COURT OF APPEALS
DECISION
DATED AND FILED

September 16, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2144-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WALTER LEE THOMAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Walter Lee Thomas appeals from a judgment entered following his conviction for two counts of second-degree sexual assault, contrary to § 948.02(2), STATS., and from an order denying his request for a new trial. On appeal, Thomas argues that: (1) he was denied due process when the trial court ruled he could not use evidence of a prior sexual assault to argue the victim

fabricated the assault; and (2) he was deprived of effective assistance of counsel because his trial counsel: (a) failed to make a pre-trial offer of proof permitting the admission of a prior sexual assault complaint on an alternative evidentiary theory; (b) failed to object to the testimony of the victim's cousin; (c) failed to sufficiently question the victim; and (d) failed to object when the State called a witness not designated on its witness list. We affirm.

I. BACKGROUND.

Thomas was convicted of two counts of second-degree sexual assault of a child on November 17, 1995. The victim, K.O., testified in court that Thomas sexually assaulted her on two separate occasions during the month of February 1995. K.O. suffers from Down's syndrome and, although she was fourteen years old at the time of the trial, has the mental capacity of a five-year-old child. At the time of the assaults, Thomas was living with his girlfriend, Eunice O., K.O. (Eunice's daughter), and Eunice's son. In late March, K.O. told her two aunts, Kim O. and Cadrina O., about the assaults. The two aunts called the police, and Thomas was arrested after an officer interviewed K.O. about the matter. After he was arrested and waived his ***Miranda*** rights, Thomas admitted to police that he had sexual contact with K.O. on two separate occasions. At trial, Eunice testified that K.O. began to behave differently in February 1995. She also testified that K.O. had been sexually assaulted by another man in 1990, and that K.O. related that incident to her sister the same day.

Thomas's trial counsel filed a motion on August 20, 1995, to introduce the 1990 assault into evidence as an exception to the Rape Shield Law,

§ 972.11(2), STATS.,[1] pursuant to ***State v. Pulizzano***, 155 Wis.2d 633, 456 N.W.2d 325 (1990).[2] The motion stated that he intended to use the evidence to show that the victim had a potential alternative source of sexual knowledge. This motion was never decided, however, because Thomas and the State entered into a stipulation concerning the prior assault. According to the stipulation, a number of items would be marked as exhibits and received into evidence, including: (1) the medical records from Sinai Samaritan Medical Center pertaining to K.O.'s 1990 sexual assault; (2) the date and time of the report of that assault; (3) a police detective's notes of his interview with Eunice concerning the 1990 assault; (4) the statement taken from the 1990 assailant, in which the assailant related the details of the sexual assault; and (5) the detective's interview with the victim, K.O.

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[1] Section 972.11(2)(b), STATS., provides, in relevant part:

> **(b)** If the defendant is accused of a crime under s. 940.225, 948.02, 948.025, 948.05, 948.06, or 948.095, any evidence concerning the complaining witness's prior sexual conduct or opinions of the witness's prior sexual conduct and reputation as to prior sexual conduct shall not be admitted into evidence during the course of the hearing or trial, nor shall any reference to such conduct be made in the presence of the jury, except the following, subject to s. 971.31(11): 1. Evidence of the complaining witness's past conduct with the defendant. 2. Evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered. 3. Evidence of prior untruthful allegations of sexual assault made by the complaining witness.

[2] In order to present otherwise excluded evidence of a child complainant's prior sexual conduct for the limited purpose of proving an alternative source for sexual knowledge, prior to trial "[T]he defendant must make an offer of proof showing: (1) that the prior acts clearly occurred; (2) that the acts closely resembled those of the present case; (3) that the prior act is clearly relevant to a material issue; (4) that the evidence is necessary to the defendant's case; and (5) that the probative value of the evidence outweighs its prejudicial effect." ***State v. Pulizzano***, 155 Wis.2d 633, 656, 456 N.W.2d 325, 335 (1990).

During the trial, the State objected to defense counsel's apparent attempt to use the prior sexual assault evidence for a purpose other than establishing an alternative source of the victim's sexual knowledge. Thomas apparently proceeded under a theory that the difference in reporting times between K.O.'s prior and recent sexual assaults suggested she fabricated the more recent assault. The trial court, after reviewing the pretrial motion and the record, granted the State's objection, concluding that Thomas inappropriately attempted to use the evidence to support a theory of fabrication. Therefore, the trial court held that the earlier sexual assault was admissible solely to show an alternative source of the victim's sexual knowledge.

