Jenny***, 2012 WI 67, ¶86 n.3, 341 Wis. 2d 668, 816 N.W.2d 191 (citing *1 McCormick on Evidence* § 185 (6th ed. 2006) and 7 Daniel D. Blinka, *Wisconsin Practice Series: Wisconsin Evidence* § 403.1 (3d ed. 2008)). As we have noted above, the question in the context of an ineffective assistance claim is whether any prejudicial effect rendered the resulting conviction unreliable in light of the other evidence presented.

¶14 Here, the fact that Crisler had crashed his car while driving drunk a day after the alleged assault was irrelevant to determining whether he had sexually assaulted the victim. Crisler points out that many prospective jurors have strong feelings about drunk drivers, and we agree that this is the sort of information that could appeal to jurors' emotions. However, for the reasons that follow, our confidence in the outcome of the trial is not undermined.

¶15 Since Crisler did not testify, and none of the other three people in the apartment were in the bedroom at the time, the case turned primarily on the credibility of the victim and the credibility of the roommate who claimed that she had seen the victim kissing the defendant earlier in the evening. The questions the prosecutor asked the roommate about whether the defendant had told her about his drunk driving accident were part of an extensive cross-examination that covered multiple topics. Although it is not entirely clear what the prosecutor hoped to show by the questions about the crash, we are satisfied that the primary focus of the cross-examination was on the roommate's unreliability. The improper questions were isolated in the context of the entire trial, and were not mentioned in closing argument or otherwise linked to any critical question in the case. In sum, we are confident that trial counsel's failure to object did not affect the outcome of the trial.

By the Court.—Judgment and order affirmed.

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