COURT OF APPEALS
DECISION
DATED AND FILED

November 25, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP330-CR **Cir. Ct. No. 2011CF4621**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL A. FARRELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ and JEFFREY A. WAGNER, Judges. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Michael A. Farrell appeals a judgment, entered upon a jury's verdicts, convicting him of three counts of repeated sexual assault of a child and one count of exposing a child to harmful materials. He also appeals an

order denying his postconviction motion for a new trial. Farrell contends that trial counsel was ineffective for failing to cross-examine the State's expert and failing to call an expert witness to contradict a particular portion of the State's expert's testimony. Farrell has not shown prejudice from either alleged error, so we affirm the judgment and order.[1]

BACKGROUND

¶2 The criminal complaint alleged that Farrell had repeatedly sexually assaulted his victim in various ways over a period of twenty-seven months, beginning when the victim was six and one-half years old. In addition to the various assaults, Farrell also allegedly made the victim watch adult pornography. The assaults came to light after the victim made comments to classmates, who brought the comments to administrators' attention.

¶3 Farrell was charged with three counts of repeated sexual assault of a child and one count of exposing a child to harmful materials. The State had no physical evidence of sexual assault from the victim's medical examination, so at trial, it presented Dr. Kelly Hodges to testify about the "frequency with which you … observe discernable injuries in children when performing" a sexual assault examination. Specifically, Hodges told the jury that "[t]he vast majority of children that I exam[ine] who have been victims of sexual abuse have normal physical exams.… [T]he mantra is it's normal to be normal. That most victims of

[1] The Honorable Richard J. Sankovitz had imposed sentence and was responsible for the judgment of conviction. The Honorable Jeffrey A. Wagner entered the order denying the postconviction motion.

child sexual abuse have normal physical exams." Defense counsel had no questions for Hodges on cross-examination.

¶4 The jury convicted Farrell. He filed a postconviction motion seeking a new trial and alleging ineffective assistance of trial counsel for his failure to cross-examine Hodges and challenge her testimony with another expert. The circuit court ordered a hearing on the motion. At the hearing, Farrell had nurse practitioner and professor Maureen Van Dinter testify in an attempt to show Hodges's testimony had been incorrect. Trial counsel also testified, explaining why he did not cross-examine Hodges.

¶5 After the hearing, the circuit court denied the motion.[2] It concluded that trial counsel had a reasonable strategic reason for not cross-examining Hodges. It further concluded that Van Dinter's testimony was based on "possibly inaccurate assertions" about the Record, and was simply not as reliable as Hodges's. The implicit finding is that there was no ineffective assistance.

DISCUSSION

¶6 "To prevail on an ineffective assistance claim, a defendant must prove both that counsel performed deficiently and that the deficient performance prejudiced the defense." ***State v. Prescott***, 2012 WI App 136, ¶11, 345 Wis. 2d

[2] Once again we caution circuit courts against adopting a party's submission *in toto*, as happened here. In denying the postconviction motion, the circuit court "adopt[ed] the State's proposed findings of fact and conclusions of law as its decision in this matter." While a circuit court is not prohibited from adopting a party's proposed document as its decision in a case, if the circuit court chooses to do so, it is required to indicate the factors on which it relied when making its decision and state those on the record. *See* ***Trieschmann v. Trieschmann***, 178 Wis. 2d 538, 544, 504 N.W.2d 433, 435 (Ct. App. 1993). Here, the circuit court failed to state the factors upon which it relied.

313, 321, 825 N.W.2d 515, 518–519. "If a defendant fails to establish either prong … we need not determine whether the other prong was satisfied." ***Id.***, 2012 WI App 136, ¶11, 345 Wis. 2d at 321, 825 N.W.2d at 519. "Whether a defendant received ineffective assistance of counsel presents a mixed question of law and fact." ***State v. Domke***, 2011 WI 95, ¶33, 337 Wis. 2d 268, 287, 805 N.W.2d 364, 373. We uphold the circuit court's findings of fact unless clearly erroneous, though we review *de novo* the ultimate conclusion of whether counsel was ineffective. *See* ***id.***, 2011 WI 95, ¶33, 337 Wis. 2d at 287, 805 N.W.2d at 374.

¶7 As noted, trial counsel had no questions for the State's expert, Hodges, and Farrell contends that trial counsel was ineffective for not cross-examining her. However, at the postconviction hearing, trial counsel testified that he did not believe cross-examining Hodges would be beneficial. For one thing, he thought that the doctor would be "hostile to my cross-examination." Additionally, he opined that Hodges's credentials were unassailable. Further, Hodges had explained why she was not surprised by the lack of observable injury; specifically, children do not always immediately report sexual assault, and the usually affected areas are made of mucus membranes—tissue that heals quickly. Here, nine to ten months had passed between the last assault and the victim's disclosure, so counsel thought that Hodges's conclusion, that no injuries would be visible, was well-supported by the Record.

