COURT OF APPEALS
DECISION
DATED AND FILED

May 20, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2711-CR **Cir. Ct. No. 2005CF80**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD J. MCGUIRE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed*.

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Donald J. McGuire appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. He was convicted of five counts of having taken "indecent liberties" with two children in 1967 and 1968. McGuire was a priest and a teacher

at the school the two children attended. McGuire argues that: (1) the thirty-six year delay in bringing these charges prejudiced his defense and violated his constitutional rights; (2) he received ineffective assistance of trial counsel; (3) the trial court erroneously admitted unduly prejudicial other acts evidence at trial; and (4) the trial court erroneously allowed unfairly prejudicial rebuttal evidence. McGuire argues as a result of these errors, the charges against him should be dismissed or he is entitled to a new trial in the interests of justice. We conclude that the delay was not unfairly prejudicial, he did not receive ineffective assistance of trial counsel, and the trial court did not erroneously exercise its discretion in its evidentiary rulings. We also conclude that McGuire is not entitled to a new trial in the interests of justice. Consequently, we affirm the judgment and order of the circuit court.

¶2 McGuire was a Jesuit priest who at the relevant times taught at Loyola Academy in Illinois. The school was not a boarding school. Victor B. and Sean C. were students at the school in the mid to late 1960's. Both Victor and Sean alleged that when they were fourteen or fifteen years old and while they were students at the school, they travelled separately and on different occasions, with McGuire to Fontana, Wisconsin, to stay at a cottage and had sexual contact with McGuire while there.[1] The cottage belonged to Victor's uncle.

¶3 Sean and Victor reported the abuse to the police many years later in 2003, and a criminal complaint was issued in 2005. A trial was held in February 2006, and the jury convicted McGuire on all five counts. The court sentenced him

[1] Victor testified that the incidents occurred at his uncle's cottage during the fall of 1967 and spring of 1968. Sean testified that the incidents involving him occurred at the cottage between Thanksgiving and Christmas of 1968.

to concurrent terms of seven years in prison on two counts, and twenty years of probation, to be served concurrently, on the remaining three counts. The court stayed the prison term pending the postconviction proceedings.

¶4 McGuire filed a motion for postconviction relief alleging that the delay in filing charges against him violated the statute of limitations and his constitutional rights. He also argued that he had newly discovered evidence, had received ineffective assistance of trial counsel, and he challenged the court's decision to admit certain other acts and rebuttal evidence. The court held a hearing and heard testimony from trial counsel, potential witnesses, and others. The court denied the motion, and McGuire appeals.

¶5 McGuire first argues that the more than thirty-six year delay in bringing the criminal charges against him prejudiced his defense, and he is entitled to have the charges dismissed. He argues that many witnesses who would have aided in his defense are dead, and the memories of those who did testify have faded. He argues that the out-of-state tolling provision in the applicable statute of limitations, WIS. STAT. § 939.74(1) (1966-69), is unconstitutional as applied to him, and that because the delay resulted in actual prejudice to him, the charges against him should be barred by due process. In the alternative, he argues that the delay justifies reversal in the interests of justice.

¶6 The applicable statute of limitations contains a provision that tolls "the time during which the actor was not publicly a resident within the state." WIS. STAT. § 939.74(3) (1965-72). The Wisconsin Supreme Court ruled that this statute of limitations covers offenses, such as these, that occurred during this time period. *See* ***State v. MacArthur***, 2008 WI 72, ¶17, 310 Wis. 2d 550, 750 N.W.2d 910. The Wisconsin Supreme Court has also concluded that the tolling provision

of the statute is constitutional, and it does not violate due process, equal protection, or the privileges and immunities clause. ***State v. Sher***, 149 Wis. 2d 1, 15, 437 N.W.2d 878 (1989).

¶7 McGuire argues that ***Sher*** does not control the outcome in this case because the court there concluded that the statute was facially valid, while he is arguing that the statute's tolling provision violates the privileges and immunities clause as well as his rights to due process and equal protection as applied to him. McGuire argues that ***Sher*** is distinguishable because Sher was denied his statute of limitations defense as a result of a two-year tolling of the statute of limitations. McGuire argues that, in contrast, the more than thirty-year tolling as applied in his case has denied him much of his right to present a defense. Further, he argues that, unlike ***Sher***, the application of the tolling provision to his case does not meet a legitimate state interest. We disagree.

