COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP65 **Cir. Ct. No. 2005CF993**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LUKE J. WIERZCHOWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Luke J. Wierzchowski appeals from a judgment of conviction of four counts of party to the crime of substantial battery and from an order denying his postconviction motion. He argues that he was denied the effective assistance of trial counsel before entering his no contest plea and at

sentencing. He also claims his sentence is an erroneous exercise of discretion. We affirm the judgment and order.

¶2 Wierzchowski, at age sixteen, participated with Aaron Krocker in an early morning home invasion. Krocker knew the family, knew the layout of the residence, and had suggested that the pair burglarize the home. As they entered, each man armed himself with a discarded table leg found on the home's patio. The pair encountered two young children and their mother sleeping in the master bedroom. A young woman sleeping in the basement came upstairs and surprised the pair of burglars. Another minor child came down from an upstairs bedroom. All occupants of the house were struck with the table legs. The young woman lost consciousness. At one point the mother was confined in the bathroom with the two youngest children. Krocker entered the bathroom and stabbed the mother in the neck and inflicted other wounds as she tried to fight him off. After the burglars left and the police were called, all occupants of the house were transported to the hospital for treatment.

¶3 The father of the family suggested to police that the crime could have been committed by Krocker. Police discovered that Krocker was then staying with Wierzchowski. Around noon the same day, Wierzchowski was picked up by police for questioning. He was advised of his ***Miranda***[1] rights, agreed to waive them, and gave a statement admitting his participation in the crime with Krocker. Wierzchowski stated that he had swung his table leg only one time at the young woman who startled him from behind. Wierzchowski also stated that he thought things had gone too far and he left the house and waited for

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

Krocker outside. A few days later, Krocker told police where they could recover the three guns stolen during the home invasion and two of the guns were concealed at Wierzchowski's home.

¶4 Wierzchowski first argues that he was denied the effective assistance of counsel because trial counsel did not file a motion to suppress his statement to police as involuntarily made and unrecorded. To support a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that this deficiency was prejudicial. ***State v. Maloney***, 2005 WI 74, ¶14, 281 Wis. 2d 595, 698 N.W.2d 583. Whether counsel's performance was ineffective presents a mixed question of fact and law. ***Id.***, ¶15. The trial court's determination of what counsel did or did not do, along with counsel's basis for the challenged conduct, are factual matters which we will not disturb unless clearly erroneous. *See* ***id.*** However, the ultimate determination of whether counsel's conduct constituted ineffective assistance is a question of law. ***Id.***

¶5 The trial court found that Wierzchowski's trial counsel reviewed the police reports, talked to Wierzchowski about the interrogation, and that Wierzchowski made no report of abusive or inappropriate tactics employed by the police or that he requested an opportunity to talk with his parents or an attorney. Counsel, based in part on the detailed information produced at the juvenile court waiver hearing, assessed Wierzchowski to be an intelligent young man not susceptible to police pressure. Counsel also observed that after the juvenile waiver hearing the victimized family appeared sympathetic to Wierzchowski. Counsel did not want to alienate the victims by suggesting anything but cooperation with the prosecution of the crimes. To that end he did not want to file a suppression motion unless he thought it would be successful and counsel determined that a motion to suppress would not have been successful. Trial

counsel developed the strategy to minimize Wierzchowski's exposure at sentencing.

¶6 The voluntariness of a custodial statement is evaluated on the basis of the totality of the circumstances and includes the balancing of the personal characteristics of the defendant against the pressures and tactics used by law enforcement officers. ***State v. Jerrell C.J.***, 2005 WI 105, ¶20, 283 Wis. 2d 145, 699 N.W.2d 110. Wierzchowski did not establish any factual circumstances suggesting his personal characteristics. He recites only his age, his ignorance about how the justice system worked, and that the initial custodial interrogation lasted "for hours" and consisted of questioning by two different officers.[2] He asserts that police conduct during the interrogation was coercive but has not established the specifics of that conduct. "A necessary prerequisite for a finding of involuntariness is coercive or improper police conduct." ***Id.***, ¶19. Nothing in the record suggests that a motion to suppress the statement would have been granted. The failure to bring a motion that would have been denied does not constitute deficient performance by trial counsel. ***State v. Reynolds***, 206 Wis. 2d 356, 369, 557 N.W.2d 821 (Ct. App. 1996). Additionally, trial counsel advanced a strategic reason for not moving to suppress Wierzchowski's statement. In doing so trial counsel considered the other evidence pointing to Wierzchowski's involvement and how to cultivate the victims' sympathy for Wierzchowski. "A strategic trial decision rationally based on the facts and the law will not support a

[2] The examination of trial counsel suggests that Wierzchowski was initially questioned by an investigator from the county's sheriff's department about a break-in at another location. He was then questioned about his involvement in the crimes leading to these convictions by a city police investigator. There is no support for Wierzchowski's suggestion that a "fresh" officer came to interrogate him.

claim of ineffective assistance of counsel." ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996).

