



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215

P.O. BOX 1688

MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880

TTY: (800) 947-3529

Facsimile (608) 267-0640

Web Site: www.wicourts.gov

DISTRICT II

September 18, 2024

To:

Hon. Lee S. Dreyfus Jr.
Reserve Judge

John A. Birdsall
Electronic Notice

Hon. Paul F. Reilly
Reserve Judge

Nicole A. Muller
Electronic Notice

Monica Paz
Clerk of Circuit Court
Waukesha County Courthouse
Electronic Notice

Daniel J. O'Brien
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2022AP1499-CR

State of Wisconsin v. Robin J. Orth (L.C. #2016CF1443)

Before Neubauer, Grogan and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Robin J. Orth appeals a judgment convicting him of one count of first-degree sexual assault of a child under the age of thirteen. He also appeals an order denying his amended postconviction motion. Orth argues that he received ineffective assistance of trial counsel because his attorney failed to object to the sequence in which the victims' audiovisual forensic interviews and subsequent in-person testimony were presented to the jury. Based upon our

review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ We affirm.

In 2017, Orth was charged with three counts of first-degree sexual assault of a child under the age of thirteen as to child victims, A.O., O.O., and M.O. During the trial, M.O. was unable to answer questions about the assault, explaining that she was afraid and embarrassed, leading to dismissal of the charge related to her. The jury convicted Orth of the charge as to A.O., and acquitted him of the charge related to O.O.² Orth filed a postconviction motion, which the circuit court denied.³ Orth then filed an amended postconviction motion that the circuit court denied after a hearing.⁴

A defendant claiming ineffective assistance of counsel must demonstrate both that his lawyer's representation was deficient and that the deficient performance was prejudicial to the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Id.* at 690. Trial counsel's decisions regarding strategy are afforded a strong presumption of reasonableness. *State v. Breitzman*, 2017 WI 100, ¶75, 378 Wis. 2d 431, 904 N.W.2d 93. To prove prejudice, a defendant must

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

² The Honorable Lee S. Dreyfuss Jr. presided over the trial and entered the judgment of conviction.

³ The Honorable Laura Lau entered the order denying Orth's postconviction motion without a hearing.

⁴ The Honorable Paul F. Reilly presided over the hearing on Orth's amended postconviction motion and entered the order denying Orth's requested relief.

show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 687.

Orth argues that his trial counsel ineffectively represented him because counsel did not object to the order of proof under WIS. STAT. § 908.08(5)(a) (2019-20).⁵ Orth contends that this statute *requires* that each child’s testimony be presented immediately after the audiovisual recording of the child’s forensic interview is shown to the jury. Section 908.08(5)(a) (2019-20) addresses audiovisual recordings of statements of children. In relevant part, it provides:

(5)(a) If the court ... admits a recorded statement under this section, the party who has offered the statement into evidence may ... call the child to testify immediately after the statement is shown to the trier of fact.... [I]f that party does not call the child, the court ... upon request by any other party, shall order that the child be produced immediately following the showing of the statement to the trier of fact for cross-examination.

Here, the prosecution presented the audiovisual recordings of the forensic interviews with the three minor victims consecutively. After the recordings were played for the jury, Sarah Flayter, the forensic interviewer, testified to provide context and explain the methodology of the forensic interviews. Then the prosecution called the victims to testify. A.O. testified first, O.O. testified next, and M.O. testified last.

Under the plain language of WIS. STAT. § 908.08(5)(a) (2019-20), the State *may call* the child to testify immediately but is not *required* to do so. The statute mandates that the court order the child to testify immediately after the jury is shown the child’s forensic interview only if the defense requests it. Here, defense counsel did not request that each child testify immediately

⁵ This statute was in effect when this case was tried but has since been modified.

after their segment of the audiovisual forensic interviews were played for the jury. Because defense counsel did not request that each child testify immediately after their segment was played, there was no violation of § 908.08(5)(a) (2019-20).

Moreover, counsel's actions did not constitute deficient performance. Counsel testified that he did not request that each child be called immediately after their section of the recording was played because the prosecutor had assured him that all three children would testify after the recordings were shown to the jury. Counsel explained that this manner of proceeding seemed consistent with the natural flow of the trial. This decision was a tactical choice that allowed for more efficient presentation of the evidence and effective cross-examination of the forensic interviewer and the children. Counsel's decision was certainly within the bounds of reasonable professional judgment. Therefore, we conclude that there was no deficient performance and no prejudice.

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed.
See WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals