COURT OF APPEALS
DECISION
DATED AND FILED

May 24, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP2471 **Cir. Ct. No. 2012CF1**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL H. GILBREATH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Adams County: PAUL S. CURRAN, Judge. *Affirmed.*

Before Blanchard, Kloppenburg, and Fitzpatrick, JJ.

¶1 PER CURIAM. A jury found Michael Gilbreath guilty of first degree sexual assault of a child based on allegations that Gilbreath had repeated sexual contact with his step-granddaughter, S.L., beginning when she was nine and ending when she was twelve. Gilbreath makes four arguments on appeal: (1) he is entitled to a new trial in the interest of justice because the real controversy was not fully tried; (2) his trial counsel was ineffective for failing to present additional evidence to undermine S.L.'s credibility; (3) the State's failure to disclose an alleged recorded statement of S.L. warrants a new trial; and (4) the circuit court erred in denying Gilbreath's post-conviction request for an in camera review of alleged mental health records of S.L. For reasons discussed below, we affirm.

BACKGROUND

¶2 The following pertinent facts are undisputed. The State's primary witness at a three-day jury trial was S.L., who was 20 years old by the time of trial. S.L. testified in part to the following. S.L. resided with Gilbreath throughout the time pertinent to the allegations, approximately 2003 to 2006. When S.L. and Gilbreath lived in the same house, he would regularly come home drunk in the early morning hours. S.L. and her aunt Haiden, who is Gilbreath's biological daughter and is close in age to S.L., shared a pull-out futon in a bedroom of Gilbreath's home. They arranged themselves so that S.L.'s head was even with Haiden's feet. Gilbreath would frequently enter the girls' room, lie on the futon between them, and sexually assault S.L. S.L. provided graphic details of three specific incidents.

¶3 S.L. first disclosed the assaults to authorities in 2008 when she was 14. This disclosure came shortly before Gilbreath was to be released from prison,

where he had been confined since 2006 on a drunk driving conviction. S.L. was interviewed by social worker Kelly Oleson.

¶4 The case was re-investigated beginning in June 2010, when S.L. made more detailed disclosures. Oleson again interviewed S.L., along with Investigator Bitsky of the sheriff's department.

¶5 Gilbreath's defense theory at trial was that S.L. fabricated the allegations in reaction to strict disciplinary rules that Gilbreath imposed to address her "behavioral problems." On cross examination, Gilbreath's trial counsel elicited testimony from S.L. that contradicted many details in her direct examination testimony. Testifying in his own defense, Gilbreath denied any sexual contact with S.L. The jury found Gilbreath guilty.

¶6 In a post-conviction motion, Gilbreath sought: (1) an order for a new trial in the interest of justice because the real controversy of S.L.'s credibility was not fully tried; (2) an order for a new trial due to ineffective assistance of counsel; (3) an order vacating his conviction based on the State's failure to turn over an alleged audio recording of S.L.'s 2010 interview with Bitsky and Oleson; and (4) an order producing, for in camera review, alleged mental health records of S.L.

¶7 At a ***Machner***[1] hearing, Gilbreath's trial counsel testified regarding his decisionmaking at trial. In addition, Gilbreath and various of his family members testified that they believed that S.L. had a character for untruthfulness, and that none of the family members had seen Gilbreath assault S.L. or had reason

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

to believe that the assaults occurred. Some of these witnesses had testified at trial, some had not.

¶8 The circuit court denied Gilbreath's request for post-conviction relief, based on a determination that all of the evidence which Gilbreath asserted the jury did not hear, and which Gilbreath argued prevented the real controversy of S.L.'s credibility from being fully tried, was cumulative to evidence that the jury did hear. The court also determined that trial counsel was not deficient in failing to more thoroughly impeach S.L.'s credibility, given trial counsel's reasonable strategic decision to end his impeachment efforts after trial counsel, in the words of the circuit court, caused S.L. to "kind of self-destruct" as a witness. The court concluded that trial counsel performed deficiently in failing to follow up on a note in Oleson's 2010 report indicating that the interview was audio recorded, but concluded that Gilbreath was not prejudiced by the deficiency. The court denied Gilbreath's motion for a new trial based on the alleged discovery violation of the State failing to turn over the audio recording to which Oleson's report referred. The court concluded that Gilbreath failed to satisfy pleading standards entitling him to production or in camera review of alleged mental health records, because the request lacked specificity and amounted to a "fishing expedition."

