COURT OF APPEALS
DECISION
DATED AND FILED

August 11, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2008AP2871-CR **Cir. Ct. No. 2007CF319**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GLENN A. RICKARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: WILBUR W. WARREN, III, Judge. *Affirmed.*

Before Brown, C.J., Neuabuer, P.J., and Anderson, J.

¶1 PER CURIAM. Glenn A. Rickard appeals from a judgment of conviction for first-degree sexual assault of a child under the age of thirteen and the order denying his postconviction motion. He argues on appeal that he received ineffective assistance of trial counsel because his counsel did not object to the

testimony of the nurse who examined the child victim and because counsel did not object to certain statements made by the prosecutor during closing; he had a constitutional right to a colloquy with the court about his decision to waive his right not to testify; and there was insufficient evidence to support his conviction. We conclude that he did not receive ineffective assistance of trial counsel, that his decision to waive his right not to testify was knowing and voluntary, and that there was sufficient evidence to support his conviction. We affirm the judgment and order.

¶2 Rickard was convicted after a jury trial. At trial, Rickard testified on his own behalf. The circuit court did not conduct a colloquy with him to determine whether he knowingly and voluntarily waived his right not to testify. In his postconviction motion, Rickard argued that he had received ineffective assistance of trial counsel and that the circuit court should have had a colloquy with him before he testified. The circuit court held a ***Machner***[1] hearing. At the postconviction hearing, defense counsel testified but Rickard did not. After hearing the evidence, the circuit court concluded that trial counsel was not ineffective, and Rickard knowingly and voluntarily waived his right not to testify.[2] Rickard appeals.

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

[2] Contrary to appellate counsel's certification, the appendix does not include the trial court's findings and conclusions. The transcript of the court's oral decision should have been included. WISCONSIN STAT. RULE 809.83(2) provides that failure to follow the rules of appellate procedure is grounds to impose a penalty on counsel or to take any other action the court considers appropriate. Therefore, the court imposes a $150 sanction against counsel for filing a false certification. *See* ***State v. Bons***, 2007 WI App 124, ¶¶20-25, 301 Wis. 2d 227, 731 N.W.2d 367. Counsel shall pay the fine within fourteen days of the date of this opinion.

¶3 We address first whether Rickard received ineffective assistance of trial counsel. 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. 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 a professional judgment in the face of alternatives that have been weighed by trial counsel.' A strategic trial 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) (citation omitted).

¶4 Rickard claims that his counsel was ineffective because he did not object to a statement made by the nurse who examined the victim after the assault. The nurse testified that she had seen redness in the child's vaginal area and that this redness "was consistent with what she was telling us was happening, that somebody was fondling and touching her down there." Rickard argues that trial counsel should have objected to this statement because the nurse, in essence was vouching for the truthfulness of the victim's testimony. He argues that such testimony is impermissible under ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984) and ***State v. Jensen***, 147 Wis. 2d 240, 256-57, 432 N.W.2d 913 (1988).

¶5 Under ***Haseltine*** and ***Jensen***, an expert witness may not give an opinion "that another mentally and physically competent witness is telling the truth." ***Haseltine***, 120 Wis. 2d at 96. While expert testimony should assist the jury, it is for the jury to determine the credibility of a witness without the help of an expert. ***Id.*** A court, however, may allow an expert witness to give an opinion "about the consistency of a complainant's behavior with the behavior of victims of the same type of crime only if the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue." ***Jensen***, 147 Wis. 2d at 256. The witness "must not be allowed to convey to the jury his or her own beliefs as to the veracity of the complainant with respect to the assault." ***Id.***

¶6 At the ***Machner*** hearing, trial counsel testified that he did not object when the nurse said the symptoms were consistent because he did not believe that the testimony was objectionable. We agree. The nurse's testimony at trial provided the jury with relevant information about the possible causes of the victim's symptoms. She did not testify about the veracity of the victim's statements, but stated only that the victim's symptoms were consistent with someone who had been assaulted. Further, on cross-examination, the nurse admitted that there were other possible causes for the victim's symptoms. When the prosecutor went too far and asked the nurse whether she believed that the victim had been sexually assaulted, defense counsel objected. We are not convinced that counsel's failure to object sooner constituted deficient performance.

¶7 Rickard also argues that his counsel should have objected to certain comments the prosecutor made during closing argument because those statements violated his constitutional right to a fair trial. The prosecutor said:

> And Mr. Rickard has the constitutional right to a trial, absolutely 100 percent, but he does not have a constitutional right to be found not guilty. He does not. He does not have a constitutional right to touch a four-year-old, to leave his DNA behind, to make her a victim. He doesn't have that right and don't give him that right to do it to anybody else.

Rickard's counsel objected at this point and the circuit court sustained the objection. Rickard argues that his counsel should have objected when the State said that he did not have a constitutional right to be found not guilty.

¶8 The second statement that Rickard asserts was objectionable was: "I can't make an attempt to get into a child sexual offender's mind. I can't do that because a normal person doesn't think like they think." Rickard claims that this was impermissible argument that suggested the jury arrive at a verdict by considering evidence other than that presented at trial, and the purpose of this statement was to inflame the jury. He further suggests that was comparable to calling someone a "Nazi."

