COURT OF APPEALS
DECISION
DATED AND FILED

April 9, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP890-CR **Cir. Ct. No. 2010CF6306**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID L. LOWE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KEVIN E. MARTENS and RICHARD J. SANKOVITZ, Judges. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. David L. Lowe appeals from a judgment of conviction, entered on his guilty pleas, for two counts of repeated sexual assault of the same child, contrary to WIS. STAT. § 948.025(1) (2003-04 and 2005-06).[1] Lowe also appeals from an order denying his motion for postconviction relief.[2] Lowe argues that his trial counsel provided ineffective assistance at sentencing when he asked the trial court to follow the State's sentencing recommendation rather than arguing for a lesser sentence. We affirm.

BACKGROUND

¶2 Lowe was charged with two counts of repeated sexual assault of the same child based on allegations made against him by his stepdaughters. Lowe entered a plea agreement with the State pursuant to which he agreed to plead guilty to both counts, the State agreed to recommend a global sentence of twelve-to-fifteen years of initial confinement and ten years of extended supervision, and Lowe would be free to argue for a different sentence. The trial court accepted Lowe's pleas and the case proceeded to sentencing.

¶3 At the sentencing hearing, trial counsel asked the trial court to follow the State's recommendation, referring to it as a "joint recommendation." Lowe did not personally object when the recommendation was made or comment

[1] The crime against one victim occurred between 2000 and 2003, while the crime against the other victim occurred between 2000 and 2006.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] The Honorable Kevin E. Martens accepted Lowe's pleas and sentenced him. The Honorable Richard J. Sankovitz, who was assigned the case due to judicial rotation, denied Lowe's postconviction motion.

on that recommendation during his allocution. The trial court followed the joint recommendation, imposing seven years of initial confinement and five years of extended supervision on count one and a consecutive eight years of initial confinement and five years of extended supervision on count two.

¶4 Represented by postconviction counsel, Lowe filed a postconviction motion that sought sentence modification based on trial counsel's alleged ineffective assistance at sentencing.[3] The motion included an affidavit from Lowe asserting that he did not agree with the State's sentencing recommendation, did not discuss with trial counsel the possibility of joining in the State's recommendation, and did not tell trial counsel to join in the State's recommendation. The trial court found that based on Lowe's affidavit, an evidentiary hearing was needed. The order stated:

> If after hearing the evidence I am persuaded that Mr. Lowe did *not* authorize his attorney to tell the court that he joined in the State's recommendation, then Mr. Lowe will have made a case for ineffective assistance of counsel and a new sentencing hearing will be in order. For an attorney to act without his client's authority (at least, in a matter for which the client's authority is required, not a matter not reserved to counsel (e.g., tactical decisions at trial)) would seem to fall well below any objective standard of reasonableness.

¶5 At the evidentiary hearing, trial counsel testified that the decision to join in the State's sentencing recommendation was made during the sentencing hearing. Trial counsel explained that he became concerned when Lowe's wife

[3] Lowe also sought sentence modification on grounds that the trial court erroneously exercised its sentencing discretion. The trial court rejected that argument and Lowe has not raised the issue on appeal. Therefore, we do not address it. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (issues not briefed are deemed abandoned).

"gave a very emotional commentary to the judge," which trial counsel determined could lead the trial court to impose a greater sentence than the State was seeking.[4] Trial counsel said that during Lowe's wife's statement to the court, trial counsel pushed away the microphone on counsel's table so that he could talk privately with Lowe. Trial counsel testified:

> I was talking to my client at the table and I was telling my client that our sentencing was going very badly and we should join rather than ask for something separate and get a worse sentence, as some would say, cut our losses and try[] to go for a joint recommendation rather than asking for something like probation or other sentences that I don't think was realistic.

Trial counsel said that he "made it very clear to [Lowe], words to the effect [that] we better be joining in this recommendation." Trial counsel said that he and Lowe "went back and forth on it" and ultimately, Lowe accepted trial counsel's advice, which Lowe indicated by "nodd[ing] his head affirmatively to" trial counsel.

¶6 In contrast, Lowe testified that trial counsel did not tell him that they should join the State's sentencing recommendation and that Lowe did not agree to do so.[5] In answer to the trial court's questions, Lowe acknowledged that he did not voice any disagreement after he heard trial counsel make the sentencing recommendation or during his allocution. Lowe said he had been "confused with the system" on the day of sentencing and was "upset with the sentencing."

[4] For instance, Lowe's wife told the trial court that Lowe had lied to her about the number of times he was previously married, which she learned "as the years progressed." She talked at length about the girls' suffering and the crimes that she said had "completely ripped apart all of our lives."

[5] Lowe's testimony was inconsistent. For instance, he said that trial counsel did not ask him to change his position on sentencing, but then he testified, "I don't recall."