¶8 The question of whether the statute violates the privileges and immunities clause was decided by the supreme court in ***Sher.*** The court applied a three-part test to reach this determination: whether the statute disadvantages non-residents, whether the discrimination violates a fundamental right, and if so, whether the means employed are substantially related to a legitimate state interest. ***Id.*** at 11-12. The court concluded that while the statute "disadvantages" a non-resident, it also concluded that there is no fundamental right to a statute of limitations defense. ***Id.*** at 12. Even though it concluded there was no fundamental right involved, the court also concluded that the statute was "substantially related to several legitimate state objectives: the identification of criminals, the detection of crime, and the apprehension of criminals." ***Id.*** at 14. The court stated that "sec. 939.74(3) does not violate the privileges and

immunities clause." ***Sher***, 149 Wis. 2d at 15. We see no reason why the ruling does not apply to McGuire's case as well.

¶9 The supreme court in ***Sher*** also concluded that there was a rational basis for the statute. ***Id.*** at 15-16. The court stated that since the statute was substantially related to several legitimate state interests, "it is also rationally related to those interests since the 'rationally related' test is a lesser standard than the 'substantially related' test." ***Id.*** at 16. The court concluded that the application of the statute to the facts of that case did not create an "absurd result." ***Id.*** at 17. We similarly conclude that the application of the statute to the facts of this case is rationally related to the state's interest in identifying, detecting, and apprehending criminals.

¶10 McGuire also argues that the statute violates his due process rights. McGuire acknowledges that the test for determining whether a delay in bringing a charge violates due process, even though the charges were brought within the statute of limitations, is whether the defendant has established actual prejudice resulting from such a delay, and whether the delay was for the purpose of giving the prosecutor a tactical advantage. ***State v. Wilson***, 149 Wis. 2d 878, 903-05, 440 N.W.2d 534 (1989). McGuire argues, however, that the supreme court erred in the ***Wilson*** decision when it ruled that the defendant had to prove that the purpose of the delay was to gain a tactical advantage.

¶11 We will not address whether the supreme court's decision in ***Wilson*** was incorrect. *See* ***State ex rel. Swan v. Elections Board***, 133 Wis. 2d 87, 93-94, 394 N.W.2d 732 (1986) (the court of appeals is primarily an error correcting court), and ***State v. Olsen***, 99 Wis. 2d 572, 583, 299 N.W.2d 632 (Ct. App. 1980) (the court of appeals is bound by the prior decisions of the supreme court). We

conclude that McGuire cannot establish that the delay in charging was to gain a tactical advantage because there is no dispute that the State did not learn about the crimes until 2003. We reject McGuire's argument that the statute violates due process. We conclude that the application of the statute to McGuire in this case is constitutionally permissible as decided by the supreme court in ***Sher***.

¶12 McGuire also argues that the lengthy delay in bringing these charges against him was so prejudicial that his conviction should be reversed in the interest of justice under WIS. STAT. § 752.35 (2007-08), because the delay resulted in the real controversy not being tried. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). McGuire argues that some of the witnesses he would like to have called at trial are dead, and that the memories of those who did testify have faded over time.

¶13 We are not convinced that McGuire was denied the fundamental right to present a defense. The three main witnesses to the events Sean, Victor, and McGuire, were all available to testify.[2] McGuire cross-examined the two victim-witnesses, was able to present other witnesses to support his defense, and was able to put forth his side of the story. Further, the passage of time also affected the State's ability to present its case. We decline to reverse the conviction on this basis.

¶14 McGuire next argues that he received ineffective assistance of trial counsel. He argues that his trial counsel, Attorney Gerald Boyle, did not investigate two potential witnesses: Elita Bender and Robert Goldberg, and that

[2] McGuire did not testify at his trial.

