COURT OF APPEALS
DECISION
DATED AND FILED

February 13, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2010AP1787-CR
2011AP2305-CR

Cir. Ct. No. 2005CF171

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERRY L. WHEELER,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. In these consolidated appeals, Jerry Wheeler appeals from judgments convicting him of repeated sexual assault of the same child and from an order denying his postconviction motion. Wheeler argues on

appeal that the circuit court erroneously admitted evidence that he sexually abused the victim prior to the crimes charged in this case. We reject Wheeler's claim that this was other acts evidence.[1] Rather, we conclude that this evidence was properly admitted as "part of the panorama of evidence needed to completely describe the crime that occurred and is … inextricably intertwined with the crime." ***State v. Dukes***, 2007 WI App 175, ¶28, 303 Wis. 2d 208, 736 N.W.2d 515. We also reject Wheeler's ineffective assistance of trial counsel claims and his argument that the prosecutor impermissibly commented upon his right to remain silent. We affirm.

¶2 The criminal complaint alleged that in 2001 and 2002, Wheeler had sexual contact and intercourse with the victim when she was twelve and thirteen years old. The State sought to introduce evidence that as early as 1999 in Indiana, where the victim and Wheeler were living at the time, Wheeler spoke to the victim about sexual matters and thereafter started sexually abusing her (the pre-charging period evidence). The abuse continued in different jurisdictions until the charging period in the Wisconsin criminal complaint. The State argued that the jury needed to hear evidence that the sexual abuse started well before 2004 when the victim actually reported the abuse.[2] The State urged that such evidence put into context

[1] Had this been other acts evidence, it would have been governed by WIS. STAT. § 904.04(2) (2007-08). Other acts evidence is inadmissible when it constitutes character or propensity evidence. ***State v. Sullivan***, 216 Wis. 2d 768, 783, 576 N.W.2d 30 (1998). However, if the proposed evidence is relevant and "does not hinge on an accused's propensity to commit the act charged," the evidence may be admitted if other requirements are satisfied. ***Id.***

All subsequent references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] The criminal complaint alleged that in August 2004, the victim and her mother learned that Wheeler was going to be released from prison after serving a sentence for sexual assault. Wheeler intended to live near the victim and her mother. When the mother told the victim that Wheeler would soon live nearby, the victim "began to cry hysterically and then disclosed to her [mother] that she had been sexually abused by Jerry L. Wheeler since she was eight years old."

the relationship between the victim and Wheeler and the history of sexual abuse within that relationship. With this evidence, the jury could perceive the victim as someone who was abused from a young age, which may have affected her ability to report the abuse. Wheeler objected that the evidence was unduly prejudicial.

¶3 The parties and the circuit court analyzed the pre-charging period evidence as other acts evidence under WIS. STAT. § 904.04. The court found that the evidence was relevant and would allow the jury to assess the relationship between Wheeler and the victim, which was critical to the case. In addition, the evidence was not unduly prejudicial and could be the subject of a cautionary instruction. The court noted that evidence of this type can be admitted "to furnish part of the context of the crime or [when] necessary to a full presentation of the case." In response to the court's decision to admit this evidence, Wheeler requested a cautionary instruction. The court deferred consideration of the requested instruction until trial.

¶4 At trial, the victim[3] testified that Wheeler began speaking with her about sexual matters in 1999 when they were living in Indiana. When she was ten, Wheeler began to abuse her via sexual contact and intercourse. Wheeler told her that no one would believe her if she disclosed the abuse and that she would be taken away from her family if she did so. The abuse continued unabated as the victim moved to Boston and then to Wisconsin. The abuse ceased in August 2002 when Wheeler no longer had access to the victim. When she learned in August 2004 that Wheeler would be returning to the area where she lived, the victim was

[3] The victim was nineteen years old when she testified at Wheeler's September 2008 trial.

afraid the abuse would resume. At that point, the victim, then fifteen years old, disclosed the abuse to her mother. At trial, Wheeler did not renew his request for a cautionary instruction relating to the pre-charging period evidence.

¶5 On appeal, Wheeler argues that the circuit court erroneously admitted the pre-charging period evidence as other acts evidence. The State counters that the evidence was not other acts evidence. In response, Wheeler complains that the State has taken inconsistent views of the nature of this evidence. The record reveals that in the circuit court, the State variously argued that the evidence was either other acts evidence or panorama evidence that placed the relationship between the victim and Wheeler in context.

¶6 A respondent may offer grounds for affirmance that may be inconsistent with the position taken at trial. ***State v. Holt***, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985), *superseded by statute on other grounds*. We may sustain a correct decision on a theory or reasoning not presented to the circuit court. ***State v. Jensen***, 2011 WI App 3, ¶75, 331 Wis. 2d 440, 794 N.W.2d 482.

¶7 We agree with the State that the pre-charging period evidence was not other acts evidence. Evidence that the abuse occurred over many years and that Wheeler told the victim that no one would believe her and she would be removed from her family was all "part of the panorama of evidence needed to completely describe the crime that occurred and is … inextricably intertwined with the crime." ***Dukes***, 303 Wis. 2d 208, ¶28. "The evidence involved the relationship between the principal actors," ***Jensen***, 331 Wis. 2d 440, ¶85, and explained the context in which the victim delayed reporting the abuse.

