COURT OF APPEALS
DECISION
DATED AND FILED

April 9, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP100-CR **Cir. Ct. No. 2008CF278**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADAM A. YOURA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Adam Youra appeals a judgment, entered after a court trial, convicting him of first-degree sexual assault of a child. Youra also appeals the order denying his motion for postconviction relief. Youra contends he

is entitled to a new trial based on the ineffective assistance of his trial counsel. We reject Youra's arguments and affirm the judgment and the order.

BACKGROUND

¶2 In 2008, the State charged Youra with first-degree sexual assault of a child. The complaint alleged that in 2004, Youra had sexual intercourse with then eleven-year-old K.L. In 2009, Youra was charged with the 2007 theft of a firearm from the home of J.H. The cases were consolidated on Youra's motion and tried to the court. Youra was found guilty of the sexual assault charge, but acquitted of the theft. The court imposed a twenty-five-year sentence consisting of twelve years' initial confinement followed by thirteen years' extended supervision. Youra filed a postconviction motion for a new trial, claiming he was denied the effective assistance of trial counsel. Youra's motion was denied after a ***Machner***[1] hearing. and this appeal follows.

DISCUSSION

¶3 A claim of ineffective assistance of counsel requires a showing that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). An attorney's performance is deficient if it is outside the range of professionally competent assistance, in that the attorney's acts or omissions were not the result of reasonable professional judgment. ***Id.*** at 690. However, "every effort is made to avoid determinations of ineffectiveness based on hindsight … and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably

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

within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The prejudice prong of the ***Strickland*** test is satisfied when the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. ***Id.*** at 694.

¶4 This court's review of an ineffective assistance of counsel claim presents a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The trial court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** However, the ultimate determination whether the attorney's performance falls below the constitutional minimum is a question of law that this court reviews independently. ***Id.***

¶5 Youra raises two ineffective assistance of counsel claims. First, he argues counsel was ineffective by failing to object to other acts evidence—specifically, J.H.'s testimony that Youra may have sexually assaulted her on the same night firearms were stolen from the home she shared with her mother and other relatives. In the context of her testimony about the firearm theft, J.H. recounted that Youra spent the night at her house in early September 2007. J.H., who was then fifteen years old, shared a pizza and soda with Youra and then felt "dizzy and tired." As she lost consciousness, the last thing J.H. remembered was Youra "messing" with the top button of her pants, saying he hated those kinds of buttons. J.H. testified that she did not know if she was assaulted, but thought that is what happened. A couple of days later, J.H. was informed by her mother that firearms were missing from their residence and the theft was reported to police.

¶6 Youra argues that the prejudice from "hearing a detailed account of a separate sexual assault, in the trial of a sexual contact charge, is apparent." The

defense strategy at trial, however, was that the girls fabricated their respective sexual assault claims to get even with Youra for stealing the firearms. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." ***Strickland***, 466 U.S. at 690.

¶7 In the motion to consolidate, counsel recounted that the theft accusation was lodged on or about September 7, 2007. On October 30, 2007, J.H. "alleged to the police, seemingly as an afterthought thrown in for good measure that, co-related in time to the alleged thievery event, [Youra] had committed a sexual assault against [her]." The next day, J.H.'s friend, K.L., "suddenly upped and alleged that [Youra] had raped her … several years earlier." The motion ultimately asserted that the two cases were "based on the same act or transaction or on [two] or more acts or transactions connected together or constituting parts of a common scheme or plan [consisting of] … a conspiracy of witnesses toward the furtherance of a fraud to be perpetrated upon the court."

¶8 Counsel reiterated the defense theory during his opening argument at trial and pursued the defense theory during his cross-examination of both girls. The court asked counsel to confirm on the record that he was not challenging the other acts for strategic reasons. Counsel confirmed that the other acts testimony was necessary for strategic reasons, that he had discussed the strategy with Youra and the testimony was "the very foundation" of why the defense wanted both cases to be joined. At the ***Machner*** hearing, counsel repeated that Youra had "concurred" with the "unitary theory of defense."

¶9 Based on defense counsel's failure to reference J.H.'s story during his closing argument, Youra nevertheless argues there is no connection between J.H.'s sexual assault story and either the firearm theft or K.L's sexual assault.

Despite counsel's failure to make a final reference to J.H.'s allegation, the record shows that the court was well aware of the defense strategy. Although the strategy ultimately failed, "[t]rial counsel is not ineffective simply because an otherwise reasonable trial strategy was unsuccessful." ***State v. Maloney***, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620. Youra's trial counsel was not deficient for making the strategic decision not to object to other acts evidence that supported a reasonable defense theory.

¶10 Even if we assumed counsel was deficient for failing to object to the other acts evidence, the court indicated at the postconviction hearing that it gave "no weight to the other acts evidence," and the most compelling evidence was K.L.'s testimony. Youra, therefore, has failed to establish how he was prejudiced by this claimed deficiency.