Thomas was found guilty of both counts of sexual assault, contrary to § 948.02(2), STATS. Thomas filed a motion for a new trial, which the trial court denied. The trial court also denied Thomas's request for a ***Machner*** hearing,[3] stating the following reasons: (1) there was no factual issue in dispute upon which to predicate a hearing; (2) no testimony by counsel was necessary to explain the alleged deficient conduct; and (3) any deficiency on the part of trial counsel did not operate to prejudice Thomas because there was no reasonable probability that the outcome of the case would have been altered by the admission of the omitted evidence. Thomas now appeals.

II. ANALYSIS.

A. Due Process Claims

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

At trial, the State objected to Thomas's counsel's apparent attempt to use evidence of K.O.'s prior sexual assault to show K.O. fabricated the more recent assault. Thomas's counsel argued that the State had waived their right to make that objection by entering into the stipulation concerning the 1990 sexual assault evidence. The trial court found that the State had preserved its right to object, and granted the State's objection, concluding that counsel could only use the prior assault evidence to show an alternative source of sexual knowledge. Thomas now argues: (1) the trial court erred when it found the state had not waived its right to object; and (2) even if the State preserved its right to object, the trial court erred when it granted the State's objection. We disagree.

1. Alleged waiver by the State of the right to object.

Thomas first argues that the State waived its right to object to his use of the prior sexual assault evidence to argue a theory of recent fabrication by the victim. Thomas claims the State waived their right to object because the State entered into the stipulation and failed to object when Thomas first started to question witnesses about the difference in recording times.

In Thomas's brief filed with the trial court in support of his motion to introduce the prior sexual assault into evidence, counsel stated only one reason for its introduction, to show that the victim had an alternative source of sexual knowledge. He makes no reference in his brief to another reason for its admission. That motion was never decided by the trial court because Thomas and the State stipulated that the assault evidence could be admitted into the record. The stipulation fails to mention for what purpose the evidence of the prior assault could be used. Thus, Thomas argues that he was free to use the prior assault for any purpose.

Construction of a stipulation is a question of law; thus, this court will review it *de novo*. *See* ***Duhame v. Duhame***, 154 Wis.2d 258, 262, 453 N.W2d 149, 150 (Ct. App. 1989). A stipulation should not be construed technically so as to effect the waiver of a right not plainly intended to be relinquished. *See* ***Milwaukee & Suburban Transport Corp. v. Milwaukee County***, 82 Wis.2d 420, 442, 263 N.W.2d 503, 516 (1978) (citation omitted). A court may consider extrinsic evidence to ascertain the parties' intent where the language of stipulation is ambiguous; that is, it is reasonably susceptible to more than one meaning. *See* ***Duhame***, 154 Wis.2d at 266, 453 N.W.2d at 152.

Here, since there was no express language in the stipulation in regard to the use of the evidence, we look to the motion and the State's response. Neither one discusses any other purpose but that of proving alternative sexual knowledge. There is nothing in the record that indicates that the State intended to waive its right to object to the use of the evidence for any purpose except to show alternative sexual knowledge, as trial counsel had repeatedly asserted. The only place where there was a "meeting of the minds" in regards to the stipulation was in the motion and the State's reply that, absent further agreement, trial counsel could not use the evidence of the 1990 sexual assault for anything but proving alternative sexual knowledge. For the aforementioned reasons, the trial court correctly found that the State did not waive its right to object.

2. Trial court's grant of the State's objection.

Thomas also argues that, even if the State did not waive its right to object to his counsel's use of the 1990 assault evidence for a reason other than showing an alternative source of sexual knowledge, the trial court erred in

granting the State's objection and excluding the use of the evidence to suggest the victim fabricated the assault.

A defendant has the right to a fair opportunity to defend against the State's accusations. ***State v. Johnson***, 118 Wis.2d 472, 479, 348 N.W.2d 196, 200 (Ct. App. 1984). A corollary to that right is the right to present relevant and competent evidence to the court. ***Id.*** However, although these rights are important, they are not absolute. ***Id.*** These general rights may bow to other legitimate state interests, if those interests are substantial enough to overcome the claim of the accused. ***Id.*** The Rape Shield Law, enunciated in § 972.11(2), STATS., protects a legitimate state interest by recognizing that, with a few exceptions, evidence of a complainant's prior sexual conduct is seldom relevant and that, even if relevant, is likely to be outweighed by its prejudicial effect. *See* ***Pulizzano***, 155 Wis.2d at 647, 456 N.W.2d at 331.

