COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1731-CR **Cir. Ct. No. 2007CF342**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICKY H. JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Manitowoc County: JEROME L. FOX, Judge. *Affirmed*.

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

¶1 REILLY, J. Ricky H. Jones was charged with two counts of first-degree sexual assault of a child under thirteen years of age for separate incidents involving C.B. and M.W. Jones went to trial and was convicted by a jury. Prior to

trial, the court denied Jones's motion to introduce evidence that C.B. and M.W. had made prior untruthful allegations of sexual assault against other men. The court also, midtrial, excluded Jones's proffered ***Richard A.P.***[1] evidence as Jones's trial counsel had not provided notice in accordance with the State's discovery demand. Jones now appeals these rulings as well as the court's denial of his postconviction motion for a new trial, brought on the basis that his trial counsel was ineffective for failing to provide notice of the ***Richard A.P.*** evidence and for eliciting testimony that he was under investigation for a "different" sexual assault. We reject Jones's arguments and affirm.

Ineffective Assistance of Counsel

¶2 In order to find that trial counsel was ineffective, "[a] defendant must prove both that his or her attorney's performance was deficient and that the deficient performance was prejudicial." ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. We uphold a circuit court's findings of fact unless clearly erroneous, but whether counsel's conduct ultimately amounts to ineffective assistance is a question of law that we review de novo. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305.

*1. Notice of **Richard A.P.** Evidence*

¶3 At trial, Jones called forensic psychologist Dr. Eugene Braaksma and attempted to elicit testimony regarding Braaksma's assessment that Jones posed a low risk of committing a sexual offense. The court found that the evidence might be admissible under ***Richard A.P.***, 223 Wis. 2d 777, but excluded

[1] ***State v. Richard A.P.***, 223 Wis. 2d 777, 589 N.W.2d 674 (Ct. App. 1998).

it as Jones had not provided Braaksma's expert report prior to trial in accordance with the State's discovery demand. Jones claims his counsel was ineffective for not providing notice of the expert report.

¶4 At the ***Machner***[2] hearing, Jones's trial counsel admitted that he committed error when he did not provide a copy of Braaksma's report to the State pursuant to its discovery demand. The circuit court agreed that Jones's trial counsel was deficient in this regard. The court found no prejudice to Jones, however, as the profile "would have had, at best, minimal value to the defendant's defense." The court pointed out that Jones's own expert called such profiling "problematical at best" and that such testimony would have been "powerfully outweighed" by the graphic testimony given by the victims.

¶5 We agree that Jones's trial counsel was deficient in failing to provide notice of the expert testimony to the State and, as a result, failing to have the expert's complete testimony admitted at trial. Like the circuit court, however, we find that this error was not prejudicial as it does not undermine confidence in the outcome of the trial. This case came down to whether the jury believed that Jones engaged in sexual contact/conduct with C.B. and M.W. Both girls testified that Jones assaulted them; Jones testified that he did not. As noted by the circuit court, the jury's verdict reflected that it believed C.B. and M.W. rather than Jones. An expert's opinion as to whether Jones possessed the profile of a person who would commit a sexual assault was unlikely to disturb this credibility finding; the exclusion of the "profile" testimony does not undermine our confidence in the jury's conclusions.

[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

2. Officer Testimony of Other Sexual Assault Investigation

¶6 Jones next claims that his trial counsel was deficient by eliciting testimony at trial that Jones was under investigation for another sexual assault allegation. Jones argues he is entitled to a new trial due to bias from the jury knowing that there were other sexual assault allegations against him, thereby making the current allegations more credible. We disagree as the "other" allegation referred to the co-victim and the question was offered as part of Jones's trial strategy.

¶7 The testimony about which Jones complains came from Detective Erik Kowalski, who was investigating M.W.'s allegations. Trial counsel testified at the ***Machner*** hearing that his trial strategy was to attempt to get the State's witnesses to open the door to admitting that C.B. and M.W. had made allegations against other men, that Jones was aware of this strategy, and that counsel was pursuing this strategy through this line of questioning. In accordance with this strategy, Jones's trial counsel asked Kowalski about a "different case" of sexual assault that Detective Brian Swetlik was investigating. Kowalski answered that this other case involved Jones.

¶8 The circuit court found that the testimony about which Jones complains referred to the investigation into allegations by C.B. and, therefore, was properly before the jury. In making this finding, the court noted that Swetlik testified directly after Kowalski about his investigation into C.B.'s allegations. The court found it clear that the reference to a "different case" referred to C.B.'s case. This finding of fact is not clearly erroneous. Furthermore, any error was the result of a reasonable trial strategy agreed to by Jones, which we will not second

guess. ***State v. Domke***, 2011 WI 95, ¶49, 337 Wis. 2d 268, 805 N.W.2d 364. Jones's trial counsel was not deficient in eliciting this testimony.

Court Error

¶9 Jones argues that the circuit court erred when it excluded his ***Richard A.P.*** evidence and denied his attempt to show that his accusers had previously made similar allegations against other men. We review a circuit court's decision to exclude such evidence under the erroneous exercise of discretion standard. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). "An erroneous exercise of discretion occurs when the circuit court does not consider the facts of record under the relevant law or does not reason its way to a rational conclusion." ***State v. Davis***, 2001 WI 136, ¶28, 248 Wis. 2d 986, 637 N.W.2d 62.

