COURT OF APPEALS
DECISION
DATED AND FILED

May 22, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1604-CR **Cir. Ct. No. 2010CF24**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEITH W. MCGARY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Calumet County: DONALD A. POPPY and ANGELA W. SUTKIEWICZ, Judges. *Affirmed*.

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

¶1 PER CURIAM. Keith W. McGary appeals a judgment convicting him of repeated sexual assault of the same child and an order denying his

postconviction effort to secure a new trial. We reject his claims of trial court error and ineffective assistance of trial counsel. We affirm the judgment and order.

¶2 A jury found McGary guilty of repeatedly sexually assaulting Megan R., the fourteen-year-old daughter of a woman with whom McGary sometimes resided. McGary filed a postconviction motion alleging that his trial counsel was ineffective. The trial court denied his motion after a ***Machner*** hearing.[1] McGary appeals.

¶3 McGary first contends that the trial court violated his right to confront his accuser when it would not allow his counsel to question Megan about allegedly threatening McGary that she was "going to get" him. McGary has forfeited the right of review on this issue.

¶4 An appellant may not claim that evidence was wrongly excluded "unless a substantial right of the party is affected[] *and* … the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked." WIS. STAT. § 901.03(1)(b) (2011-12)[2] (emphasis added). McGary's defense theory was that Megan fabricated the assaults. The court had ruled before trial that it would allow evidence relating to Megan's character or reputation for truthfulness and to any motive she may have had for falsifying her accusations. The court also ruled, however, that evidence of

[1] The Honorable Donald A. Poppy presided over the trial. The Honorable Angela W. Sutkiewicz, who succeeded Judge Poppy upon his retirement, presided over the ***Machner*** hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979)

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

her allegedly vindictive behavior against other family members was not relevant and would require a specific offer of proof.

¶5 Attorney Marcus Falk represented McGary. On cross-examination, Falk asked Megan whether she ever got angry at McGary if he did not attend events at her school such as games or parent-teacher conferences or "for any reason." Megan repeatedly answered "no." Megan then acknowledged that she was "very close" to one of McGary's grandsons who lived with Megan's family for a time and got "a little" angry when the boy's mother took him away. When McGary's counsel asked Megan if she had said anything angry to McGary on that occasion, the State objected on the basis of the court's pretrial ruling. The court sustained the objection and Falk turned to a new line of questions.

¶6 We cannot assign trial court error because McGary concedes that he made no offer of proof that he hoped to establish that Megan was angry at him and so was motivated to lie. Recognizing that, McGary restates the argument as ineffectiveness of his trial counsel for failing to make an offer of proof. We address the claim in that light.

¶7 To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court reviewing counsel's performance must be highly deferential and avoid the distorting effects of hindsight. ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. Counsel's performance is deficient if it falls below an objective standard of reasonableness. ***Id.*** To prove prejudice, "the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a

probability sufficient to undermine confidence in the outcome.'" ***Id.***, ¶20 (citation omitted). We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. ***Strickland***, 466 U.S. at 697.

¶8 Appellate review of an ineffective assistance of counsel claim presents a mixed question of law and fact. ***State v. McDowell***, 2004 WI 70, ¶31, 272 Wis. 2d 488, 681 N.W.2d 500. We will not disturb the trial court's findings of fact unless they are clearly erroneous. ***Id.*** This includes the trial court's articulated assessments of credibility and demeanor. ***Thiel***, 264 Wis. 2d 571, ¶23. The ultimate determination of whether counsel's performance falls below the constitutional minimum for effective assistance of counsel presents a question of law we review independently. ***McDowell***, 272 Wis. 2d 488, ¶31.

¶9 With no witnesses, as is common in sexual-assault cases, and no forensic evidence, this case turned on credibility. McGary contends that Falk knew it was essential to establish Megan's motivation to lie, yet he failed to present any evidence about the retaliatory threat that she was "going to get [McGary]" either through Megan or her brother, who had told Falk pretrial that he overheard her make the threat to McGary.

¶10 McGary asserted postconviction that Falk knew that Megan had told McGary she was angry at him for not attending her sporting events and for being involved with a woman other than her mother and said she would "get him" for that, and that one of Megan's brothers told Falk he had overheard the threat.

¶11 Falk testified at the ***Machner*** hearing that he asked Megan "in more ways than one if she had ever gotten angry at [McGary] for anything" and Megan repeatedly said she never had. Falk explained that after being "cut off" by the prosecutor's objection, he did not press on because he "was trying to follow the

court's order." Falk also testified that the brother earlier had said that he confronted Megan about the truth of her accusations as he "remembered a time in the past when [Megan] had said something to [McGary] to the effect of I'm going to get you." At trial, however, the brother surprised Falk by denying it.

¶12 We must be "highly deferential" when evaluating counsel's performance. ***Thiel***, 264 Wis. 2d 571, ¶19 (citation omitted). Still, assuming that Falk's failure to have the jury learn of Megan's alleged retaliatory threat was objectively unreasonable, McGary has not shown how it prejudiced his defense. An ineffective assistance claim fails if the defendant cannot show both prongs. *See* ***State v. Williams***, 2006 WI App 212, ¶18, 296 Wis. 2d 834, 723 N.W.2d 719.

¶13 McGary asserts that Megan was angry at him for not attending her sporting events and for cheating on her mother but provides no evidence to shore up that claim. He does not establish when or in what context Megan made the alleged threat that her brother once claimed to have overheard and that McGary claims Megan made directly to him. For whatever reason, McGary did not call the brother as a witness at the postconviction hearing and McGary, who did testify, was asked no questions about it.

