COURT OF APPEALS
DECISION
DATED AND FILED

February 20, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP41-CR **Cir. Ct. No. 2009CF812**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS F. KAFER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: WILLIAM DOMINA, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Thomas F. Kafer appeals a judgment convicting him, after a jury trial, of first-degree sexual assault of a child—sexual contact with a person under thirteen; repeated first-degree sexual assault—same child; and

child enticement—sexual contact. He also appeals an order denying his postconviction motion alleging that the ineffective assistance of counsel denied him a fair trial. We reject his arguments and affirm.

¶2 The parents of fifteen-year-old Austin Z. and thirteen-year-old Aaron Z. reported to police that Kafer and Austin exchanged sexually charged text messages. The boys also revealed that Kafer had given them full body massages that included sexual contact when they were ten and twelve years old. The boys viewed Kafer, a longtime family friend, as their uncle. A jury found Kafer guilty of two counts of sexual assault and one count of child enticement.

¶3 Postconviction, Kafer contended his trial counsel was ineffective for failing (1) to notify him of the State's pretrial offer[1] and (2) to properly investigate the case—specifically, that counsel failed to call or consult an expert to testify about the reliability of his accusers and to file a motion for a "taint hearing." The trial court denied the motion after a ***Machner***[2] hearing. Kafer appeals.

¶4 To prevail on a claim of ineffective assistance of counsel a defendant must prove that counsel's performance was deficient and that the deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Counsel's performance is deficient if he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** The defendant must overcome a strong presumption that counsel acted reasonably within professional norms. ***State v.***

[1] Kafer abandons this issue on appeal.

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

Johnson, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The deficient performance is prejudicial if the errors were serious enough to render the resulting conviction unreliable. ***Strickland***, 466 U.S. at 687. We need not address both components if the defendant fails to make a sufficient showing on one of them. ***Id.*** at 697. This analysis calls for a mixed standard of review. We review the trial court's findings of fact regarding counsel's conduct under a clearly-erroneous standard. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). Whether those facts constitute deficient performance and prejudice are questions of law that we review independently. ***State v. Tulley***, 2001 WI App 236, ¶5, 248 Wis. 2d 505, 635 N.W.2d 807.

¶5 Kafer first contends that trial counsel was ineffective for failing to object to the allegedly hearsay testimony of a forensic interviewer of the boys. As the State observes, this claim was only hinted at in Kafer's postconviction motion, was not developed or argued at the ***Machner*** hearing, and was not addressed by the trial court, leaving nothing to review on that score. Citing ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997), the State argues that issues not preserved in the trial court, including alleged constitutional errors, should not be considered on appeal. Kafer apparently concedes the State's position because he does not answer it in his reply brief. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994). We thus need not discuss it.

¶6 The State's case depended upon the credibility of the child accusers. Kafer contends that his counsel ineffectively failed to consult a defense expert such as forensic psychologist Hollida Wakefield, who testified for the defense at the postconviction motion hearing. Wakefield testified that investigatory interviews of children often entail techniques that suggest or coerce responses and render the alleged victim's disclosures unreliable. Kafer claims that counsel

should have consulted such an expert to pave the way for a pretrial "taint hearing" to challenge the admissibility of the boys' hearsay statements as well as their ability to testify at trial. The failure to do so, he argues, compromised his ability to rebut the State's case and provide a believable defense.

¶7 In his postconviction motion, Kafer relied on a New Jersey case as support for the necessity of a pretrial "taint hearing." *See* ***State v. Michaels***, 642 A.2d 1372, 1382 (N.J. 1994). Here, Kafer cites ***State v. Kirschbaum***, 195 Wis. 2d 11, 535 N.W.2d 462 (Ct. App. 1995). While ***Kirschbaum*** notes that some other jurisdictions "recognize that young children can be susceptible to suggestive interview techniques" that "can undermine the reliability of a child's account of actual events," ***id.*** at 23, it is not a taint-hearing case. Nor is any other Wisconsin case: Wisconsin does not require taint hearings. Counsel is not ineffective for failing to make or contemplate a legal argument with dim prospects of success, *see* ***State v. Toliver***, 187 Wis. 2d 346, 359, 523 N.W.2d 113 (Ct. App. 1994) (no duty to make meritless arguments), or for failing to forecast changes in the law, *see* ***State v. McMahon***, 186 Wis. 2d 68, 84-85, 519 N.W.2d 621 (Ct. App. 1994) (no duty to argue unsettled points of law).

¶8 Furthermore, no prejudice flowed from trial counsel's failure to request a taint hearing. The "taint" cases generally involve the competency of very young child victims to testify reliably from their memory about the offense and the identity of the suspect. Aaron and Austin were about ten and twelve at the time of the offenses and thirteen and fifteen at the time of the interviews, and they knew Kafer all their lives. Significantly, Kafer did not dispute that the contact occurred but insisted only that it was not for sexual gratification. A taint hearing is to determine the reliability of the victim witness, not to assess the defendant's intent. Kafer's admissions establish the reliability.

¶9 We also see no ineffectiveness in trial counsel's decision not to call or consult with an expert on the subjects of reconstructed memory, delayed reporting, or proper interview tactics as those topics pertain to child sex-assault victims. Counsel testified that there seemed little benefit in retaining an expert given the nature of Kafer's text messages to Austin, his "own words" admitting the contact, and his claim of no wrongful intent. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." ***Strickland***, 466 U.S. at 691. The trial court's finding is not clearly erroneous that evidence an expert might have offered on those matters was irrelevant to the facts of this case. Counsel was not deficient for not calling or consulting an expert whose input would have been only marginally germane at best. Under the circumstances, Kafer has not defeated the presumption that "the challenged action 'might be considered sound trial strategy.'" *See* ***id.*** at 689 (citation omitted).

By the Court.—Judgment and order affirmed.

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