DISCUSSION

New Trial Based On Real Controversy Not Fully Tried

¶9 Gilbreath argues that the real controversy, which was a "credibility battle" between S.L. and Gilbreath, was not fully tried. Following our supreme court's recent direction regarding purported new impeachment material that is of the same general nature as impeachment material used at trial and therefore

cumulative, we reject this argument. *See* ***State v. McAlister***, 2018 WI 34, ¶39, 380 Wis. 2d 684, __ N.W.2d __.

¶10 We may reverse a conviction in the interests of justice where the real controversy was not fully tried, or where a miscarriage of justice has occurred. *See* WIS. STAT. § 752.35 (2015-16).[2] "Although the second prong of our power of discretionary reversal under section 752.35 ('that justice has for any reason miscarried') requires 'a finding of substantial probability of a different result on retrial,' the first prong ('that the real controversy has not been fully tried') does not."[3] ***State v. Thomas***, 161 Wis. 2d 616, 625, 468 N.W.2d 729 (Ct. App. 1991) (quoted sources omitted).

¶11 Our discretionary reversal power under WIS. STAT. § 752.35 "should be exercised sparingly and with great caution." ***State v. Williams***, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719. We exercise it "'only in exceptional cases.'" ***State v. Armstrong***, 2005 WI 119, ¶114, 283 Wis. 2d 639, 700 N.W.2d 98 (quoted source omitted).

¶12 With respect to evidentiary matters, the real controversy has not been fully tried "(1) when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case; and (2) when the jury had before it evidence not properly admitted which so clouded a crucial

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[3] As Gilbreath notes, the circuit court misstated the not-fully-tried prong, suggesting that Gilbreath was obligated to show a substantial probability of a different result. However, as we explain in the text, we conclude that under the correct standard there was no basis for the court to grant a new trial, because the real controversy was fully tried.

issue that it may be fairly said that the real controversy was not fully tried." ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996) (citation omitted).

¶13 With that background on general legal standards, we turn to Gilbreath's request that we exercise our authority to grant a new trial under the not-fully-tried prong of WIS. STAT. § 752.35. More specifically, Gilbreath argues that the jury was not given the opportunity to hear the following categories of evidence, which were presented at the post-conviction hearing, all related to S.L.'s credibility: (1) testimony from S.L.'s uncle, Aaron, and cousin, Kayla, contradicting S.L.'s testimony that she disclosed the assaults to them; (2) evidence contradicting S.L.'s denial that she had behavioral problems and establishing Gilbreath's interference with her dating, including statements S.L. made to social workers following her disclosures; (3) inconsistencies and omissions in S.L.'s 2008 statement, specifically that Gilbreath touched her over her clothing as opposed to under her clothing and that she made no mention of three specific assaults that she testified to at trial; (4) testimony of family members bearing on S.L.'s credibility, including testimony by Aaron and S.L.'s brother, Giovanni, who during part of this time slept in S.L.'s room, and by Kayla and Haiden; (5) testimony from S.L.'s family members regarding S.L.'s alleged motive to lie in 2008 and factual support for Gilbreath's position that S.L.'s behavioral problems led to the 2010 disclosure; and (6) evidence undermining S.L.'s testimony denying that she sent letters to Gilbreath when he was in prison from 2006-2008, such as photographs and testimony from family members corroborating events described in the letters.

¶14 We conclude that the evidence that Gilbreath argues the jury should have heard and did not hear is merely additional impeachment material of the

same general character as the substantial impeachment of S.L. that occurred at the trial and, therefore, he is not entitled to a new trial.

¶15 S.L. was thoroughly and seemingly effectively impeached at trial across a broad range of topics, which raised substantial questions about the consistency of her accounts about the assaults, her credibility on particular points, and her potential motivations for testifying falsely that Gilbreath sexually assaulted her. The circuit court stated that the post-conviction testimony only reinforced the court's impression from trial that defense counsel "cut [S.L.] to pieces" during cross examination, leaving the State with a weak case.

