COURT OF APPEALS
DECISION
DATED AND FILED

October 23, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2011AP1260
2011AP1261

Cir. Ct. No. 2005CF123
2006CF75

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TODD RICHARD LONDON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Pierce County: JOSEPH D. BOLES, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Todd London, pro se, appeals an order denying his WIS. STAT. § 974.06 (2009-10)[1] motion for postconviction relief. London alleges

[1] All references to the Wisconsin Statutes are to the 2009-10 version.

various deficiencies of his postconviction counsel and further contends the circuit court erroneously exercised its discretion by denying his motion without a hearing. London also argues that the cumulative effect of his stated claims warrants a new trial. We reject London's arguments and affirm the order.

BACKGROUND

¶2 London was charged with two counts of sexually assaulting his daughter, who was under the age of thirteen. As noted by this court in London's direct appeal:

> The allegations came to light when the victim wrote essays in a creative writing class that described inappropriate conduct. When she was initially questioned by a social worker and police, she denied any sexual misconduct occurred. She later described an incident of sexual intercourse with London, but denied any other incidents. In a subsequent interview, she alleged an additional incident of sexual contact with London.
>
> The victim testified the first incident occurred when her father and stepmother, [Chana], came home from a party. Chana went into the bedroom followed by her father who appeared angry. The victim looked through a crack in the door and saw her father strike her stepmother in the temple knocking her to the floor unconscious. He then found the victim, grabbed her by the hair and dragged her to the bed where he had intercourse with her. She also testified he hit her in the back with his fist during the incident. After he left the room, the victim revived Chana and took her upstairs to the victim's bedroom. The victim then came back downstairs and slept on the couch. On cross-examination, the victim said a lump on Chana's head that was visible on the night of the incident "disappeared" the next day. Relatives who saw them the next day did not observe any signs of physical abuse.
>
> The victim also described the second incident of sexual contact. While she was sitting on a couch watching television, her father and Chana came home and went into the bedroom. Her father came out of the bedroom and touched the victim's breasts and crotch area. He also slapped her and choked her with one hand. Chana then

> came into the room and told him to stop. The victim then ran upstairs.

¶3 London was convicted upon a jury's verdict of the charged crimes and the court imposed concurrent thirty-year sentences consisting of twenty years' initial confinement and ten years' extended supervision. London filed a postconviction motion raising several claims of ineffective assistance of trial counsel. The trial court denied that motion and London appealed.

¶4 On direct appeal, London presented six challenges to his conviction, including four challenges to the effectiveness of trial counsel. Specifically, London claimed trial counsel was ineffective for failing to: (1) introduce evidence to show why the victim would fabricate sexual assault allegations; (2) challenge the victim's credibility by presenting expert testimony contradicting her claims of physical abuse and injury; (3) call an expert witness to inform the jury of the significance of the delay in reporting the sexual assaults and the victim's initial denial that any assault occurred; and (4) offer expert testimony from Dr. Harlan Heinz regarding the interview techniques and family structures that might contribute to false allegations. We rejected London's arguments and affirmed the judgment of conviction and order denying postconviction relief. ***State v. London***, Nos. 2008AP1952-CR and 2008AP1953-CR, unpublished slip op. (WI App Feb. 9, 2010).

¶5 London then filed the underlying WIS. STAT. § 974.06 motion for postconviction relief challenging the effectiveness of his postconviction counsel. The court denied the motion without a hearing and this appeal follows.

DISCUSSION

¶6 A claim of ineffective assistance of counsel requires a showing that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). An attorney's performance is deficient if it is outside the range of professionally competent assistance, in that the attorney's acts or omissions were not the result of reasonable professional judgment. ***Id.*** at 690. However, "every effort is made to avoid determinations of ineffectiveness based on hindsight … and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Further, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." ***Strickland***, 466 U.S. at 690.