¶9 Closing argument is the lawyer's opportunity to tell the jury how the lawyer views the evidence. ***State v. Adams***, 221 Wis. 2d 1, 19, 584 N.W.2d 695 (1998). "A prosecutor may comment on the evidence, detail the evidence, argue from it to a conclusion, and state that the evidence convinces him or her and should convince the jurors." ***Id.*** Prosecutors are permitted to strike hard blows, but not foul ones. *See* ***State v. Neuser***, 191 Wis. 2d 131, 139, 528 N.W.2d 49 (Ct. App. 1995). Further, it is "a violation of the lawyer's code of ethics for a lawyer to tell a jury what he or she believes is the truth of the case, unless it is clear that the lawyer's belief is merely a comment on the evidence before the jury." ***State v. Jackson***, 2007 WI App 145, ¶22, 302 Wis. 2d 766, 735 N.W.2d 178.

¶10 At the ***Machner*** hearing, Rickard's counsel testified that he "paused" when the prosecutor said that Rickard did not have a constitutional right to be found not guilty, but that the prosecutor's next statement elaborated on the thought. Counsel did object when he believed the prosecutor crossed the line by telling the jury to stop Rickard from offending again. As to the second statement Rickard finds objectionable, trial counsel testified that he did not object when the prosecutor talked about getting inside a sex offender's brain for strategic reasons because he did not want to call "extra attention" to those words. Counsel also said that he did not think the words were objectionable.

¶11 We are not convinced that Rickard's trial counsel performed deficiently by failing to object to either of these statements. The first statement should be considered in context. The State was saying, in essence, that the facts needed to be proven beyond a reasonable doubt, but if the State proved its case, the defendant did not have a constitutional right not to be convicted. This is not an improper comment. Further, trial counsel objected only a few second later when the State's comments did go too far. We also conclude that the second statement was not improper because it was addressing the element of intent. Further, trial counsel offered a reasonable strategic reason for not objecting to the statement.

¶12 Rickard's next argument is that the trial court should have conducted a colloquy with him to determine whether he was knowingly and voluntarily waiving his right not to testify before allowing him to testify on his own behalf. In a case decided after both the trial and postconviction motion, we addressed the issue of whether a trial court must conduct a colloquy with a defendant before that the defendant testifies. ***State v. Jaramillo***, 2009 WI App 39, 316 Wis. 2d 538, 765 N.W.2d 855. In that case, we concluded that the right not to testify is a fundamental right and the waiver of that right must be knowing and voluntary.

Id., ¶8. We concluded that we do not have the supervisory authority that would permit us to promulgate rules of criminal procedure, and consequently, we cannot mandate that a circuit court conduct a colloquy with a defendant. ***Id.***, ¶16. We also concluded, however, that once a defendant raises the issue in a postconviction motion, the circuit court was required to determine whether the defendant knowingly and voluntarily waived his right not to testify. ***Id.***, ¶18. In ***Jaramillo***, the circuit court had denied the defendant's postconviction motion alleging that the trial court should have conducted a colloquy, and holding that the defendant should have raised the claim in the context of an ineffective assistance of counsel claim. ***Id.***, ¶2. The circuit court, consequently, had not addressed whether the defendant had knowingly and voluntarily waived his right not to testify.

¶13 In this case, however, the circuit court considered at the postconviction hearing whether Rickard knowingly and voluntarily waived his right not to testify and found that he had. Rickard chose not to testify at the postconviction hearing. His trial counsel, however, testified that he had informed Rickard he had the right to testify and the right not to testify, and that if he chose not to testify, "the jury will be instructed to not hold that against him, that he has the right to remain silent. I probably also told him that the only way for the jury to hear his side of the story from his words would be if he did testify." Counsel also testified that after *voir dire*, he once again told Rickard that he had a right to testify or not to testify. The record shows that Rickard admitted in his affidavit in support of the postconviction motion that counsel had told him he had a right not to testify.

¶14 The court considered these and other factors and concluded that by taking the stand to testify at trial, Rickard "understood his right that he did not have to take the stand, that he could not be forced to testify." The court went on:

> Mr. Rickard chose not to testify at the postconviction hearing. He wasn't going to be forced to testify at that hearing either, and I would presume that his election not to testify at the postconviction hearing was sufficient for him to understand that he was again exercising a right. The fact, at least in a postconviction sense, further leads this Court to believe by his not denying it or the fact that there is nothing on the record that would support a denial of his understanding, the Court's left with the record that it has, and that is primarily [trial counsel] indicating his discussion and the defendant's understanding of his right to testify and his concomitant right not to testify.

In sum, the court concluded that Rickard had knowingly and voluntarily waived his right to not testify. Based on the facts in the record and as found by the circuit court, we also conclude that Rickard knowingly and voluntarily waived this right.

¶15 The third issue Rickard raises is whether there was sufficient evidence to support the conviction. The victim, who was five-years old at the time of trial, testified that Rickard put his finger in her pants, and touched her in the middle of her "privates." The victim was not able to respond to the prosecutor's requests that she point to where Rickard had touched her. Rickard argues that the victim's testimony was not sufficient because the prosecutor did not ask her to further define what she meant by her "privates."

> [A]n appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citations omitted).

¶16 Our review of the record shows that there was more than enough evidence presented at trial to establish that Rickard touched the four-year-old victim in her vaginal area. The nurse testified that the victim told her that Rickard had touched "her butt" and pointed to her vaginal area. The victim said that Rickard had put his finger in her pants. The victim's mother testified that the victim had shown her where Rickard had touched her and it was her vagina. Further, Rickard's DNA was found in the victim's vaginal area and her underpants. We reject Rickard's argument that the evidence was not sufficient to support the conviction. 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.