¶11 Next, Youra argues counsel was ineffective by failing to properly prepare Youra to answer the prosecutor's questions on three topics: the time of a phone call he made from J.H.'s residence; the number of his prior convictions; and the dates he attended different schools. Youra testified that on the night of the alleged theft from J.H.'s house, he became ill, "started calling for a ride around 10:00" and left around 10:30 or 11:00. On cross-examination, the prosecutor questioned Youra about phone records indicating that a phone call was placed from the residence at 11:27. The prosecutor asked: "[I]f, in fact, that call was placed at 11:27 p.m., that would mean you were still in that residence at 11:27 p.m.; is that correct?" Youra responded: "It could – I was sick. Like I said. As I remember, I know I was there for a couple hours. I ate pizza and I got sick and I left, and I thought it was about 11:00."

¶12 With respect to his past convictions, Youra stated he had four and the prosecutor ultimately corrected him, indicating the correct number was thirteen. On redirect, however, Youra explained that he misunderstood convictions to mean the number of cases he had, not the number of counts for which he was convicted within each case. Finally, Youra expressed some confusion about when he had moved while in high school and consequently which high schools he attended at certain times.

¶13 Youra argues that these inconsistencies made his testimony "unreliable and untrustworthy" and could have been avoided had counsel "gone through the expected questions ahead of time." At the postconviction hearing, counsel explained that he generally does not engage witnesses in a "semiformal mock trial" because when a lawyer over-prepares a witness, the witness sounds rehearsed and insincere. With respect to Youra's specific claims, however, counsel testified only that he had a vague recollection of knowing about the telephone records placing Youra in J.H.'s home at 11:27 p.m. on the night of the alleged theft. Because postconviction counsel never actually asked trial counsel whether he had discussed the records with Youra, there is no factual basis in the record to establish that counsel did not discuss them with Youra prior to trial.

¶14 Turning to Youra's prior convictions, counsel testified that he did not recall whether he discussed the number with Youra immediately before trial. That counsel did not recall reviewing this information with Youra does not establish that he failed to do so. Moreover, counsel testified that he represented Youra in a Door County case while the present matters were pending. When Youra opted to accept a plea agreement in the Door County case, counsel explained the ramifications of that decision, noting it would add a substantial number of convictions he would have to acknowledge if he took the stand in a

later case. Ultimately, Youra has failed to carry his burden of establishing the factual basis for this ineffective assistance claim.

¶15 Finally, with respect to the dates Youra attended various high schools, postconviction counsel never asked trial counsel about whether he and Youra discussed these dates prior to trial. Youra has therefore failed to preserve his claim that counsel was ineffective in this regard. *See* ***State v. Elm***, 201 Wis. 2d 452, 463, 549 N.W.2d 471 (Ct. App. 1996) (where defendant fails to ask trial counsel about specific aspect of performance, defendant waives claim with respect to that alleged deficiency).

¶16 At any rate, Youra has not shown that he was prejudiced by these claimed deficiencies. Youra emphasizes the following comments made by the court at trial:

> Defendant's demeanor, by sharp contrast, was completely inconsistent with one who is attempting to present a credible account. The answers and justifications were quick. That is, when challenged on what was obviously something wrong such as the number of convictions or the timing, when clearly it became evident that the timing that was originally presented was just completely wrong, then suddenly, that timing changed.

The court added, however:

> Even when he was in school and so forth, I don't think that was intended to be a misrepresentation, but he had a very difficult time even getting that whole account straight as to where he was and when he was allegedly working and so forth, so there's really nothing, actually, to serve as a basis, but it was actually the demeanor itself that was persuasive in terms of the effect that it has as being, again, completely inconsistent with the truthful testimony, and so that coupled with what was already, I think, a very strong case by the state by virtue of the witnesses who testified, provides more than adequate basis for a finding of guilt beyond a reasonable doubt.

The court's comments, taken as a whole, suggest that its evaluation of Youra's credibility was based more on his demeanor than the specifics of his answers.

¶17 In its postconviction ruling, the court acknowledged that defendants often get confused about what constitutes a conviction, and added:

> My recollection was, actually, [it] tended to be the demeanor of the defendant that made him incredible. The inability to, in a coherent way, present evidence, and the way in which he, frankly, just seemed to not be telling the truth. And it was as much his body language as what he said, and so I do recall finding that he was not at all credible and it was grounded in that, although I have to say that, obviously, whether it's four convictions or five or seven or as many as 13, that's obviously, something that a finder of fact may take into account as it bears only on the issue of credibility.

In any event, as noted above, the court found the victim's testimony to be very compelling, noting that her testimony, together with the corroborating testimony of two other witnesses, was enough for the State to have met its burden. Youra, therefore has failed to demonstrate a reasonable probability that the result of the proceeding would have been different had his counsel done more to prepare him for cross-examination.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).