¶7 The prejudice prong of the ***Strickland*** test is satisfied where the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. ***Id.*** at 694. We may address the tests in the order we choose. If London fails to establish prejudice, we need not address deficient performance. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶8 Here, London's WIS. STAT. § 974.06 postconviction motion alleges various deficiencies of his "postconviction" counsel. Specifically, London contends postconviction counsel should have argued trial counsel was ineffective for failing to object to the prosecutor's comments during closing argument about the relative credibility of prosecution and defense witnesses. London also claims

postconviction counsel should have challenged the trial court's decision to allow exhibits into the jury room, as well as the State's alleged discovery violation.

¶9 We note that although postconviction and appellate counsel are often the same person, their functions differ. *See* ***State ex rel. Smalley v. Morgan***, 211 Wis. 2d 795, 797, 565 N.W.2d 805 (Ct. App. 1997). To the extent London claims his postconviction counsel failed to preserve challenges to the effectiveness of his trial counsel, those arguments were properly raised in the circuit court by his WIS. STAT. § 974.06 motion. London's arguments regarding exhibits in the jury room and the State's purported discovery violation, however, were preserved by objection of trial counsel. Therefore, the deficiency, if any, for failing to raise these arguments on direct appeal was of appellate counsel, not postconviction counsel. Although a challenge to the effectiveness of appellate counsel is properly raised by a petition for a writ of habeas corpus pursuant to ***State v. Knight***, 168 Wis. 2d 509, 512-13, 484 N.W.2d 540 (1992), we will nevertheless address London's claims on their merits.

¶10 Counsel is not required to raise on direct appeal every nonfrivolous issue the defendant requests. *See* ***Jones v. Barnes***, 463 U.S. 745, 751 (1983). Postconviction counsel is free to strategically select the strongest from among all the nonfrivolous claims available in order to maximize the likelihood of success on direct review. *See* ***Smith v. Robbins***, 528 U.S. 259, 288 (2000). Thus, "only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." ***Id.*** (quoting ***Gray v. Greer***, 800 F.2d 644, 646 (7th Cir. 1986)).

¶11 Here, London claims postconviction counsel should have argued trial counsel was ineffective for failing to challenge the following comments the

prosecutor made during the State's closing argument. When discussing the emotion exhibited on the witness stand by both the victim and her brother, the prosecutor noted: "There's no way that was fake." In recounting that London's parents and sister testified they did not see injuries on either the victim or her stepmother, the prosecutor stated: "I'll be frank with you, I'm not sure they would have said if they did see anything." The prosecutor also stated: "But the defense here is simply—although they won't come right out and tell you this—[the victim's] lying. That is the only defense. Because if it's he didn't do it, then she has to be lying." Further, when recounting testimony that London punched a door in anger after another man made advances toward Chana at a bar, the prosecutor posited: "Do you really think when Chana got home the next day all it was was an, 'I didn't appreciate you doing that?' … I don't buy that for a minute, and I don't think you should either. I bet she felt his wrath for a long time over that." Finally, London insists it was improper for the prosecutor to state that Chana could have presented corroborative testimony had she not died before trial.

¶12 London's complaints about the prosecutor's comments are based on his belief that a prosecutor may not challenge the credibility of the defendant or his witnesses, and may not urge the jury to believe the State's witnesses. The prosecutor, however, is given considerable latitude in closing argument, subject only to the rules of propriety and the trial court's discretion. ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979). Prosecutors are permitted to argue their cases with vigor and zeal, and may strike hard blows, but not foul ones. *See* ***United States v. Young***, 470 U.S. 1, 7 (1985).

> The line between permissible and impermissible argument is drawn where the prosecutor goes beyond reasoning from the evidence and suggests that the jury should arrive at a verdict by considering factors other than the evidence. The constitutional test is whether the prosecutor's remarks so

> infected the trial with unfairness as to make the resulting conviction a denial of due process. Whether the prosecutor's conduct affected the fairness of the trial is determined by viewing the statements in context. Thus we examine the prosecutor's arguments in the context of the entire trial.

State v. Neuser, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995) (internal citations and quotations omitted).

