COURT OF APPEALS
DECISION
DATED AND FILED

April 17, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1547-CR **Cir. Ct. No. 2008CF648**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA L. WELLS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marathon County: GREGORY E. GRAU, Judge. *Affirmed*.

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

¶1 PER CURIAM. Joshua Wells appeals a judgment convicting him of three counts of second-degree sexual assault and one count of false

imprisonment.[1] He also appeals an order denying his postconviction motion in which he alleged ineffective assistance of trial counsel. He argues: (1) the court improperly struck Wells' testimony regarding his relationship with the victim six months before these crimes occurred; (2) his trial counsel was ineffective for failing to impeach the victim with a prior conviction and for failing to humanize Wells; and (3) this court should grant a new trial in the interest of justice. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 All of the charges arise out of a series of incidents that occurred one night at Wells' apartment. The victim testified she knew Wells for three years and had arranged to stay with Wells when she moved to Wisconsin from Arizona to escape a domestic abuse situation. On the same day she arrived, they had consensual intercourse. However, when the victim headed to the shower, Wells grabbed her, bruising her arm, and pulled her back into the bedroom. He pushed her back on the bed with his hands to her throat, tied her hands to the headboard using a torn bed sheet, and had intercourse without her consent. Wells then pushed her to the floor, grabbed her hair and forced her to perform oral sex. Wells then prepared food for them and, after dinner, again put her on the floor and placed his hands around her throat and again had vaginal and oral sex with her. During these assaults, Wells also twice bit the victim's nipple. When asked why

[1] Wells also appeals his conviction on one count of misdemeanor battery that is not included in the written judgment contained in the record filed with this court. The court orally rendered judgment and sentenced Wells on that count. Therefore, we consider the challenge to the battery count a part of this appeal.

she did not run away, she responded that she weighed 310 pounds and he was closer to the door, and, being new to the area, she did not know where to go.

¶3 On cross-examination, the victim was confronted with inconsistencies with her prior testimony and statements she made to police officers and a nurse. She denied telling Wells after consensual sex that Wells should "prove to me you can be dominant."

¶4 Tracy Fremming, a sexual assault nurse examiner, described bruises she observed on the victim's neck, chest and nipples.

¶5 Anthony Welch, a jail inmate, testified that Wells told him he bought a bus ticket for a woman and forced her to have sex with him because he thought he deserved it.

¶6 Wells testified that he met the victim in Indiana and they continued contact by e-mail. He testified that, around Thanksgiving 2006, when they were in Indiana, "There was already, I guess, what you would call sexual attention there to begin with. That led to some sexual conversation as well as some making out." The prosecutor objected to the testimony on the ground the court prohibited the defense from disclosing prior sexual conduct between Wells and the victim. Wells' counsel responded that the challenged testimony did not describe "sexual activity." In his offer of proof, he indicated that he was merely trying to establish "that they were good friends from Indiana, and that, in part, is why she agreed to come from Arizona to Wisconsin." The court struck the testimony and ordered the jury to disregard it.

¶7 Wells admitted that he had vaginal and oral sex with the victim, and testified that she asked him to prove to her that he was dominant, so he decided to

"role play bondage." He stated there was "some light nipping of the nipples," followed by a shower, dinner, and drinking. When he asked the victim about her "turn-ons," she responded "choking." They then had intercourse with his hand on her neck. After intercourse, she indicated she needed a cigarette and left the room. He fell asleep. He awoke when the police knocked on the door.

¶8 Wells filed a postconviction motion alleging ineffective assistance of his trial counsel, Paul Goetz. The motion faulted Goetz for failing to impeach the victim with a prior conviction and for failing to ask Wells about his education, work history and military service.[2] The court found Goetz's performance was deficient in not impeaching the victim with her prior conviction, but Wells failed to establish prejudice from that error. The court found that Goetz's failure to humanize Wells by presenting evidence of his education, work and military background did not constitute deficient performance.

DISCUSSION

¶9 The trial court properly struck Wells' testimony about his relationship with the victim in Indiana. Under the rape shield statute, WIS. STAT. § 972.11(2)(b)1. (2009-10),[3] the defendant may not present evidence of the victim's sexual conduct unless he files a pretrial motion under WIS. STAT. § 971.31(11). ***State v. Jackson***, 216 Wis. 2d 646, 658, 575 N.W.2d 475 (1998). Because Wells did not file such a motion, the court properly excluded that evidence. Wells argues that he was not required to file a pretrial motion because

[2] The postconviction motion alleged other aspects of ineffective assistance by Goetz that are not pursued on appeal.

