COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1100-CR **Cir. Ct. No. 2009CF189**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID W. BISHOP,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Manitowoc County: PATRICK L. WILLIS, Judge. *Affirmed and cause remanded with directions*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. A jury found David W. Bishop guilty of second-degree sexual assault of a child and of repeated sexual assault of the same child.

Bishop filed a motion for postconviction relief seeking a new trial on the grounds that the trial court erroneously denied his pretrial request for new counsel, that he was denied the effective assistance of counsel at trial, and that a new trial was warranted in the interest of justice. The court denied his motion. We affirm the judgment of conviction and the order denying his postconviction motion.[1]

¶2 Bishop began having sexual intercourse with Rebecca B. when she was fourteen. The two-count information alleged the sexual assault of a child on or about August 23, 2004 and repeated sexual assaults of the same child between August 24, 2004 and June 28, 2006. Rebecca reported that the initial incident occurred on the first day of the 2004 Manitowoc County Fair.

¶3 Shortly after Bishop's initial appearance, his appointed counsel was permitted to withdraw at Bishop's request. The public defender's office then appointed Attorney Eric Pangburn. Two weeks before trial, Bishop requested a new attorney because he was dissatisfied with Pangburn's responsiveness. The court denied the motion. The jury found Bishop guilty. After the court denied his postconviction motion for a new trial, Bishop filed this appeal.

[1] The judgment of conviction erroneously states the date of the offense for count one as October 13, 2005 rather than August 23, 2004, the date alleged in the information. This is a clerical error. A court has the power to correct clerical errors at any time. ***State v. Prihoda***, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857. Therefore, while we affirm Bishop's conviction in all respects, we remand with directions that the judgment of conviction be amended to reference the correct date.

¶4 Bishop first contends that the trial court erroneously exercised its discretion when it denied his request for new counsel. Whether counsel should be relieved and a new attorney appointed is a matter for the trial court's discretion. ***State v. Johnson***, 50 Wis. 2d 280, 283, 184 N.W.2d 107 (1971). To assess whether the trial court erroneously exercised its discretion, this court considers:

> (1) the adequacy of the court's inquiry into a defendant's complaint; (2) the timeliness of the motion; and (3) whether the alleged conflict between a defendant and his [or her] attorney was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case.

State v. Wanta, 224 Wis. 2d 679, 702-03, 592 N.W.2d 645 (Ct. App. 1999). The defendant must show good cause for substitution of appointed counsel, such as a conflict of interest, a complete breakdown of communication, or an irreconcilable conflict that could lead to an unjust verdict. ***State v. Darby***, 2009 WI App 50, ¶29, 317 Wis. 2d 478, 766 N.W.2d 770. If the substitution would require a continuance, the trial court must balance the defendant's desire for new counsel against the societal interest in prompt and efficient administration of justice. ***Id.***, ¶30.

¶5 The court considered Bishop's complaints of little contact with Pangburn; Pangburn's summary of the case's readiness; that the public defender's office does not make a third appointment without a "measurable showing of good cause"; and that two weeks was not enough time for a new attorney to prepare. Substitution of counsel so near to trial likely would have required a continuance. The court also found two weeks was enough time to finish interviewing Bishop's desired witnesses, and Bishop now concedes that Pangburn was able to complete his investigation before trial. The court concluded that Bishop had not met his burden. It properly exercised its discretion.

¶6 Bishop next contends that Pangburn rendered ineffective assistance. To prevail on such a claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Thus, the defendant must show that counsel made errors so serious that (1) counsel did not function as the "counsel" the Sixth Amendment guarantees and (2) he or she was deprived of a fair trial and a reliable outcome. ***Id.*** A reviewing court may dispose of the claim on either ground. ***Id.*** at 697. The issues of performance and prejudice present mixed questions of fact and law. ***State v. Eckert***, 203 Wis. 2d 497, 507, 553 N.W.2d 539 (Ct. App. 1996). We uphold findings of historical fact unless they are clearly erroneous, while deficient and prejudicial performance present legal issues we review de novo. ***Id.***

¶7 Bishop first claims Pangburn failed to attempt to counteract prejudicial other-acts evidence. In response to questioning about why she did not report the assaults sooner, Rebecca suggested that she feared Bishop. She testified that once during a fight, Bishop began choking her mother and then began choking her when she tried to intervene. Bishop claims Pangburn should have objected to the testimony, moved to strike it, or requested a curative instruction.

¶8 Pangburn testified at the ***Machner***[2] hearing that he did not specifically recall the testimony but that to object would have highlighted it. "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). The trial court has the opportunity to see

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

and hear counsel's trial performance and to evaluate its purpose in light of his or her testimony. A trial court's determination that counsel undertook a reasonable trial strategy is "virtually unassailable." ***State v. Maloney***, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620. Moreover, the trial court stated that it would have overruled the objection because the testimony went to Rebecca's credibility and was not unduly prejudicial in light of other evidence in the case. A lawyer is not ineffective for failing to make a meritless objection. *See* ***State v. Reynolds***, 206 Wis. 2d 356, 369, 557 N.W.2d 821 (Ct. App. 1996).

¶9 Bishop also asserts that Pangburn ineffectively failed to present evidence as to the correct dates of the 2004 Manitowoc County Fair. Rebecca testified at trial that Bishop first had sexual intercourse with her on August 23, 2004, the first day of the fair. Bishop put in evidence at the ***Machner*** hearing that the fair actually opened on August 24. Pangburn admitted not investigating the matter because he personally knew that it was close to the correct date and a challenge would have done little to undermine Rebecca's credibility. The trial court concluded there was "no reasonable possibility" that a one-day error in recalling an event nearly six years before the trial began had "any measurable effect on the outcome of the case." We will not second-guess that conclusion.

¶10 Furthermore, the information charged that Bishop had sexual intercourse with Rebecca "on or about Monday, August 23, 2004," and the court had the authority to allow amendment of the information to conform to the proof if not prejudicial to the defendant. WIS. STAT. § 971.29(2) (2011-12)[3]. Bishop would not be prejudiced by an amendment that did not change the crime charged

[3] All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

when the alleged offense is the same and resulted from the same transaction. *See* ***State v. Koeppen***, 195 Wis. 2d 117, 123, 536 N.W.2d 386 (Ct. App. 1995).

¶11 Bishop next argues that if the count one assault *was* on August 24, it impermissibly occurred inside the time frame of count two, *see* WIS. STAT. § 948.025(3), and violates his right to be free of double jeopardy. This borders on the frivolous. Moreover, by failing to raise this issue below when it was easily correctable by amendment, Bishop has forfeited his right to raise it here. *See* ***State v. Ndina***, 2009 WI 21, ¶¶29-31, 315 Wis. 2d 653, 761 N.W.2d 612.

¶12 Finally, Bishop requests a new trial in the interest of justice. He sketchily argues that, due to the denial of new counsel and the ineffective assistance of the counsel he did have, the real controversy was not tried or there was a miscarriage of justice. Having concluded that neither of those claims has merit, we decline to order a new trial. *See* ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976) (where defendant's earlier arguments were without substance, "adding them together [to claim that justice was not served] adds nothing. Zero plus zero equals zero.").

By the Court.—Judgment and order affirmed and cause remanded with directions.

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