¶7 In ***Jerrell C.J.***, 283 Wis. 2d 145, ¶58, the Wisconsin Supreme Court adopted a rule that all custodial interrogation of juveniles shall be "electronically recorded where feasible, and without exception when questioning occurs at a place of detention." Wierzchowski argues that his trial counsel should have moved to suppress his statement because it was not electronically recorded. ***Jerrell C.J.*** was decided July 7, 2005 and by its own terms applies only to "future cases." ***Id.*** Wierzchowski's interrogation took place months before the decision, on March 25, 2005. The rule established in ***Jerrell C.J.*** has no application to Wierzchowski's case. Any attempt to argue ***Jerrell C.J.*** as grounds for suppression would have failed. Again, trial counsel's performance was not deficient. ***Reynolds***, 206 Wis. 2d at 369.

¶8 The presentence investigation report (PSI) was originally prepared on misinformation that Wierzchowski had entered a plea to count one of the criminal complaint when in fact that count was dismissed as a read-in. An addendum was prepared to the PSI. That addendum also included information the PSI author received in interviews with the victims specifically addressing Wierzchowski's conduct.[3] Wierzchowski claims that the information in the PSI addendum is inaccurate because the victims' narratives "differ greatly" from those included in the original PSI, the sworn testimony of the victims at Wierzchowski's juvenile waiver hearing and Krocker's preliminary hearing, and the police reports.

[3] The original PSI included the victims' statements based on interviews conducted when the author was preparing a PSI for Krocker's sentencing.

He characterizes the PSI addendum to include "a radically expanded view" of his involvement because prior to the PSI addendum none of the victims accused Wierzchowski of hurting anyone but the young adult woman who surprised him in the hallway. The addendum included statements that Wierzchowski beat and injured the mother and her two young children. Wierzchowski argues that trial counsel was ineffective for not objecting to the inaccuracies in the PSI addendum.

¶9 Contrary to Wierzchowski's claim, the record shows that trial counsel challenged the accuracy of the information in the PSI addendum. Upon inquiry from the sentencing court about errors or corrections to the addendum trial counsel pointed out the difference between Wierzchowski's statement that he only swung once and the addendum's indication that Wierzchowski was involved in hitting other persons. Counsel indicated that Wierzchowski disagreed with that information in the addendum. During his sentencing argument, trial counsel pointed out that the family's statements that Wierzchowski was more involved than he admitted directly conflicted with Wierzchowski's recollection of what occurred inside the house. He argued that the facts and Wierzchowski's personal characteristics supported Wierzchowski's version that he did not hit the young children. Counsel also pointed to the mother's testimony at Krocker's preliminary hearing that it was Krocker who struck her and her son and that she did not see who struck her youngest daughter. He indicated that he was surprised by the changed sentencing recommendation in the addendum and that it could only be attributed to the author's belief of the victims' statements that Wierzchowski participated in the beating of the mother. He affirmatively stated that Wierzchowski's participation in the beating of the mother "just did not happen." The person who spoke on Wierzchowski's behalf at sentencing suggested that the victims' version may have been tainted by a desire for revenge.

¶10 In response to the challenge to the victims' versions of the crime, the sentencing court stated, "exactly what happened in that residence won't perhaps ever be known in terms of individual responsibility between you and Mr. Krocker." The court acknowledged that the victims were calling Wierzchowski a liar and rejected the suggestion that their versions were motivated by revenge. With respect to the victims' statements that Wierzchowski hit the youngest daughter and stomped on the son, the court stated, "I don't know if you struck [the daughter] or not. [She] thinks you did. Her mom thinks you did. … Don't know about [the son] and the shoe prints but everything here says that it was you that stomped on him." Ultimately the court didn't find it necessary to sort out the exact details of who did what because the overriding fact was that if Wierzchowski had not joined Krocker, Krocker would not have been able to commit the crimes alone.

¶11 Trial counsel was not deficient for not making a specific objection that the information in the PSI addendum was inaccurate. The issue was put before the sentencing court. The sentencing court acknowledged that the accuracies or inaccuracies of the victims' statements would never be fully known. The determination was one dependent on the credibility of the witnesses to the event. Because the information was not an objective fact that is capable of being accurate or inaccurate, counsel could not make a claim that the information was inaccurate.

¶12 At sentencing the sister of the victimized mother spoke and urged the court to impose a lengthy sentence. Wierzchowski argues that trial counsel was ineffective for not objecting to the statement from someone who was not a victim. Trial counsel testified he could not find a reason to object to the sister's testimony. The circuit court found that trial counsel's failure to object was not

deficient performance because the sister's statements stayed within bounds of providing information relevant to sentencing.

¶13 Persons other than victims are allowed to make statements at sentencing so long as their comments are relevant to the sentence. ***State v. Harvey***, 2006 WI App 26, ¶42, 289 Wis. 2d 222, 710 N.W.2d 482; WIS. STAT. § 972.14(3)(a) (2005-06).[4] It is within the sentencing court's discretion to permit statements by other persons. ***Harvey***, 289 Wis. 2d 222, ¶42.