1. ***Richard A.P.*** *Expert Testimony*

¶10 Jones argues that although the circuit court had the ability to exclude his ***Richard A.P.*** expert testimony based on his trial counsel's failure to provide the expert report as discovery, the court should have ordered a recess or continuance in accordance with WIS. STAT. § 971.23(7m)(a) (2011-12)[3] so that Jones could present a complete defense. Jones misreads the statute. *See* ***State v. Gribble***, 2001 WI App 227, ¶34, 248 Wis. 2d 409, 636 N.W.2d 488. A circuit court "shall exclude any witness not listed or evidence not presented" unless there is good cause shown for failure to comply with a valid discovery request. Sec.

[3] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

971.23(7m)(a). The word "shall" means that but for the exception, all such evidence is mandated to be excluded. ***Gribble***, 248 Wis. 2d 409, ¶¶34-35. The circuit court excluded the expert testimony because the State was not properly provided notice of it in accordance with § 971.23(2m)(am). No good cause was offered for the lack of notice, and therefore, no recess or continuance was required. ***Gribble***, 248 Wis. 2d 409, ¶¶34-35. The circuit court did not err.

2. Other Allegations of Sexual Assault

¶11 Prior to trial, Jones sought an order allowing him to admit evidence that C.B. and M.W. had made prior untruthful accusations of sexual assault. The court reviewed videotape interviews and reports related to uncharged accusations that the victims had made against other men and held a hearing on Jones's motion. The court denied Jones's request, saying that "in reviewing this record [the court] can't come to the conclusion that these young women lied." Instead, the court found "that their version of an incident was unsubstantiated, which I find to be very much different than an untruthful allegation." Jones filed an interlocutory appeal, and this court reversed and remanded for the court to reanalyze the admissibility of the evidence using the standard of "whether a reasonable person could reasonably *infer* that C.B. or M.W. was untruthful when making the prior allegations." ***State v. Jones***, No. 2008AP1595-CR, unpublished slip op. ¶16 (WI App July 29, 2009) (emphasis added).

¶12 On remand, the court again denied Jones's motion, based on both the decision from Jones's appeal and the Wisconsin Supreme Court's decision in ***State v. Ringer***, 2010 WI 69, ¶31, 326 Wis. 2d 351, 785 N.W.2d 448, which clarified that the standard is whether "a jury could reasonably *find* that the complainant

made prior untruthful allegations of sexual assault." (Emphasis added.) The circuit court stated:

> Had I been asked to rule on the—the standard that the court sets in this case, whether a reasonable jury could reasonably infer that the girls had been untruthful, I would have found, in my opinion, that a reasonable jury could not have reasonably inferred that the—that the girls had been untruthful.
>
> ….
>
> But were I to use "find" as a standard, it would be, I think, even easier for me to conclude that no reasonable jury could find that the—that the complainants made prior untruthful allegations of sexual assault.

Jones argues that the circuit court erroneously exercised its discretion by not admitting this evidence. We disagree.

¶13 Evidence of a complainant's prior untruthful allegation of sexual assault is admissible only if the circuit court determines "(1) the proffered evidence fits within WIS. STAT. § 972.11(2)(b)3[.]; (2) the evidence is material to a fact at issue in the case; and (3) the evidence is of sufficient probative value to outweigh its inflammatory and prejudicial nature." ***Ringer***, 326 Wis. 2d 351, ¶27. The Wisconsin Supreme Court has further clarified that in order for the proffered evidence to fit within § 972.11(2)(b)3., the circuit court must first conclude from the proffered evidence that a jury could reasonably find the alleged victims made prior untruthful allegations of sexual assault. ***Ringer***, 326 Wis. 2d 351, ¶36. Section 972.11(2)(b)3. "is to be reviewed in terms of occurrence and whether a prior allegation of the general occurrence of a sexual assault is later recanted by the complainant or proved to be false by the defendant." ***State v. Moats***, 156 Wis. 2d 74, 110, 457 N.W.2d 299 (1990).

¶14 In this case, the circuit court thoroughly reviewed the documentation relating to the accusations made by the victims against other men. The victims have never recanted and their allegations were never proven to be false by the defendants. *See* ***id.*** The circuit court concluded under ***Ringer*** that the girls' claims were simply unsubstantiated and did not amount to untruthful claims warranting their admission at trial. *See* ***Ringer***, 326 Wis. 2d 351, ¶40. The court properly determined that the prior allegations did not fall within the WIS. STAT. § 972.11(2)(b)3. exception as Jones did not meet his burden of establishing a sufficient factual basis that the past allegations were untruthful. *See* ***State v. DeSantis***, 155 Wis. 2d 774, 787-88, 456 N.W.2d 600 (1990). The circuit court reasoned its way to a rational finding based on its review of the evidence and, as such, did not erroneously exercise its discretion.

New Trial in the Interest of Justice

¶15 Jones revives the above-rejected arguments in an effort to persuade us that we should exercise our discretionary authority to order a new trial in the interest of justice. As none of Jones's arguments are viable, we decline to do so. *See* ***State v. Echols***, 152 Wis. 2d 725, 745, 449 N.W.2d 320 (Ct. App. 1989).

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.