Boyle's failure to investigate these witnesses prejudiced his defense. To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground**.** ***Id.*** at 697. To demonstrate 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. ***Id.*** at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.***

¶15 We review the denial of an ineffective assistance claim as a mixed question of fact and law. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). We will not reverse the circuit court's factual findings unless they are clearly erroneous. ***Id.*** However, we review the two-pronged determination of trial counsel's performance independently as a question of law. ***Id.*** at 128. We will not "second-guess a trial attorney's 'considered selection of trial tactics or the exercise of professional judgment in the face of alternatives that have been weighed by trial counsel.' A strategic decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) (citations omitted).

¶16 McGuire first argues that his trial counsel was ineffective when he did not investigate Elita Bender as a possible witness. Bender's husband owned the cottage in Fontana where the offenses took place. McGuire argues that Boyle should have called Bender as a witness to counter the State's evidence that her husband had given McGuire a key to the cottage. They were not married, however, at the time of the incidents. McGuire asserts that Bender would have

testified that she only saw McGuire twice during the relevant time periods and only once at the Fontana cottage, that her husband only had two sets of keys to the cottage and was very possessive of the cottage, and that her husband did not ever suggest that McGuire was an important person to him. McGuire argues that his trial counsel's failure to investigate what Bender knew about the situation was wholly unreasonable.

¶17 At the postconviction hearing, Boyle testified that he did not believe the key was a real issue in the case. He stated that he chose to focus instead on Sean's prior statement that the assault against him took place in Eagle River and not in Fontana. Boyle stated that he did not want to "run the risk" of having Bender testify because she had married Victor's uncle three or four years after the events of the trial, and there was another witness who would have testified that McGuire had been given a key to the cottage. Bender also testified at the postconviction hearing.

¶18 The circuit court found that Boyle did not overlook Bender as a witness, but rather made a reasoned decision not to explore her testimony both because her testimony could have been impeached and it would not have helped the defense. We conclude that the decision not to call Bender was reasonable trial strategy. Because we believe that this was a reasonable trial strategy, and nothing in Bender's postconviction testimony convinces us otherwise, we also conclude that McGuire has not established that he was prejudiced by Boyle's failure to investigate Bender as a potential witness.

¶19 McGuire also argues that his trial counsel was ineffective for failing to investigate and call at trial, Robert Goldberg, or Goldberg's sister.[3] McGuire argues that Goldberg's testimony would have contradicted the two victims' testimony that they did not know each other before 2003. Goldberg and his sister both testified at the postconviction hearing. Goldberg testified that in 1972, he had seen Sean and Victor at the home of another man, who also claimed to have been sexually assaulted by McGuire. His sister also testified that she had seen the two together. McGuire asserts that this testimony would have shown that Victor and Sean knew each other in the early 1970s.

¶20 Boyle testified that he did not investigate Goldberg because he believed it would be dangerous given the potential his testimony had to corroborate Sean's story. Boyle also stated that it had the possibility of leading to the admission of other act's evidence. He stated that he believed it would have seriously harmed McGuire's defense at trial. We again conclude that the Boyle's decision not to investigate or call Robert Goldberg or his sister was a reasonable trial strategy. Further, Boyle's failure to investigate these witnesses does not undermine our confidence in the outcome of the trial. We reject McGuire's claim that he received ineffective assistance of trial counsel.

¶21 McGuire next argues that the circuit court erred when it allowed unfairly prejudicial other acts evidence and rebuttal evidence. Prior to trial, the circuit court excluded the State's evidence that McGuire sexually assaulted two

[3] McGuire initially argued that Goldberg's testimony was newly discovered evidence. Boyle's testimony at the postconviction hearing, however, established that Boyle knew about Goldberg prior to trial. This testimony established that Goldberg's testimony was not newly discovered evidence. Consequently, McGuire argued instead that Boyle was ineffective for failing to investigate and call Goldberg at trial.

other boys. The court, however, allowed the State to introduce evidence that McGuire had sexually assaulted Victor and Sean in Illinois, both before and after the incidents in Fontana. The court allowed the evidence to show McGuire's motive and intent, the absence of mistake, and to put the nature of McGuire's relationship with the two boys in context.