¶7 The trial court accepted trial counsel's version of events. Addressing Lowe directly, the trial court made the following findings of fact:

> Going into that sentencing hearing you had your hopes high. You had hoped for probation. [Trial counsel] told you that was very unlikely based on his experience….
>
> …[Trial counsel] said you would be doing well to get 8 to 10 years, and you were likely going to prison…. [Y]ou knew … the prosecutor[] was going to recommend 12 to 15 years. And you also knew beyond that that the sentence could be much, much longer. The judge had 80 years to work with, although that's not all up-front time….
>
> And then the sentencing hearing begins. And then you[] hear from your wife. She talks about your infidelity and all these things she found out about you after you g[o]t married and how awful this has been for the kids and how traumatic this has been and it starts to go south, and you recognized that it was starting to go south, and [trial counsel], I believe, pulls the microphone over and has a very quick conversation with you.
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> ….
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> … And in that conversation he said, I think we should go with the State's recommendation of 12 to 15 years. [Trial counsel] doesn't remember exactly what words he said to you, and he doesn't remember exactly what words you said to him. But what I draw from his testimony is that he was confident you agreed you should go along with the State's recommendation so that it didn't get any worse.
>
> The fact that he can't remember the exact words and the fact that he doesn't remember what he said exactly or what you said exactly doesn't distract from my confidence having listened to his testimony that he was confident—I should say distract from my confidence in his confidence that you knew what he was asking and that you agreed with it.

¶8 The trial court also rejected Lowe's argument that he had trouble communicating with his lawyer and that that should be taken into account when analyzing whether his consent to go along with the State's recommendation was

valid. The trial court explained: "In our system, you're either competent or you're not competent. If there's some specific communication difficulty, we expect to see evidence of that before we make the court or the attorneys follow some special procedure, and these very general references to communication difficulties I don't think suggest any special rule [should] be applied in your case."

¶9 The trial court recognized that attorneys are required "to make a sentencing recommendation that's within the authority that's given to them by the client" and concluded that in this case, trial counsel sought and received that authority from Lowe. Accordingly, the trial court denied the postconviction motion. This appeal follows.

DISCUSSION

¶10 Lowe presents several arguments related to trial counsel's presentation of a joint sentencing recommendation.[6] First, Lowe asserts that he did not consent to the joint sentencing recommendation and that the trial court's findings to the contrary are clearly erroneous. Second, he argues that trial counsel made several errors at sentencing that deprived him "of his right to present his own recommendation and to appeal the judgment of conviction." (Capitalization and bolding omitted.) Third, he argues that he was denied the effective assistance of counsel when trial counsel "abandoned the sentencing recommendation in the midst of sentencing without his client's full knowledge or consent."

[6] Lowe's brief includes numerous sub-arguments. To the extent we have not addressed some of his sub-arguments, they are deemed denied as meritless. *See* ***Libertarian Party v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996) (An appellate court is not required to discuss arguments unless they have "sufficient merit to warrant individual attention.").

¶11 We begin with Lowe's claim that the trial court's factual findings are clearly erroneous. Lowe asserts, for instance, that the trial court erred when it found that: trial counsel and Lowe "both understood the length and nature of the sentence to be requested," they "communicated effectively before and during the sentencing," and they agreed to join in the State's sentencing recommendation.

¶12 When a trial court sits as a fact finder, it is the trial court's role to assess the credibility of witnesses, ***Fidelity & Deposit Co. of Maryland v. First National Bank of Kenosha***, 98 Wis. 2d 474, 485, 297 N.W.2d 46 (Ct. App. 1980), and the weight to be given to each witness's testimony, ***Milbauer v. Transport Employes' Mutual Benefit Society***, 56 Wis. 2d 860, 865, 203 N.W.2d 135 (1973). We will not overturn a trial court's "credibility determination absent a finding that it is 'inherently or patently incredible,' or 'in conflict with the uniform course of nature or with fully established or conceded facts.'" ***Nicholas C.L. v. Julie R.L.***, 2006 WI App 119, ¶23, 293 Wis. 2d 819, 719 N.W.2d 508 (citation omitted). Similarly, this court defers to the trial court's findings of fact unless they are clearly erroneous. *See* ***State v. Carter***, 2010 WI 40, ¶19, 324 Wis. 2d 640, 782 N.W.2d 695. A finding is clearly erroneous if "'it is against the great weight and clear preponderance of the evidence.'" ***State v. Sykes***, 2005 WI 48, ¶21 n.7, 279 Wis. 2d 742, 695 N.W.2d 277 (citation omitted).

