COURT OF APPEALS
DECISION
DATED AND FILED

November 25, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2301-CR **Cir. Ct. No. 2005CF2606**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VERNON L. CARLSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: MICHAEL J. BYRON, Judge. *Affirmed.*

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Vernon Carlson appeals a judgment convicting him on ten counts of possessing child pornography. The issues are whether he received ineffective assistance from trial counsel, whether he should receive a new

trial on newly discovered evidence, and whether we should grant him discretionary reversal under WIS. STAT. § 752.35 (2007-08).[1] We affirm.

¶2 The State charged Carlson after a technician repairing Carlson's computer observed a pornographic image of a child among temporary internet files automatically saved to his web browser's cache. The State charged Carlson with the ten possession counts, and he received a bench trial.

¶3 There was no dispute at trial that multiple child pornography images were stored as temporary files on Carlson's computer. An investigating officer testified that 620 of what appeared to be child pornography images were present in the temporary file cache for the Opera web browser, with 73 of those depicting children "way under the age of eighteen" indecently posed or performing sexual acts. It was also undisputed that Carlson had viewed many of the child pornography images. When asked if he intentionally viewed the images he testified that "I viewed some, yes. It was to see what it was, yes." He also answered "Some of it, yes," when asked, "And of necessity, then you knew as you continued to see where the child porno sites were leading it was probably going to view you some more child porno and you were viewing this just to see what it was?" The trial essentially came down to whether Carlson had knowingly downloaded and viewed the child pornography images, or whether they appeared on his computer because he visited child pornography sites accidentally or because a computer virus involuntarily took him to those sites.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 To prove Carlson's knowing possession the State also introduced statements Carlson made to the repair technician to the effect that he got into something he shouldn't have and couldn't stop, and to a police officer indicating that he willingly looked at images of fourteen or fifteen-year-old girls, but was sickened by the pictures of very young children. The State's computer expert testified that some of the saved pictures were very small, or thumbnail size, while some were much larger, indicating that someone had clicked on the thumbnail version to make them easier to view. He also testified that Carlson's Opera web browser had gone to websites with child pornography terms in their titles, such as "Lolita," and that several with such titles were bookmarked. He acknowledged that Carlson's computer had numerous viruses on it that would involuntarily redirect the viewer of particular websites to other websites. However, he testified that these viruses were typically designed to work with the Internet Explorer web browser, and that he knew of no virus that currently worked with the Opera browser Carlson was using when the photos were downloaded. Consequently, the expert concluded that the images on Carlson's computer were not attributable to a virus involuntarily taking him to child pornography websites.

¶5 Carlson testified that he came across child pornography by following links and clicking on pop-ups that appeared while he was browsing for adult pornography. He said that "things started coming, and I just followed them where they went." He stated that he tried to delete the images and had no idea his computer was saving them. He denied making the inculpatory statements attributed to him, and he denied ever searching for child pornography. He testified that he would see the images and then try to delete them.

¶6 Carlson's computer expert confirmed in testimony that it was very easy to be redirected and to get into unwanted images while browsing for

pornography. He testified that when he "carved off" webpages Carlson went to and used his computer to view them, he was redirected to other websites. He was not using the Opera web browser when the redirection occurred, and he was unable to refute the State expert's testimony that no known viruses attached to the Opera browser. Both experts testified that viruses can put unwanted bookmarks on a browser.

¶7 The court found beyond a reasonable doubt that Carlson had knowingly gone to web sites containing child pornography images, and was thus guilty of the charged offenses. Based on that finding of guilt, the court sentenced and convicted Carlson.

¶8 In a postconviction motion Carlson alleged that trial counsel performed ineffectively by failing to hire an expert sufficiently knowledgeable to provide evidence supporting Carlson's assertion that he did not knowingly and voluntarily download and view child pornography. At the hearing on his motion he called a computer expert, John Holt, who testified that he discovered, through a five-minute Google search, that the version of the Opera browser Carlson used was subject to numerous viruses that could have involuntarily redirected him to websites he had no intentions of visiting. Holt further testified that such viruses could cause downloading of full-size images, and involuntary bookmarking of websites. Carlson argued alternatively that Holt's testimony was newly discovered evidence, and called for a new trial in the interest of justice. The trial court denied the motion, finding that trial counsel made a reasonable decision in the expert she chose, and explaining that Holt's testimony, if given at trial, would not have changed the verdict. On appeal Carlson renews his arguments that he received ineffective assistance, and that he should receive a new trial on newly discovered evidence, and in the interest of justice.

¶9 Carlson contends that trial counsel performed deficiently by failing to discover and present evidence that the Opera browser was vulnerable to viruses that might have caused involuntary downloads of child pornography. To establish deficient performance by counsel, the defendant must show that counsel's representation fell below objective standards of reasonableness. ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). We conclude that to meet objective standards of reasonableness criminal defense attorneys are not required to be computer experts or computer savvy. Here, counsel performed reasonably by locating and presenting evidence from a qualified computer expert. Counsel did not perform deficiently simply because the expert she located did not provide as much helpful testimony as Holt could have. There is no authority for the proposition that defense counsel must present the most helpful expert available to be effective.

¶10 Additionally, to prevail on an ineffective performance claim the defendant must also show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). Carlson failed to make that showing because, as the trial court fully explained, Holt testifying would not have changed the verdict. As the trial court noted, all of the evidence considered together, including inculpatory statements Carlson made and the large amount of child pornography on his computer, indicated a high probability that he deliberately downloaded and viewed child pornography. As the trial court also noted, Holt's testimony established no more than a possibility that the child pornography downloads and Carlson's child pornography bookmarks were attributable to viruses.

¶11 For the same reason, we reject Carlson's contention that he is entitled to retrial on newly discovered evidence. Even if the evidence in question meets the test for "newly discovered," the evidence must create a reasonable probability of a different result on retrial. *See* ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). The trial court reasonably determined that Holt's testimony would not have produced a different result for the reasons discussed in the above paragraph. Because the trial court's determination was reasonable, we affirm it. *See* ***State v. Morse***, 2005 WI App 223, ¶14, 287 Wis. 2d 369, 706 N.W.2d 152 (trial court uses its discretion in deciding whether to grant retrial on newly discovered evidence).

¶12 Under WIS. STAT. § 752.35, this court may use its discretion to set aside a judgment if we conclude that the real controversy has not been fully tried, or it is probable that justice has miscarried. Carlson asks that we consider reversal for either or both reasons. Because we conclude that the real controversy was fully tried, and in the absence of any prejudicial errors or omissions in the trial court proceeding, we conclude that reversal and a new trial is not warranted, and decline to use our authority under § 752.35.

By the Court.—Judgment and order affirmed.

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