¶14 Here the sister helped the victimized mother give her statement to the police when the mother could not speak because of damage to her vocal chords from the knife wound inflicted during the crime. As the circuit court noted, the sister was intimately involved in communication between the victimized family and the police. The sister's statement mostly related to the physical and psychological effect of the crime upon the victims, something relevant to the sentence. *See* WIS. STAT. § 950.04(1v)(pm). The circuit court appreciated having the sister's perspective because it is telling that even a person who does not live with the family on a day-to-day basis has observed the effects of the crime on the family. The sentencing court properly exercised its discretion in allowing the sister's statement. There was no basis to object to this portion of the sister's statement.

¶15 Wierzchowski argues that the objectionable portions of the sister's statement were her accusation that Wierzchowski was more involved than what he admitted, that he had hurt each of the victims, and that he knew they were going to

[4] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

the home to steal and hurt people.[5] Wierzchowski also contends he was prejudiced by the sister's recommendation that he be sentenced to ten years' initial confinement.

¶16 We are not persuaded that even if trial counsel should have objected to those specific accusations and the recommendation, that Wierzchowski was prejudiced. The test for prejudice is whether our confidence in the outcome is sufficiently undermined. *See* ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). As we have already discussed, the level of Wierzchowski's involvement was an issue developed at sentencing and one not capable of confirmation. The sister's suggestion that he was more involved was not any different from the statements in the PSI addendum and those given at sentencing by the victims. Her statement was not the only source of that information. The same is true of the sister's suggestion that Wierzchowski knew they were going to the home to hurt people. There was other evidence and statements at sentencing suggesting that Wierzchowski was or should have been aware that violence would ensue. The notion that Wierzchowski should have been aware that they would encounter people at the home was just another circumstance of the crime that the sentencing court recognized as not capable of confirmation. Also the sister's recommendation for a ten year sentence was not the only one. The victimized mother rejected the prosecution's recommendation for four to six years and indicated that a sentence of six to ten years was more appropriate. The young boy asked the court to impose a ten year sentence. Our confidence in the outcome of

[5] The sister said that she had been told by an investigating officer that Wierzchowski had admitted that Krocker told him they were going to the home to steal and hurt people. Wierzchowski contends there is no basis in the court record or police reports for the hearsay statement that Wierzchowski had the intent all along to hurt the family.

the sentencing is not undermined by the fact that no objection was made to a very limited portion of the sister's statement.

¶17 Having concluded that Wierzchowski was not denied the effective assistance of trial counsel, we turn to his claim that the sentence is the product of an erroneous exercise of discretion.[6] A strong presumption of reasonableness is afforded sentencing decisions because the sentencing court is in the best position to consider the relevant factors and assess the defendant's demeanor. ***State v. Gallion***, 2004 WI 42, ¶18, 270 Wis. 2d 535, 678 N.W.2d 197. "When discretion is exercised on the basis of clearly irrelevant or improper factors, there is an erroneous exercise of discretion." ***Id.***, ¶17. Wierzchowski argues that the sentence was improperly based on the unsworn statement of the mother's sister and emotion.

¶18 We have already concluded that the sister's statement was properly allowed under WIS. STAT. § 972.14(3)(a). We reject Wierzchowski's contention that the sentencing court "adopted the version proffered by" the sister. As we have indicated, the sentencing court did not adopt any one particular version of Wierzchowski's participation in the crime. The sentencing court did not once make a reference to the statement of the sister. It indicated that it was relying on the statements of the people that were present when the crime occurred. The sentence was not an erroneous exercise of discretion simply because the sentencing court allowed the sister's statement.

[6] Wierzchowski faced a maximum sentence of twenty-two years' initial confinement and eight years' extended supervision. On three counts Wierzchowski was sentenced to consecutive terms totaling ten years' initial confinement and four and one-half years' extended supervision. Sentence was withheld on the remaining count and Wierzchowski was placed on probation for three and one-half years.

¶19 That the sentence imposed exceeded the recommendation of the prosecution, defense, and original PSI does not mean that the sentence was imposed only on the basis of emotion. The sentencing court properly exercised its discretion in considering the nature of the offense, including the brutal attack on children, and Wierzchowski's need for punishment and rehabilitation. Wierzchowski's repeated claim that the sentencing court relied on the unsworn victim statements instead of the sworn testimony at Krocker's preliminary hearing fails again when simply recast as a claim that the court relied on emotion. Although the sentencing court relied on the victims' perspectives of what occurred that night, it recognized that Wierzchowski's true involvement would never be known. That the victims were emotional in their recommendation to the court does not require the court to disregard their recommendation. *See* ***State v. Johnson***, 158 Wis. 2d 458, 466, 463 N.W.2d 352 (Ct. App. 1990) (a sentencing court does not erroneously exercise its discretion when it considers statements and recommendations from victims). The sentencing court did not erroneously exercise its discretion because it independently concluded that the sentence was appropriate in light of the facts of the case. *See* ***id.*** at 465.

By the Court.—Judgment and order affirmed.

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