IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CHRISTOPHER BOTTO,

Appellant,

v. Case No. 5D19-2790

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed December 4, 2020

3.850 Appeal from the Circuit Court for Orange County, Leticia J. Marques, Judge.

Michael Ufferman, of Michael Ufferman Law Firm, P.A., Tallahassee, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Carmen F. Corrente, Assistant Attorney General, Daytona Beach, for Appellee.

EDWARDS, J.

Appellant, Christopher Botto, was found guilty of lewd or lascivious molestation of a child following a jury trial in 2013. On appeal, this Court affirmed his conviction and sentence of forty years' imprisonment.[1] Appellant timely sought postconviction relief by

[1] *See Botto v. State*, 160 So. 3d 452, 452 (Fla. 5th DCA 2015).

raising eight claims in a Florida Rule of Criminal Procedure 3.850 motion, asserting ineffective assistance of counsel throughout his first and second trials. We agree with Appellant's claim that his counsel rendered ineffective assistance by failing to object to testimony involving uncharged crimes; accordingly, we reverse and remand for a new trial. We affirm as to all the other claims and issues raised without need for discussion.

Appellant, an adult friend of the victim's father, was living at the victim's grandfather's house. The eight-year-old victim came for a visit to his grandfather's house and shared a bed with Appellant for several nights due to a lack of other sleeping accommodations. After leaving his grandfather's house, the victim told his mother that Appellant had molested him on multiple nights. The family contacted the police, and the local child protection team conducted a videotaped interview of the victim. In the tape, the victim said that Appellant repeatedly reached inside the victim's underwear and touched or grabbed the victim's privates. In response to a question from the child protection investigator, the victim said that Appellant had performed oral sex on him. The State's information charged that Appellant violated sections 800.04(5)(b) and 775.082(3)(a)(4), Florida Statutes (2012), by touching the child in a lewd or lascivious manner between June 24, 2012, and July 8, 2012; however, it did not specifically charge Appellant with any crime involving oral sex or allege that Appellant had oral sex with the child.

When Appellant's trial was set to begin, the State asked for a continuance, stating that it was not fully prepared and was having trouble securing the attendance of two

Williams rule[2] witnesses who would testify that Appellant had molested them in the past when they were eleven years old. Appellant had pled no contest to the charges related to the *Williams* rule witnesses. The trial court denied the continuance, and the trial commenced. The trial court ruled that there would be no evidence presented concerning any uncharged crimes and that there would be no mention of Appellant's prior criminal record or arrests for molestation other than the potential *Williams* rule testimony.

During the first trial, the State asked the grandfather if he had any concerns about Appellant sharing a bedroom with his grandson. The grandfather said that he did not, at that point, because he did not know about Appellant's past. Appellant's defense counsel objected and moved for a mistrial. At the trial court's direction, defense counsel discussed with Appellant whether to seek a mistrial. Trial counsel ultimately requested and received a mistrial. Defense counsel moved to dismiss the charges, alleging that the State had intentionally created the need for a mistrial and was thereby violating Appellant's due process rights and his right to be free from double jeopardy. Although the trial court granted the mistrial, it found the State had no such intent to create a mistrial. Thus, while defense counsel may have been optimistic about dismissal of all charges, that did not occur.

A second trial was commenced, during which the videotape of the victim's interview was played to the jury and admitted in evidence through the testimony of the child protection team investigator. The video seen by the jury included the victim's discussion of how Appellant inappropriately touched and grabbed the victim's privates.

[2] *See Williams v. State*, 110 So. 2d 654, 662 (Fla. 1959) (holding evidence of prior bad acts, which would otherwise be inadmissible, can be admissible to show common plan or scheme or lack of mistake).

The jury heard and saw, without defense objection, the portion of the taped interview during which the victim said that Appellant had requested to perform oral sex and the victim believed that he did perform oral sex on him while the victim slept.

One of the *Williams* rule witnesses testified during the second trial and described Appellant engaging in similar inappropriate touching and grabbing.[3] That *Williams* rule witness also testified, without objection, that Appellant performed oral sex on him. Several other witnesses testified during the second trial. The jury in the second trial then found Appellant guilty as charged in the information.

