COURT OF APPEALS
DECISION
DATED AND FILED

February 2, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP3166-CR **Cir. Ct. No. 2007CF677**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRADLEY S. GALLENTINE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: WILLIAM M. GABLER, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Bradley Gallentine appeals a conviction for second-degree sexual assault in violation of WIS. STAT. § 940.225(2)(c) and an

order denying his postconviction motion for a new trial.[1] Gallentine contends he received ineffective assistance of counsel when his trial attorney failed to challenge DNA evidence and the results of a photographic lineup conducted shortly after the crime. We affirm.

BACKGROUND

¶2 Gallentine was convicted of sexually assaulting an eighty-five-year-old woman suffering from Alzheimer's disease. The victim's brother-in-law, Robert R., testified at trial he was outside the victim's home when he heard her calling for her deceased husband. Robert noticed a bicycle parked in the driveway and entered the home. Robert discovered a man in the victim's living room with his head down and his hands between his sister-in-law's legs. The man, whom Robert did not recognize, quickly left out the back door with his face turned away from Robert. Robert's wife, Rogene, was waiting in a car outside the victim's residence and watched the man exit the house and leave on the bicycle. Gallentine was charged with second-degree sexual assault four days later.

¶3 The principal issue at trial was the attacker's identity. Rogene testified the assailant wore an orange shirt at the time of the assault. Three neighbors testified they saw Gallentine around the time of the assault wearing an orange shirt and riding a bicycle. Gallentine's wife testified her husband was aware the victim had Alzheimer's disease and owned an orange shirt that she had not seen since the day of the assault. Police testimony noted inconsistencies in Gallentine's statements following the assault.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 The State bolstered its identification case with DNA evidence taken from the victim. The DNA evidence was minimal and yielded an incomplete data profile consisting of only four DNA markers of a possible twelve. All four markers were consistent with Gallentine's DNA profile. Jennifer Zawacki, the State's DNA analyst, acknowledged the testing method used could not eliminate any paternal relatives. In addition, Zawacki testified the DNA profile matched one individual other than Gallentine when searched against a State database of 4,004 individuals. On cross-examination, Gallentine's attorney elicited testimony emphasizing the incomplete DNA evidence could not prove Gallentine was the attacker.

¶5 The State also bolstered its identification case with the results of photographic lineups conducted in the days following the assault. Police presented Robert with six photographs, but he was unable to identify the suspect in the photo array. Officer Ryan Lambeseder subsequently testified that although Robert could not make a definitive identification, Robert selected two photographs he said were very similar to the person he had seen at the victim's home. One of the two photographs Robert selected was of Gallentine. Rogene picked Gallentine's photograph out of the same lineup. A second photographic lineup, not at issue on this appeal, focused on the bicycle Robert saw outside the victim's residence. Robert selected Gallentine's bicycle from the photo array presented.

¶6 Gallentine filed a postconviction motion for a new trial, alleging ineffective assistance of counsel. The trial court accurately summarized the content of the motion and found the defense attorney's performance was not deficient and that, even if it was, Gallentine suffered no prejudice:

> The motion challenging Mr. Bachman's effectiveness focuses on …

> [Robert's] alleged faulty … photo line-up identification and the insufficient DNA evidence ….
>
> ….
>
> [A]lthough one can quibble over whether or not Mr. Bachman's cross-examination or closing argument in this case was … sufficient, sometimes less is more. And when it comes to the testimony of [Robert and the State's DNA analyst], less was more. I think it was appropriate for Mr. Bachman to just focus in on what little [Robert] did know and on what little significance the DNA evidence [had]. And he did that and he did that effectively.

The court noted the "combined evidence from all of [the witnesses] … did convince the jury beyond a reasonable doubt that Mr. Gallentine [was] the offender[]" and was sufficient to convict Gallentine even if his attorney had interposed successful objections.

DISCUSSION

¶7 On appeal, Gallentine insists he received ineffective assistance of counsel and asserts that, even if not amounting to ineffective assistance, his attorney's failures at trial are sufficiently egregious to warrant exercise of our discretionary reversal authority under WIS. STAT. § 752.35. Ineffective assistance requires the defendant to show counsel's performance was deficient and he or she suffered prejudice as a result. ***State v. Darcy N.K.***, 218 Wis. 2d 640, 660, 581 N.W.2d 567 (Ct. App. 1998) (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)). An attorney's performance is deficient if the attorney made errors so serious that the attorney failed to function as the counsel guaranteed by the Sixth Amendment. ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433 (quotation omitted). Prejudice is defined as "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." ***Id.*** (citation omitted).