¶8 All evidence is subject to relevancy and prejudice analyses. WIS. STAT. §§ 904.01, 904.03. Here, the circuit court assessed the relevancy and

prejudicial effect of this evidence when it decided to admit this evidence. The court properly exercised its discretion in admitting this evidence. *See* ***Jensen***, 331 Wis. 2d 440, ¶75.

¶9 Wheeler next complains that the jury did not receive a cautionary instruction for the pre-charging period evidence. Trial counsel did not ask the court for a cautionary instruction as part of the jury instruction conferences. In the absence of such a request, the circuit court was not required to give a cautionary instruction. *See* ***State v. Payano***, 2009 WI 86, ¶100, 320 Wis. 2d 348, 768 N.W.2d 832.

¶10 Because trial counsel did not request a cautionary instruction, Wheeler claims that his trial counsel was ineffective. Wheeler's trial counsel testified at the postconviction motion hearing. The circuit court found that counsel made a strategic decision not to ask for a cautionary instruction because counsel believes that such an instruction highlights troublesome evidence for the jury and suggests to the jury how the evidence may be used against the defendant. Counsel also attempted to downplay the value of this evidence as part of his closing argument.

¶11 Deciding not to seek a cautionary instruction can be a strategic decision to avoid "'underscor[ing] the forbidden purpose' the defendant wishes to avoid." ***Id.***, ¶100 n.22 (citation omitted). "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). We "will not overturn a trial court's findings of fact concerning the circumstances of the case and the counsel's conduct and strategy unless the findings are clearly erroneous." ***State v. Knight***, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540

(1992). We are bound by the circuit court's credibility assessments. ***State v. Peppertree Resort Villas Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. Based on this record, the circuit court's findings regarding trial counsel's approach to the cautionary instruction are not clearly erroneous. Wheeler did not establish that his trial counsel's performance was deficient. *See* ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997).

¶12 Finally, Wheeler argues that on three occasions at trial, the prosecutor improperly commented on Wheeler's right to remain silent and his decision not to testify. The remarks focused on the same theme: only two people, Wheeler and the victim, knew what happened between them. Because Wheeler's trial counsel did not object to the prosecutor's remarks, Wheeler lodged another ineffective assistance of trial counsel claim. At the postconviction motion hearing, trial counsel testified that he did not object to the prosecutor's remarks because he did not view them as a comment on Wheeler's right to remain silent. The circuit court agreed that the prosecutor's remarks were not a comment upon Wheeler's silence.

¶13 To establish his ineffective assistance of counsel claim, Wheeler had to show that he was prejudiced by trial counsel's allegedly deficient failure to object to the prosecutor's remarks. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶26, 246 Wis. 2d 648, 630 N.W.2d 752. Counsel cannot be faulted for not taking a course of action that would have failed. *See* ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994). We agree with the State and the circuit court that the prosecutor did not impermissibly comment upon Wheeler's right to remain silent. Therefore, counsel did not perform deficiently when he failed to object.

¶14 We apply the following test to determine whether the prosecutor's remarks were improper:

> [F]or a prosecutor's comment to constitute an improper reference to the defendant's failure to testify, three factors must be present: (1) the comment must constitute a reference to the defendant's failure to testify; (2) the comment must propose that the failure to testify demonstrates guilt; and (3) the comment must not be a fair response to a defense argument.

State v. Jaimes, 2006 WI App 93, ¶21, 292 Wis. 2d 656, 715 N.W.2d 669.

¶15 The first challenged comment was made during the prosecutor's initial closing argument:

> Ladies and gentlemen, the fact of the case is that there were two people that can tell you what happened or didn't happen in the locations that [the victim] stated the abuse happened and you had the opportunity to listen to [the victim] testify. You had the opportunity to observe her as she did so. Only two people can tell you what happened.

¶16 Postconviction, the circuit court found that in the context of the entire case, the argument was permissible. Shortly before the prosecutor made this remark, the prosecutor argued that the defense was trying to distract the jury from the evidence presented in court about the crimes. Rather, the defense wanted the jury to consider that the victim had fabricated her claims and to speculate about who else might have overheard the abuse, if the abuse actually occurred. In this context, the remark was a fair response to the defense and not a comment on Wheeler's failure to testify.

¶17 Later, in closing argument, the prosecutor addressed the victim's delay in reporting the abuse, the suggestion that she might have fabricated the abuse, and a suggestion that she might have confided in a relative in 2001 about

the abuse. The prosecutor argued: "Only two people know what happened. What makes sense? Ask yourself." Postconviction, the circuit court found that the remark was a response to an issue created by the defense: a suggestion that someone else might have known about the abuse, had the abuse occurred. The court also found that the remark was an exercise of the State's right to argue that the jury should believe the victim. We agree with the circuit court. The remark was a fair response to the defense and was not a comment on Wheeler's failure to testify.

¶18 In rebuttal, the prosecutor again returned to the "only two people know" theme:

> There are two people that can tell you what happened or did not happen in the bedroom. The State cannot bring in others to state what happened in that bedroom because only two people know and I am not quite sure who I would bring in to tell you.

The circuit court found that the prosecutor's remark was a response to the defense's closing argument and not a comment upon Wheeler's silence. The defense cited the victim's claim that she yelled at Wheeler during one incident of abuse, but no one reported hearing her, which undermined the veracity of her abuse claim. The State argues on appeal that the remark was a fair response to Wheeler's argument. We agree. The State wanted to bring the jury's focus back to the fact that only the principal actors, Wheeler and the victim, knew what happened between them.

By the Court.—Judgments and order affirmed.

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