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

the behavior he described does not constitute "sexual conduct." WISCONSIN STAT. § 972.11(2)(a) defines sexual conduct as "any conduct or behavior relating to sexual activities of the complaining witness, including but not limited to prior experience of sexual intercourse or sexual contact, use of contraceptives, living arrangements and life-style." Wells' argument ignores the language "including but not limited to" by focusing on the absence of any claim of intercourse, sexual contact or life-style. Furthermore, in his brief on appeal, Wells describes his and the victim's conduct in Indiana as "foreplay," in effect conceding that it was conduct or behavior relating to sexual activities.

¶10 Even if Wells' testimony about their prior relationship was not properly stricken, the error was harmless. In his offer of proof, Wells' counsel indicated he merely wanted to establish that Wells and the victim were long-time friends. That fact was readily conceded by the victim. On appeal, Wells argues that the testimony would have established a romantic relationship in which consent to sexual activity might occur. However, the victim herself testified that they had consensual intercourse shortly before the sexual assault. Her testimony was far more probative of that point than Wells' excluded testimony.

¶11 Wells next argues that his trial counsel was ineffective. To establish ineffective assistance of counsel, Wells must show deficient performance and prejudice. ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). To show deficient performance, he must show specific acts or omissions of counsel that were outside the wide range of professionally competent assistance. ***Id.*** at 690. To demonstrate prejudice, he must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. ***Id.*** at 694. A reasonable probability is one that undermines this court's confidence in the outcome. ***Id.***

¶12 Wells has not established deficient performance based on Goetz's failure to present evidence that would "humanize" Wells. Wells faults Goetz for failing to present evidence of Wells' education, work history[4] and military service in Iraq. Goetz' failure to present evidence to humanize Wells does not constitute deficient performance for several reasons.

¶13 First, a defendant's education, work history and military service are irrelevant to the elements of the charged sexual assault. There is no logical basis for believing that an educated, hard-working veteran would be less likely to commit a sex crime.

¶14 Second, Wells cites no legal authority for the proposition that effective counsel must attempt to humanize his or her client during the guilt phase of a trial, and our research discloses no case in which counsel was found ineffective on that basis. Almost all of the reported cases involving counsel's attempts to humanize a defendant relate to the penalty phase, particularly in death-penalty cases.

¶15 Third, Wells relies on an article by a trial consultant that stresses the importance of humanizing an accused gang defendant. Failure to follow strategies suggested by a trial consultant does not equate to incompetent representation. The issue is not whether counsel's representation "deviated from best practices" or even whether it deviated from "common custom," but whether it amounted to incompetence under prevailing professional norms. ***Harrington v. Richter***, 131

[4] Wells did testify that when he lived in Indiana, he worked seventy hours per week in a management position. The evidence Goetz failed to present regarding his job history consisted of jobs in fast food, restaurants and telemarketing.

S. Ct. 770, 788 (2011). Wells has not established that Goetz's failure to present evidence of Wells' education, work history and military service was outside the wide range of professionally competent assistance.

¶16 Wells also has not established prejudice from Goetz's failure to impeach the victim by evidence that she was previously convicted of a crime. Goetz vigorously cross-examined the victim regarding her numerous inconsistent accounts of the incidents. A defendant is not prejudiced by counsel's failure to impeach a key witness with prior criminal convictions if the jury already had reason to question the witness's credibility. *See* ***State v. Tkacz***, 2002 WI App 281, ¶22, 258 Wis. 2d 611, 654 N.W.2d 37. Because of the modest probative value of a single conviction for a witness whose testimony was otherwise vigorously challenged, Wells has not undermined this court's confidence in the outcome.

¶17 Finally, Wells seeks a new trial in the interest of justice, arguing that the controversy was not fully tried and that justice has miscarried. This issue merely repeats arguments rejected in this opinion. We conclude that the issues were fully and fairly tried. Justice has not miscarried and there is no basis for believing that retrial would result in a different verdict. *See* ***State v. Cleveland***, 2000 WI App 142, ¶21, 237 Wis. 2d 558, 614 N.W.2d 543.

By the Court.—Judgment and order affirmed.

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