Thomas argues that the court should have overruled the State's objection and, under ***Pulizzano***, allowed trial counsel to continue using the evidence in support of his theory of fabrication. Thomas also argues that the trial court failed to consider the fact that the State opened the door by eliciting testimony from its witnesses concerning delayed reporting times. We decline to review whether the trial court erred, because even if the trial court's exclusion of the prior sexual assault evidence for any purpose other than proving alternative sexual knowledge was error, the error was harmless pursuant to the balancing test enunciated in ***State v. Dyess***, 124 Wis.2d 525, 370 N.W.2d 222 (1985). According to ***Dyess***:

> [T]he test should be whether there is a reasonable possibility that the error contributed to the conviction. If it did, reversal and a new trial must result. The burden of proving no prejudice is on the beneficiary of the error, here the state. The state's burden, then, is to establish that there

> is no reasonable possibility that the error contributed to the conviction.

Id. at 543, 370 N.W.2d at 231-32.

We conclude that the State has met its burden. There is no reasonable possibility that the trial court's decision concerning the stipulation contributed to the conviction. Even if trial counsel had been able to argue that the difference in reporting times supported a theory of fabrication, Thomas's defense would have been only slightly bolstered. Trial counsel, while questioning the victim's mother and a social worker, suggested that a difference in reporting times showed K.O. was fabricating the recent assaults. Counsel also made this suggestion in his closing argument to the jury. As a result of the questioning and the closing argument, counsel drew the jury's attention to the disparity in reporting times, although not as directly as counsel might have wished.

Also, there was other overwhelming evidence to establish that there was no reasonable possibility that the trial court's decision concerning the stipulation contributed to the conviction. For example: (1) both K.O.'s teacher and mother testified that they observed a change in K.O.'s behavior during late February and March, which was a change consistent with children of the same behavioral level who have been sexually assaulted; (2) Thomas lived in the household and had the opportunity to commit the crime; and, (3) most importantly, Thomas confessed to both sexual assaults in a properly admitted statement and in a way which substantially corroborated K.O.'s story.

Therefore, we conclude that, even assuming the trial court erred by excluding the use of the evidence contained in the stipulation to prove that,

because of the difference in reporting times, K.O. fabricated Thomas's assaults, any error it made was harmless.

B. Ineffective Assistance of Counsel Claims

Thomas claims that defense counsel was ineffective for four reasons: (1) counsel failed to make a pre-trial offer of proof (permitting the admission of an earlier sexual assault) on an alternative evidentiary theory; (2) counsel failed to object to Cadrina O.'s testimony as to what the victim told her about the assaults; (3) counsel failed to lay a proper foundation for admitting the victim's statement to Lucy Jones, Thomas's mother; and (4) counsel failed to object to one of K.O.'s teachers taking the stand when she was not on the State's witness list. We reject Thomas's claims.

1. Standard of review.

The two-pronged test that must be met in order to prove an ineffective assistance of counsel claim is set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). The defendant must show that: (1) counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense. ***Id.*** at 687. *See also* ***State v. Pitsch***, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). In our review of the trial court's decision, we accept its findings of fact unless they are clearly erroneous. ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). However, "whether counsel's performance was deficient and whether counsel's deficient performance prejudiced the defense are questions of law which this court decides without deference to the … court below." ***Id.*** at 236-37, 548 N.W.2d at 76 (citation omitted).

In order for defendants to prove the deficiency prong of the ***Strickland*** test, they must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. This court, pursuant to ***Strickland***, recognizes that "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." ***Id***. at 690; ***Pitsch***, 124 Wis.2d at 637, 369 N.W.2d at 716. In order to prove the prejudice prong of the ***Strickland*** test, "[t]he 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694; ***Pitsch***, 124 Wis.2d at 642, 369 N.W.2d at 719. A defendant must show that trial counsel's errors "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Strickland***, 466 U.S. at 687. If a defendant fails to show one prong, this court need not address the other prong. *See* ***Sanchez***, 201 Wis.2d at 236, 548 N.W.2d at 76.