¶22 "A trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has 'a reasonable basis' and was made 'in accordance with accepted legal standards and in accordance with the facts of record.'" ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992) (citations omitted). Nearly all evidence is, to some extent, prejudicial to the party against whom it is offered. ***State v. Alexander***, 214 Wis. 2d 628, 642, 571 N.W.2d 662 (1997). Unfair prejudice results when "the proffered evidence, if introduced, would have a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case." ***State v. Mordica***, 168 Wis. 2d 593, 605, 484 N.W.2d 352 (Ct. App. 1992) (citations omitted).

¶23 The admission of other acts evidence requires a three-step analysis. ***State v. Sullivan***, 216 Wis. 2d 768, 771-72, 576 N.W.2d 30 (1998). The court must consider:

> (1) Is the other acts evidence offered for an acceptable purpose under WIS. STAT. § (Rule) 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?

> (2) Is the other acts relevant, considering the two facets of relevance set forth in WIS. STAT. § (Rule) 904.01? The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.
>
> (3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence? *See* WIS. STAT. § (Rule) 904.03.

Id. at 772-73 (footnote omitted).

¶24 The circuit court in this case conducted the ***Sullivan*** three-step analysis, and concluded that the evidence was offered for a proper purpose, was relevant, and that the probative value was not outweighed by the danger of unfair prejudice. McGuire challenges only the circuit court's determination of the third step of the analysis, arguing that the probative value was minimal and the prejudicial effect high. He argues again that the delay in prosecution increases the prejudicial effect of this evidence. We disagree. We conclude that the evidence established motive, that the touching was not a mistake, and showed the existence of a relationship between McGuire and each of the two boys prior to their visits to the cottage. We further conclude that its prejudicial effect did not outweigh its probative value, and that the circuit court did not erroneously exercise its discretion when it admitted this evidence.

¶25 McGuire also argues that the circuit court erroneously exercised its discretion when it allowed in certain rebuttal evidence because it was cumulative. The determination of whether rebuttal evidence should be admitted is within the

trial court's discretion. ***Rausch v. Buisse***, 33 Wis. 2d 154, 167, 146 N.W.2d 801 (1966). The victims testified at trial that McGuire's bed was next to a wall. The defense then offered evidence the testimony of Dr. Robert Ryan, McGuire's doctor who had visited his room multiple occasions. Dr. Ryan testified that McGuire's bed was not up against the wall, and that the furniture was always in the same place. In rebuttal, the State offered the testimony of two other men who had attended Loyola Academy at about the same time as the victims. These were the same men who had claimed to have been abused by McGuire, and the court had excluded their testimony about the alleged assaults in its pre-trial ruling on other acts evidence. Defense counsel objected to the rebuttal testimony, asserting that it was just an attempt to get in the evidence the court had already excluded. The court limited the two witnesses' testimony to the issue of the location of the bed. McGuire argues that this rebuttal testimony was improper because it was cumulative and unnecessarily prejudicial.[4]

¶26 McGuire also challenges the rebuttal evidence of Dr. Douglas Dewire. Both victims had testified that McGuire was circumcised. The defense then had Dr. Ryan testify that McGuire was not circumcised, and offered a photograph as further proof. Dr. Ryan further opined that an uncircumcised penis is "unsightly" and that "[y]ou would know whether a person was circumcised or not." In rebuttal, the State had Dr. Dewire, a urologist, testify to rebut the statement that it was easy to tell whether a person had been circumcised.

[4] Although we address the issue, we note that while trial counsel objected to these witnesses testifying, he also stated that the testimony about the bed "was the only proper rebuttal."

¶27 Dr. Dewire testified that an uncircumcised penis with a retracted foreskin has the same appearance as a circumcised penis. He further testified that he could not tell from Dr. Ryan's photograph whether McGuire was circumcised. McGuire argues that this testimony was patently irrelevant and highly prejudicial, and it should not have been admitted.

¶28 We conclude that the rebuttal evidence was neither cumulative nor irrelevant. The State offered the evidence about the position of the bed to rebut the evidence offered by Dr. Ryan. Further, the testimony of Dr. Dewire was not irrelevant, but rebutted Dr. Ryan's testimony that anyone would know whether a man was circumcised. We conclude that the trial court properly exercised its discretion when it allowed this evidence.

¶29 We conclude that the circuit court properly denied McGuire's motion for postconviction relief. Consequently, and for the reasons stated, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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