¶16 What is important to our analysis, however, is not the extent or degree of the impeachment that occurred at trial, but instead whether the impeachment material now offered by Gilbreath is of the same general character as that offered at trial. *See* ***McAlister***, 380 Wis. 2d 684, ¶39 (additional evidence of the same general character or fact that was subject to proof at trial is cumulative and not a ground for a new trial). The additional evidence that Gilbreath seeks to admit is merely cumulative to the impeachment at the trial. As the circuit court put it, the new evidence would be merely "old wine [in] new bottles." ***McAlister***, recently decided by our supreme court, dictates this conclusion.[4]

[4] In ***State v. McAlister***, 2018 WI 34, 380 Wis. 2d 684, __ N.W.2d __, the defendant filed a post-conviction motion for a new trial based on newly discovered impeachment evidence under WIS. STAT. § 974.06. Here, Gilbreath seeks a new trial based on a contention that the real controversy was not fully tried under WIS. STAT. § 974.02. However, we see no reason why the analysis by our supreme court of what counts as cumulative evidence for purposes of establishing the need for a new trial does not apply here. At least as far as Gilbreath presents his argument for a new trial, it is defeated by the definition of cumulative evidence in ***McAlister***. As we note in the text, the court in ***McAlister*** adopted a broad principle of federal law, which is that, as stated in ***United States v. Vitrano***, 746 F.2d 766, 770 (11th Cir. 1984), "[n]ewly discovered impeaching evidence is insufficient to warrant a new trial." *See* ***McAlister***, 380 Wis. 2d 684, ¶39 (citing (continued)

¶17 McAlister was convicted in part based on the testimony of two men that McAlister was their accomplice in robberies. ***Id.***, ¶1. McAlister alleged that he had newly discovered evidence in the form of affidavits averring that his alleged accomplices had lied at trial. ***Id.***, ¶2. The court held that the circuit court properly denied McAlister's motion for a new trial without holding an evidentiary hearing.

¶18 In affirming denial of McAlister's motion, the supreme court reasoned that the affidavits were cumulative "because they were additional evidence of the same general character as was subject to proof at trial, i.e., that [McAlister's purported accomplices] lied when they implicated McAlister in order to achieve favorable plea bargains for themselves." ***Id.***, ¶4. The court stated the following as a broad proposition: "Where the credibility of a prosecution witness was tested at trial, evidence that again attacks the credibility of that witness is cumulative." ***Id.***, ¶39 (citing ***United States v. Champion***, 813 F.2d 1154, 1171 (11th Cir. 1987)). A new trial is not appropriate when the new allegations are "of the same general character, and to the same point for which testimony was elicited at trial." ***Id.***, ¶¶46, 49.

¶19 When we compare the six new proposed impeachment areas summarized above with the impeachment areas to which S.L. was subjected at trial, we conclude that these are of the same general character. We need not set forth here a detailed comparison of the two sets of evidence, but several examples illustrate the point. At trial, counsel highlighted the fact that S.L. told police that

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United States v. Champion, 813 F.2d 1154, 1171 (11th Cir. 1987), which in turn cites ***Vitrano***). We are obligated to follow legal principles adopted by our supreme court.

Gilbreath touched her over her clothes in 2008 but later told police that he touched her both over and under her clothes, and that S.L. originally reported that the touching happened five or six times, but later reported that it happened several times a week for years. This trial evidence is of the same general character as evidence that Gilbreath would seek to introduce at a new trial regarding "inconsistencies" and omissions in S.L.'s 2008 statement, including those that Gilbreath characterizes as having been "insufficiently presented" and additional inconsistencies that trial counsel chose not to pursue.

¶20 Similarly, defense counsel at trial elicited alleged motives that he contended could have caused S.L. to falsely accuse Gilbreath, based on his alleged status as the disciplinarian of the household, including the fact that Gilbreath destroyed her temporary driver's license. There was also trial testimony that S.L. was a difficult teen in those years—lying, violating curfew, and skipping school. This trial evidence is of the same general character as evidence that Gilbreath would seek to introduce at a new trial "regarding S.L.'s motive[s] to lie … and factual support for claims of behavioral problems" surrounding her 2010 disclosure.

¶21 Gilbreath essentially invites us to adopt an approach that the majority squarely rejected in ***McAlister***, under which a new trial is merited if additional impeachment, although "of the same general character, and to the same point for which testimony was elicited at trial," might strengthen defense arguments at a new trial. *See* ***McAlister***, 380 Wis. 2d 684, ¶16.