¶13 In context, we do not deem the prosecutor's remarks so prejudicial as to deprive the defendant of a fair trial. The cited comments directly responded to the defense's attack on the victim's credibility. Defense counsel called the victim a liar, noting there were no witnesses to corroborate her allegations. To that end, defense counsel used Chana's death to London's advantage during closing argument, emphasizing that the victim chose not to come forward with her accusations until after Chana died. It was reasonable for the prosecutor to argue that the victim should be believed and London should not. In any event, the jury was instructed that the arguments of counsel were not evidence, and the jury is presumed to have followed its instructions. ***State v. Olson***, 217 Wis. 2d 730, 743, 579 N.W.2d 802 (Ct. App. 1998).

¶14 London also complains there was no evidentiary support for the prosecutor to argue that London abused Chana. To the contrary, the victim testified about London's abuse of his wife. Because London has failed to establish that trial counsel was ineffective for failing to object to the prosecutor's comments, postconviction counsel was not ineffective for failing to pursue a prosecutorial misconduct argument. *See* ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel not ineffective for failing to raise meritless claim).

¶15 Next, London contends the trial court erred by permitting exhibits one through four—the victim's three creative writing essays that referenced the assaults, and her written statement to police—into the jury room during deliberations. The trial court has broad discretion in determining whether to send exhibits to the jury room. ***State v. Anderson***, 2006 WI 77, ¶27, 291 Wis. 2d 673, 717 N.W.2d 74. Here, the court admitted the exhibits over trial counsel's objection, noting they had been referred to throughout the trial "incompletely and in pieces." The court ultimately determined it was "important the jury have those exhibits so they can put them together" and make a fair decision. In fact, defense counsel urged the jury during closing argument to note that the victim never discussed rape in her writings and, in her journal entries, blamed herself and wished she could take back everything she said.

¶16 To the extent London contends the trial court should have also sent the jury a tape of his police interview denying any wrongdoing, the court noted its concern that some inadvertent damage could be done to the tape. Moreover, it was unnecessary to send the tape into the jury room because both the interviewing officer and London testified that London denied any wrongdoing, and defense counsel reminded the jury of London's denial during the closing argument. It was reasonable for appellate counsel to decide that these challenges to the court's discretionary decisions were not stronger than the arguments raised on direct appeal.

¶17 London also contends appellate counsel should have raised an argument regarding the State's discovery violation. Because defense counsel did not receive one of the victim's creative writing essays until just before trial, counsel moved to exclude the exhibit. The trial court must exclude evidence for failing to comply with a discovery demand "unless good cause is shown for failure

to comply." WIS. STAT. § 971.23(7m)(a). The trial court denied the motion to exclude the exhibit after the prosecutor indicated the essay was inadvertently omitted when the victim's other writings were provided to the defense.

¶18 London complains that the court did not find good cause for the discovery violation but, rather, determined there was no indication of bad faith. In ***State v. Martinez***, 166 Wis. 2d 250, 259, 479 N.W.2d 224 (Ct. App. 1991), this court acknowledged a reluctance "to say that negligence or lack of bad faith constitutes'good cause' as a matter of law for all cases under [WIS. STAT. §] 971.23(7)." The ***Martinez*** court continued: "While an assessment of the State's conduct in such terms may be relevant to the question of 'good cause,' it is not necessarily controlling. Ultimately, the question of whether the State has met its burden to establish 'good cause' must depend on the specific facts of the case." ***Id.***

¶19 Here, London's motion does not claim surprise and does not explain how his defense was adversely affected by the late disclosure of the document. The defense had notice of the existence of the victim's writings long before trial as they were disclosed in the criminal complaint and at a pretrial hearing. Ultimately, the State proved good cause for its noncompliance with WIS. STAT. § 971.23 due to good faith inadvertence that neither surprised nor prejudiced the defense at trial. It was, therefore, reasonable for appellate counsel to determine that this argument was not stronger than the arguments raised on direct appeal.

¶20 Although London contends he was entitled to a hearing on his motion, the circuit court may deny a postconviction motion without a hearing if the motion presents only conclusory allegations or if the record otherwise conclusively demonstrates that the defendant is not entitled to relief. *See* ***State v.***

Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. The record establishes that London was not entitled to relief. Because London's arguments are devoid of merit whether viewed separately or cumulatively, the circuit court properly denied the motion without a hearing.

By the Court.—Order affirmed.

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