¶13 Applying those legal standards here, we are not persuaded that the trial court's findings are clearly erroneous. The trial court made a credibility assessment and chose to believe trial counsel's testimony that he told Lowe they should join the State's sentencing recommendation and Lowe agreed. We see no reason to overturn the trial court's credibility assessment. *See* ***Nicholas C.L.***, 293 Wis. 2d 819, ¶23. Further, trial counsel's testimony supports the trial court's findings; they are not clearly erroneous. *See* ***Sykes***, 279 Wis. 2d 742, ¶21, n.7.

¶14 Next, we turn to Lowe's second and third main arguments related to ineffective assistance. We agree with the State that many of Lowe's contentions "turn on his assertion that he did not agree to join the State's recommendation." Because we have rejected Lowe's challenge to the trial court's factual finding that Lowe agreed with trial counsel's advice to join in the State's sentencing recommendation, many of Lowe's contentions likewise fail.[7]

¶15 We will, however, briefly address several claims of ineffective assistance that are not dependent on Lowe's assertion that he did not consent to a joint sentencing recommendation. To present a successful claim of ineffective assistance, Lowe is required to prove that his trial counsel's performance was deficient and that Lowe was prejudiced by that performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not consider both deficiency and prejudice "if the defendant makes an insufficient showing on one." ***Id.*** at 697.

¶16 Lowe contends that trial counsel should have sought an adjournment to have a meaningful consultation with him during the sentencing. The trial court found that Lowe "understood [trial counsel's advice at sentencing] clearly enough to agree with [trial counsel] and to give him the direction [Lowe] wanted to follow." This finding is not clearly erroneous. Further, Lowe has not shown that his decision to agree with trial counsel's advice would have been different had they consulted during an adjournment. Lowe has failed to prove prejudice.

[7] Having accepted the trial court's factual finding that Lowe consented to the recommendation, we also need not address whether trial counsel could have joined the State's sentencing recommendation in the absence of Lowe's consent. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground.").

¶17 Lowe also suggests that when trial counsel joined in the State's sentencing recommendation, he "abandoned his role of advocate for his client and became a mouthpiece for the [S]tate." Lowe asserts that trial counsel's "acquiescence served no purpose but to buoy the [S]tate's position for a longer sentence." Lowe's argument ignores trial counsel's reason for advising his client to join the State's recommendation: trial counsel was "very" concerned, based on his experience, that the trial court would sentence Lowe beyond the recommendation made by the State in light of Lowe's wife's comments about Lowe and his crimes. Trial counsel testified that he believed Lowe would get a better result if he could "solidify what the State was asking for." Further, when trial counsel made his recommendation, he not only joined in the State's sentencing recommendation, but he also presented reasons why the trial court should follow that joint recommendation. Specifically, trial counsel argued that Lowe should be given credit for having accepted responsibility and "saved the children from testifying." Trial counsel also pointed out that Lowe was not seeking further contact with the children and "wants them to find peace within their family." We are unconvinced that trial counsel "abandoned his role of advocate" or provided deficient representation.

¶18 Finally, we address Lowe's claim that trial counsel "was deficient for failing to explain to Mr. Lowe that if the court imposed a sentence consistent with the joint recommendation, Lowe would forfeit an opportunity to appeal and be denied the opportunity to seek a modification of the sentence." Lowe suggests that "[t]o give a valid consent, Mr. Lowe would need to understand that in joining a recommendation, his right to challenge the sentence on appeal [] would be forfeited" and notes that "[c]ourts have recommended counsel should document a client's consent to forgo an appeal by employing confirmatory letters."

¶19 The State responded to Lowe's argument as follows:

> By joining the State's recommendation, Lowe did not forfeit his right to appeal his conviction guaranteed by article I, section 21(1) of the state constitution and [WIS. STAT.] § 808.02. At most, Lowe gave up one argument that could be raised on appeal—namely, that his sentence was excessive. *See* ***State v. Magnuson***, 220 Wis. 2d 468, 471-72, 583 N.W.2d 843 (Ct. App. 1998) (defendant is judicially estopped from arguing that a sentence he or she agreed to was excessive). And Lowe provides no authority for the novel proposition that his attorney would have had to notify him that he was forgoing this appellate argument to consent to join in the State's sentencing recommendation.

(Bolding added.) We agree with the State. We are unconvinced that trial counsel performed deficiently by not specifically discussing with Lowe (or notifying Lowe by letter) that he may be precluded from arguing on appeal that his sentence was excessive. Trial counsel made an assessment of Lowe's evolving sentence prospects during the sentencing hearing and discussed that assessment with Lowe, who agreed with trial counsel to join the State's recommendation in order to dissuade the trial court from imposing an even higher sentence. Lowe has not proven that he was denied the effective assistance of counsel.

By the Court.—Judgment and order affirmed.

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