Ineffective Assistance Of Counsel

¶22 Gilbreath argues that trial counsel was ineffective for his "failure to investigate and present substantial" impeachment evidence. To prove a claim of

ineffective assistance of counsel, a defendant must show that his or her lawyer performed deficiently and that this deficient performance was prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To show prejudice, "the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" ***State v. Carter***, 2010 WI 40, ¶37, 324 Wis. 2d 640, 782 N.W.2d 695 (quoted source omitted).

¶23 The matters that Gilbreath argues trial counsel should have investigated and used to impeach S.L. are the same matters we have discussed above. We have explained, however, that S.L.'s credibility was thoroughly impeached at trial and the new impeachment material would be merely cumulative. Therefore, there could be no prejudice to Gilbreath as a result of counsel's alleged deficient performance, because the result of a new trial would be the same.[5]

¶24 Gilbreath argues that trial counsel was deficient for failing to follow up on a notation in Oleson's 2010 report that Officer Bitsky had audio recorded the interview. Assuming without deciding that trial counsel's performance was deficient in this regard, we reject this argument because Gilbreath fails to develop

[5] We also conclude that trial counsel's performance was not deficient. Given the circuit court's observation that trial counsel caused S.L. to "kind of self-destruct," we further conclude that counsel's decision to stop impeachment when he did, and not to call additional witnesses to further impeach S.L. "on the same topic," was a reasonable trial strategy under the circumstances, because trial counsel could reasonably have determined that doing otherwise would have weakened Gilbreath's case. The decision by the post-conviction court has support in the record and is consistent with the presumption of constitutional adequacy that courts are to afford trial counsel's strategic decisions. *See* ***State v. Breitzman***, 2017 WI 100, ¶65, 378 Wis. 2d 431, 904 N.W.2d 93, cert. denied, No. 17-8010, 2018 WL 1278269 (U.S. Apr. 23, 2018) ("where a lower court determines that counsel had a reasonable trial strategy, the strategy "is virtually unassailable in an ineffective assistance of counsel analysis.").

an argument that this deficiency prejudiced him. *See* ***Strickland***, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.").

Alleged Failure To Disclose A Recorded Statement

¶25 We turn to Gilbreath's argument that the State failed to produce a recording of S.L.'s 2010 interview with Oleson and Bitsky. That argument fails because there is insufficient evidence that such a recording was created and in the possession of the State.

¶26 We review alleged discovery violations using a three-step process, each of which presents a question of law subject to independent review. ***State v. DeLao***, 2002 WI 49, ¶¶14-15, 252 Wis. 2d 289, 643 N.W.2d 480. We first review whether the State violated the discovery statute. ***Id.*** If so, we determine whether the State had good cause for the violation and, if the State did not, we determine whether the defendant was prejudiced. ***Id.***, ¶15. We resolve this issue in favor of the State based on the first step.

¶27 A district attorney must disclose to a defendant "materials and information" "within the possession, custody or control of the [S]tate," including "[a]ny relevant written or recorded statements of a witness" on the State's witness list. WIS. STAT. § 971.23(1) and (1)(e). Here, regarding the 2010 interview, the State produced to Gilbreath the two relevant pieces of evidence that it apparently possessed. First, it produced a report from Bitsky stating that on June 2, 2010, he and Oleson talked to S.L. at her school, where S.L. re-alleged that Gilbreath sexually assaulted her before he went to prison in 2006. Second, it produced a four-page written report by Oleson setting forth what S.L. said during that interview.

¶28 Gilbreath points to a sentence in Oleson's report stating that "Bitsky audio taped the interview" as proof that a recording of the interview was made and that the State violated discovery rules by not turning it over. The post-conviction court opined that any of the following scenarios are feasible under the evidence before the court: Oleson was mistaken that Bitsky recorded the interview; Bitsky attempted, unsuccessfully, to record the interview; or Bitsky recorded the interview, but the recording was subsequently lost or destroyed. Gilbreath fails to challenge the finding by the court that there was insufficient evidence that the State ever possessed a recording, and we see no reason to conclude that the findings are clearly erroneous. Gilbreath failed to introduce any evidence on this topic at the post-conviction hearing, such as testimony from Bitsky or Oleson explaining the note about recording in Oleson's report or establishing that such a recording was created, and similarly fails on appeal to point to any evidence that would support his position.