¶8 The circuit court concluded that there was no deficient performance because trial counsel made a reasonable, strategic choice. *See* ***id.***, 2011 WI 95, ¶36, 337 Wis. 2d at 289, 805 N.W.2d at 374 ("Reviewing courts should be 'highly deferential' to counsel's strategic decisions[.]") (citation omitted). We do not disagree with this conclusion.

¶9 Additionally, Farrell also fails to show prejudice from trial counsel's decision not to cross-examine Hodges. Demonstrating prejudice requires a showing that it is reasonably probable that, but for counsel's deficient performance, the results of the proceeding would have been different. *See* ***State v. Koller***, 2001 WI App 253, ¶9, 248 Wis. 2d 259, 270, 635 N.W.2d 838, 845. Here, Farrell does not tell us what questions trial counsel should have asked Hodges on cross-examination, nor does he explain how those questions and their answers would have resulted in a different verdict.

¶10 Farrell's other claim of ineffectiveness is that trial counsel should have had an expert to counter Hodges's testimony. We will assume without deciding that trial counsel performed deficiently by not calling an expert. However, Farrell does not show any prejudice from this failure.

¶11 Farrell contends that the jury was presented erroneous testimony when Hodges testified that the "'vast majority' of child sexual assault victims have normal physical exams when they are subsequently examined by treating professionals." He contends that trial counsel should have called Van Dinter to counter this incorrect information. However, Farrell seems to overlook the fact that Van Dinter actually agreed with Hodges on this particular point.

¶12 At the postconviction hearing, appellate counsel had Van Dinter read from the State's pretrial summary of Hodges's likely testimony, which said that Hodges "may also discuss the circumstances under which a full examination may not be indicated and the fact that her experience and research reveals that the great majority of children reporting sexual abuse have normal examinations." Defense counsel then asked Van Dinter, "Now, generally speaking … would you agree with that?" Van Dinter answered, "Yes."

¶13 Van Dinter reaffirmed this agreement during cross-examination. The State inquired, "But would you say that it is a true statement that the great majority of sexual assault exams on children do come up with a finding of normal, meaning no abnormalities noted?" Van Dinter again answered, "Yes." Thus, there is no support for a claim that Hodges's testimony was factually erroneous.

¶14 It appears that what Farrell really thinks should have been highlighted to the jury is Van Dinter's conclusion that *in this case*, there ought to have been observable injury to the victim. Van Dinter testified that, given the facts of this case, it would not be accurate to say there would be no sign of an injury; instead, "an accurate statement would be that in some situations -- and the research definitely supports this -- that you may see evidence of repeated trauma, particularly in the three to nine o'clock position, and that a careful examination would show that evidence."

¶15 But Van Dinter made this conclusion on an assumption that Farrell repeatedly assaulted his victim by "full penetration" of his penis into her vagina. The circuit court held that the trial testimony "is far more accurately characterized as describing instances of sexual contact with the exposed vagina and possible partial penetration…. [T]he totality of the testimony does not support the conclusion that the child sustained 'full penetration' of her vagina by the defendant's penis[.]" Thus, Van Dinter offered only a difference of opinion about the likelihood of visible injury in this case, based on certain facts as she believed them to be. Hodges, though, had explained why she was not surprised that the victim had no visible injury in this case—as noted, she explained that the mucus membranes ordinarily involved in sexual assault heal quickly, assuming that there was an injury to them to begin with—and a mere difference of opinion among

experts does not render the other expert's opinion incorrect or inaccurate. *See* ***State v. Slagoski***, 2001 WI App 112, ¶9, 244 Wis. 2d 49, 59, 629 N.W.2d 50, 54.

¶16 Further, the circuit court found that Hodges's experience was superior to Van Dinter's. Hodges is a pediatrician whose job it is to conduct foster care exams, physical abuse exams, and sexual assault exams, and she testified that she has performed at least a hundred sexual assault exams. Van Dinter, a semi-retired nurse practitioner and professor emeritus, has performed eighteen exams in twenty-eight years, completing her last exam eight or nine years ago.

¶17 Consequently, we are not persuaded that calling Van Dinter as an expert at trial would have changed the verdicts. She agreed generally with Hodges and her differing opinion was based on a faulty premise of different assaults than the victim alleged. In any event, Hodges's actual experience with child sexual assault examinations far exceeds Van Dinter's. Thus, calling Van Dinter was not reasonably probable to result in different verdicts, so trial counsel's failure to call her as a witness was not prejudicial, and the postconviction motion was properly denied.

By the Court.—Judgment and order affirmed.

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