¶14 A defendant must affirmatively prove prejudice. ***State v. Johnson***, 153 Wis. 2d 121, 129, 449 N.W.2d 845 (1990). In other words, "not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." ***Id.*** (citation omitted). The defendant must prove that the error "actually had an adverse effect on the defense." ***Id.*** (citation omitted). McGary has not carried his burden.

¶15 McGary also asserts that Falk was ineffective for interfering with his Fifth Amendment right to testify. *See* ***State v. Flynn***, 190 Wis. 2d 31, 50, 527

N.W.2d 343 (Ct. App. 1994) (stating that we assess such a claim under ***Strickland***'s two-prong test). McGary contends that, although he told Falk "from day one" that he wanted to testify, Falk did not explain that the ultimate decision was McGary's and did not adequately advise him of the pros and cons of testifying, such that he did not knowingly and voluntarily waive his right to testify.

¶16 A criminal defendant has a fundamental right to testify on his or her own behalf. ***State v. Denson***, 2011 WI 70, ¶57, 335 Wis. 2d 681, 799 N.W.2d 831. A waiver of the right requires the trial court to conduct an on-the-record colloquy. ***Id.***

¶17 At the outset of the second day of trial, the court did just that. In response to the court's questions, McGary confirmed that: he understood he had the absolute constitutional right to testify and it was his decision not to; if he chose to testify he would have to answer the prosecutor's questions on cross-examination; nobody made threats or promises to encourage him not to testify; he understood that no matter what Falk had recommended, it ultimately was his personal choice to exercise his constitutional right to testify; he was making his choice voluntarily; and he had no questions for the court about his right to testify.

¶18 His responses notwithstanding, McGary testified at the postconviction hearing that he was so upset during the colloquy that he could not remember everything, that he never retreated from his insistence that he wanted to testify, that "[Falk] told me I wasn't going to testify and he wasn't going to call me," and that he thought the final decision was Falk's.

¶19 Kathleen Klover, the woman with whom McGary had a relationship, also testified but to no benefit for McGary's ineffectiveness claim. She said she was present during two discussions between McGary and Falk, the upshot of

which was only that McGary wanted to testify and Falk thought it was not in McGary's best interest.

¶20 Falk testified that he told McGary that, while he had the right to testify and that the final decision was McGary's, Falk saw "a large number of pitfalls and potential hazards" and wanted to make clear to McGary that testifying on his own behalf would be "a gamble." Among Falk's concerns were McGary's criminal record and his demeanor, which was described through other testimony as angry, threatening, and abusive. Falk testified that after another discussion on the second day of trial, McGary advised him that he had decided not to testify.

¶21 The transcript of the waiver colloquy and the postconviction court's assessment of the witnesses' credibility convinced the court that McGary had, in fact, understood that testifying was his right and whether to exercise it was his choice. The court remarked on McGary's claim that when he gets upset, he cannot remember. The court then noted that, despite his responses, McGary professed to be so upset during the colloquy that he remembered nothing, or could not say what he remembered, about what Judge Poppy said, yet despite being very upset with Falk, McGary could remember clearly everything Falk said. The court observed that McGary "cannot have it both ways." The court's credibility determinations are not clearly erroneous. We see no deficient performance.

¶22 McGary's final claim of ineffectiveness is that Falk did not object to comments in the prosecutor's closing argument that were inflammatory and "call[ed] on the jurors to reach a verdict based on factors other than evidence." This argument also fails.

¶23 Counsel is allowed considerable latitude in closing arguments, with the trial court having discretion to determine the propriety of the argument. ***State***

v. Draize, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979). Counsel crosses the line between permissible and impermissible argument when he or she goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering factors other than the evidence. *See* ***id.*** The test is whether the prosecutor's closing remarks so infect the trial with unfairness as to make the conviction a denial of due process. ***State v. Wolff***, 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992).

¶24 McGary contends that Falk deficiently failed to object to the prosecutor's following comments in her closing argument:

> Sexual assaulters don't want people around when they're sexually assaulting their victims, obviously because they want these cases to be difficult to prove. They don't want the community to come back and say, you are accountable for what has happened here.
>
> This is your county. I'm a guest here.[3] These are our children, these are our little girls, they belong to you. We need to protect them.

¶25 McGary asserts that Falk should have objected to the remarks. He argues that the jury heard no evidence about the common behavior of sexual offenders, i.e., that sex offenders want the cases against them to be hard to prove or want to avoid accountability in the community. Calling on the jurors to protect the county's children, McGary contends, was tantamount to telling them that to acquit him was to release a known sex offender to further victimize other children.

[3] The court informed the jury during voir dire that the prosecutor, an assistant district attorney from another county, was appointed as a special prosecutor due to a matter unrelated to this case.

¶26 Falk testified that he did not object because he thought the statements about protecting the community and that sexual assaulters do not want to get caught and be held accountable were "so self-evident" and a matter of common knowledge to ordinary people as to make an objection inappropriate.

¶27 The trial court held that, for the same reasons Falk gave, he was not ineffective for failing to object to the prosecutor's remarks. We agree. We also observe that the court instructed the jury that it was to decide the case solely on the evidence offered and received, to disregard remarks by the attorneys that suggested any facts not in evidence, and that closing arguments, including the attorneys' conclusions and opinions within them, are not evidence. "Jurors are presumed to have followed jury instructions." ***State v. LaCount***, 2008 WI 59, ¶23, 310 Wis. 2d 85, 750 N.W.2d 780.

¶28 For the above-stated reasons, we deny McGary's request for a new trial.

By the Court.—Judgment and order affirmed.

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