2. Counsel's failure to bring a pre-trial motion.

At trial, Thomas's counsel sought to use the prior sexual assault evidence to argue that, since K.O. promptly reported the 1990 sexual assault but delayed reporting in Thomas's case, there was a reasonable inference that she fabricated the incidents with Thomas. Thomas's trial counsel, however, failed to make pre-trial offer of proof on this alternative evidentiary theory. The State concedes that Thomas's counsel performed deficiently in this instance. Even if counsel's action was deficient, Thomas must prove the other prong of the ***Strickland*** test—that trial counsel's conduct prejudiced the outcome of the trial. We conclude he has failed to prove prejudice.

Under the ***Strickland*** test, Thomas carries the burden of proving prejudice. *See* ***Strickland***, 466 U.S. at 687. Thomas has failed to do so in this case. Even though trial counsel was dissatisfied with the result of the State's objection to his use of the stipulation, he managed to raise essentially the same issue in argument to the jury despite the limitations on use of the stipulation. He was just not permitted to make his argument as directly as he wished. Further, as stated previously, the cumulative weight of the evidence shows that the outcome of the trial was not prejudiced by trial counsel's performance.

3. Counsel's failure to object to Cadrina O.'s testimony.

Thomas next alleges that his trial counsel was deficient by failing to object on hearsay grounds to Cadrina O.'s testimony that K.O. told her that Thomas sexually assaulted her on two occasions. We decline to make a ruling on this matter because the second prong of the ***Strickland*** test has not been met by Thomas. Even if K.O.'s statement to Cadrina had been excluded as hearsay, there is no reasonable possibility that the outcome of the trial would have been any different. The jury might have regarded K.O.'s testimony as slightly weaker. However, there is no indication that any result of this apparent deficiency would have prejudiced the trial because of the strength of the State's case.

4. Counsel's failure to lay a foundation for admission of K.O.'s statement to Lucy Jones.

Thomas also asserts that trial counsel was ineffective because he failed to lay a foundation for the admission of K.O.'s statement to Lucy Jones that she hated Thomas because he "made her mind." Thomas argues that if trial counsel had asked K.O. whether she hated Thomas because he "made her mind," K.O. might have admitted hating Thomas for that reason or denied hating Thomas.

Thomas claims that if K.O. had admitted hating Thomas for "making her mind," the jury would have been provided with a motive for K.O. to fabricate the assaults; and, if K.O. had denied hating Thomas, trial counsel could have asked Jones about K.O.'s alleged prior inconsistent statement pursuant to § 908.01(4)(a)(1), STATS.[4]

Neither possible scenario is enough to overturn the prejudice prong of ***Strickland***. K.O.'s cousin had already testified that K.O. said she hated Thomas. K.O. responded by testifying that the reason she was angry with Thomas was that he had sexually assaulted her. In any event, the other overwhelming evidence that Thomas committed the assaults prevents conduct's counsel with respect to this issue from amounting to prejudice under ***Strickland***.

5. Counsel's failure to object to a witness whose name did not specifically appear on the State's witness list.

Finally, Thomas argues his counsel was ineffective for not objecting when the State put K.O.'s teacher, Susan Lieven, on the stand. If defense counsel had objected, the next step would have been to establish surprise and prejudice. *See* ***Kutchera v. State***, 69 Wis.2d 534, 543, 230 N.W.2d 750, 755 (1975). Defense counsel would have been unable to show either since Lieven's name was already on Thomas's own witness list. Further, since "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," this court concludes that Thomas cannot claim that this was a witness which counsel was unprepared to question.

[4] Section 908.01(4)(a)(1), STATS., states:

> **(4)** STATEMENTS WHICH ARE NOT HEARSAY. A statement is not hearsay if: (a) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is: 1. Inconsistent with the declarant's testimony ….

See ***Strickland***, 466 U.S. at 690. Therefore, counsel was not deficient for failing to object to K.O.'s teacher's testimony.

If a defendant fails to show one prong, this court need not address the other prong. *See* ***Sanchez***, 201 Wis.2d at 236, 548 N.W.2d at 76. Since Thomas failed to show that trial counsel's performance was deficient for failing to object to Lieven's testimony, we need not discuss the second prong of the ***Strickland*** test.

III CONCLUSION.

For the aforementioned reasons, this court affirms the decision of the trial court.

By the Court.—Judgment and order affirmed.

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