The postconviction court held an evidentiary hearing with regard to Appellant's claim that trial counsel was ineffective for failing to object to the discussion of oral sex in the victim's videotaped interview. During the hearing, Appellant's trial counsel admitted that she had no strategic reason for not objecting to the discussion of oral sex that was contained in the interview tape played for the jury. The State pointed out that it had not mentioned anything about oral sex in its initial closing argument. However, defense counsel, in her closing argument, repeatedly encouraged the jury to review the videotape of the victim's interview. Defense trial counsel pointed to the discussion of oral sex in that taped interview as being inconsistent with other evidence; she argued this inconsistency should lead the jury to find the victim fabricated all the events. As noted earlier, the jury convicted Appellant of all charges in the information.

[3] Although Appellant claimed that the State was having difficulty getting the *Williams* rule witnesses to attend and testify at the first trial, he also claimed in his rule 3.850 motion that he saw one of the *Williams* rule witnesses sitting in the courtroom during the first trial in violation of the rule of sequestration, which had been invoked. Appellant could not explain how the *Williams* rule witness was unavailable to the State when Appellant personally saw that witness in court during the State's case in the first trial. This is the same *Williams* rule witness who testified in the second trial.

Analysis

Because a motion for postconviction relief alleging ineffective assistance of counsel presents mixed questions of law and fact, this Court applies a mixed standard of review. This Court "defer[s] to the circuit court's factual findings that are supported by competent, substantial evidence, but [reviews] the circuit court's legal conclusions de novo." *Brown v. State*, 258 So. 3d 1201, 1205–06 (Fla. 2018) (citing *Sochor v. State*, 883 So. 2d 766, 772 (Fla. 2004)). Competent, substantial evidence, is "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957).

In order to prove a claim of ineffective assistance of counsel, a defendant must prove "both that trial counsel's performance was deficient and that the deficient performance prejudiced the defendant so as to deprive him of a fair trial." *Smith v. State,* 126 So. 3d 1038, 1042–43 (Fla. 2013) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). With regard to the first prong, the defendant must establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. With regard to the second prong, "*Strickland* places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different." *Smith*, 126 So. 3d at 1042–43 (quoting *Wong v. Belmontes*, 558 U.S. 15, 27 (2009)). This standard does not "require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.'" *Gregory v. State*, 224 So. 3d 719, 729 (Fla. 2017) (quoting *Porter v. McCollum*, 558 U.S. 30, 44 (2009)).

The trial court found that Appellant's counsel's failure to object to the victim's discussion of oral sex in the videotape amounted to deficient performance under the first prong of *Strickland*. However, the trial court found that Appellant was not prejudiced because the evidence of his guilt was overwhelming and that the outcome would have been the same even if the mention of oral sex had been objected to and excluded.[4]

We agree with the postconviction court that counsel's failure to object to the discussion of oral sex in the victim interview constituted deficient performance under *Strickland*. However, unlike the postconviction court, we find that Appellant was prejudiced by counsel's deficient performance. Evidence of uncharged "collateral crimes" is not admissible to show a criminal defendant's guilt or propensity to commit a criminal act. *Holland v. State*, 636 So. 2d 1289, 1293 (Fla. 1994) (citing *Williams v. State,* 110 So. 2d 654, 662 (Fla. 1959)). "The improper admission of similar fact testimony is presumed to be harmful error." *Pastor v. State*, 792 So. 2d 627, 630 (Fla. 4th DCA 2001) (citing *Holland*, 636 So. 2d at 1293; *Czubak v. State*, 570 So. 2d 925, 928 (Fla. 1990); *Leverett v. State*, 696 So. 2d 519 (Fla. 4th DCA 1997)). Appellant's trial counsel compounded the prejudice created by the unobjected-to admission of the oral sex discussion in the videotape when she repeatedly urged the jury to watch the videotape again to see the supposedly inconsistent claims made by the victim in that tape compared to what he said during the trial. In our opinion, the second trial did not provide a fundamentally fair and reliable proceeding. A new trial is required. We remand this matter

[4] Both below and on appeal, Appellant points only to the victim's videotaped interview as containing evidence of uncharged crimes involving oral sex. However, the *Williams* rule witness testified in the second trial that Appellant performed oral sex on him when he was eleven. *See McLean v. State*, 934 So. 2d 1248, 1256 (Fla. 2006) (discussing special concerns related to *Williams* rule evidence in child molestation cases).

with instructions to vacate the current judgment and sentence, and to conduct a new trial. We have carefully considered the parties' briefs and the record on appeal and affirm as to all other issues.

AFFIRMED IN PART, REVERSED IN PART, REMANDED WITH INSTRUCTIONS.

ORFINGER, J., and CHASE, M., Associate Judge, concur.