¶29 Gilbreath asserts that ***State v. Martinez***, 166 Wis. 2d 250, 479 N.W.2d 224 (Ct. App. 1991), compels a different result. We disagree. In ***Martinez***, police inadvertently lost or destroyed a surveillance tape of the defendant in a drug deal. 166 Wis. 2d at 251. Despite the fact that the State could not produce the tape, the circuit court ruled that police officers could testify to their recollections of what they heard as they monitored the deal from a surveillance vehicle. ***Id.***, 256. We reversed, holding that unless the State could show good cause for its failure to produce the tape, Martinez was entitled to a new trial ***Id.*** We emphasized that our holding was limited to cases involving the question of whether the State could make a showing of good cause in the face of a clear discovery violation. ***Id.***, 259 n.5. Unlike in ***Martinez***, Gilbreath presented

insufficient evidence that police or the prosecution were responsible for the loss or destruction of evidence.

¶30 For these reasons, we conclude that Gilbreath has failed to demonstrate that he is entitled to a new trial on the ground that the State allegedly failed to disclose the alleged recording of the interview.

Post-Conviction Request For Alleged Medical Records

¶31 In testifying at trial, S.L. made a passing reference that she had "ended up going to a psychiatry ward" during a period in which she was having trouble adjusting to foster placement, which occurred after she wrote a letter to her counselor summarizing S.L.'s account of the assaults. Based on this testimony, Gilbreath filed a motion for post-conviction discovery, asking for an in camera review of S.L.'s mental health records. The defense theory was that such records would prove whether S.L. was hospitalized, as she testified, and give Gilbreath another potential point on which to impeach her credibility if she had not been hospitalized. The circuit court denied Gilbreath's motion and Gilbreath argues on appeal that the court erred in doing so. We conclude that the circuit court properly denied Gilbreath's request for production of S.L.'s alleged mental health records.

¶32 To be entitled to an in camera review of a victim's mental health records, a defendant must prove that the records are material to the defense. ***State v. Shiffra***, 175 Wis. 2d 600, 608, 499 N.W.2d 719 (Ct. App. 1993), *abrogated in part on other grounds by* ***State v. Green***, 2002 WI 68, ¶32, 253 Wis. 2d 356, 646 N.W.2d 298. Specifically, the defendant must show "a reasonable likelihood that the records will be necessary to a determination of guilt or innocence." ***Green***, 253 Wis. 2d 356, ¶32. Defendants are required to make "a fact-specific evidentiary showing, describing as precisely as possible the information sought

from the records and how it is relevant to and supports his or her particular defense." ***Id.***, ¶33.

¶33 Whether Gilbreath made a showing sufficient to trigger an in camera review implicates his constitutional right to a fair trial and thus raises a question of law. *See* ***id.***, ¶20. We review questions of law de novo. ***Id.***

¶34 We conclude that the post-conviction court correctly determined that Gilbreath's pleading did not satisfy the required showing. Gilbreath suggests that, because he "narrowed" his initial broad ***Shiffra*** request to request only production of records showing whether S.L. spent time in a psychiatry ward, the analysis changes in favor of disclosure. We see no basis for such an argument.

¶35 Moreover, even if Gilbreath could establish that S.L. had not been hospitalized, proving that she lied on this topic would appear to stand for little in itself. Gilbreath fails to explain how it would have pushed the jury in either direction in determining his guilt or innocence. As we have noted, Gilbreath substantially impeached S.L. with inconsistencies and inaccurate testimony.[6]

CONCLUSION

¶36 For these reasons, we affirm the judgment of conviction and the order denying post-conviction relief.

[6] We reject as an undeveloped legal argument Gilbreath's assertion that S.L.'s mention that she went to a psychiatry ward acted as a waiver of her privilege of confidentiality in her records under WIS. STAT. § 905.11. The purported argument consists of a single sentence, followed by a quote from § 905.11, but reflects no legal reasoning and further Gilbreath fails to tell us where in the record he preserved this as an issue by presenting it to the circuit court. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (stating that we may decline to review arguments "supported by only general statements" but not "reflecting any legal reasoning").

By the Court.—Judgment and order affirmed.

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