¶8 We examine a trial court's resolution of an ineffective assistance claim under a mixed standard of review, deferring to a trial court's factual findings regarding counsel's action during circuit court proceedings. ***Darcy N.K.***, 218 Wis. 2d at 660. However, whether counsel's performance was deficient, and whether prejudice resulted from that deficiency, are questions of law we review de novo. ***Id.*** Gallentine bears the burden of proof on both requirements of the ineffective assistance claim, and we will affirm the denial of postconviction relief if we conclude he has failed to meet his burden on either issue. *See* ***id.***

¶9 Gallentine has demonstrated neither deficient performance nor any prejudicial effect resulting from counsel's alleged mishandling of the DNA evidence. Gallentine relies on ***State v. Peters***, 192 Wis. 2d 674, 534 N.W.2d 867 (Ct. App. 1995), to establish his attorney should have objected to the DNA evidence as facially unreliable. Yet in ***Peters***, we emphasized that the circuit court is "not required to determine [the reliability of] the DNA evidence and the statistics derived therefrom" as a prerequisite to admissibility. ***Id.*** at 690. So long as the evidence is relevant—in this case, the DNA evidence was probative of both the fact of the assault and the identity of the attacker—"the reliability of the evidence is a weight and credibility issue for the fact finder and any reliability challenges must be made through cross-examination …." ***Id.*** Defense counsel's failure to make a meritless objection does not constitute deficient performance. ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987).

¶10 Gallentine also claims his attorney rendered ineffective assistance by failing to consult DNA experts or statisticians. Gallentine relies too heavily upon ***Peters***' discussion of the relevance of statistical probability evidence. In ***Peters***, we determined the circuit court properly exercised its discretion in admitting testimony about the minimal statistical probability that the match between the

defendant's DNA and that found on the victim was merely coincidental. ***Peters***, 192 Wis. 2d at 690-92. In doing so, we spoke broadly about the importance of statistical probability evidence, but we did not suggest the failure to present such evidence forms the basis for an ineffective assistance claim. ***Id.*** at 691. Moreover, Gallentine has not identified any expert who would testify on his behalf, nor how such an expert would testify. Complaints of uncalled witnesses are not favored because such allegations are largely speculative. *See* ***State v. Street***, 202 Wis. 2d 533, 549, 551 N.W.2d 830 (Ct. App. 1996). The State's expert conceded the DNA evidence could not prove the attacker's identity, and Gallentine is not clear what further expert testimony would have added.

¶11 Gallentine also claims his attorney failed to adequately cross-examine the State's expert. Although failure to conduct an adequate cross-examination can constitute deficient performance, *see* ***State v. Zimmerman***, 2003 WI App 196, ¶39, 266 Wis. 2d 1003, 669 N.W.2d 762, we do not view defense counsel's cross-examination as lacking in this case. The jury was informed the incomplete DNA sample could not produce a definitive identification. Though this deficiency was brought out on direct examination, Gallentine's counsel emphasized it on cross:

> Q Okay. And you said that you found four out of the 12 markers that might match Mr. Gallentine? Correct?
>
> A Correct.
>
> Q This amount that you had to test was so small you couldn't … do all the tests you wanted?
>
> A Well, the tests were attempted. However, there was such a small amount of male DNA there that not all of the DNA types … did come up or were received. Only four were detected at that point.
>
> Q Okay. So about a third?

> A Sure.
>
> ….
>
> Q … You couldn't honestly say in your report that he was a probable contributor, could you?
>
> A He's a possible contributor, … based on his DNA types being consistent with the evidence profile.
>
> Q You couldn't use any words stronger than possible? Correct?
>
> A I'm not able to eliminate any of his potential male relatives. So, therefore, there is no individualization with this type … of DNA analysis ….

Defense counsel's cross-examination indicates he fulfilled his role as counsel guaranteed by the Sixth Amendment. *See* ***Allen***, 274 Wis. 2d 568, ¶26.

¶12 Gallentine also argues defense counsel rendered ineffective assistance in his handling of the photographic lineup evidence. Robert was the first witness the prosecution called and testified he could not identify the suspect from the photographic lineup. Gallentine claims his attorney improperly allowed officer Lambeseder to later testify, without objection, that Robert selected two photographs similar to the suspect. The result, in Gallentine's view, was that, although Robert admitted he could not identify the defendant, Lambeseder's testimony gave rise to a de facto identification.

¶13 Gallentine does not adequately develop this argument. Gallentine asserts defense counsel should have objected because Lambeseder's testimony was irrelevant and its probative value was substantially outweighed by its prejudicial effect. Although Gallentine leans heavily upon our supreme court's statement that "eyewitness testimony is often hopelessly unreliable," ***State v. Dubose***, 2005 WI 126, ¶30, 285 Wis. 2d 143, 699 N.W.2d 582 (quotation omitted), Gallentine fails to appreciate Robert's testimony that he could not

identify the suspect. Lambeseder did not suggest otherwise, but merely explained the inconclusive result of the photographic lineup and the procedure used. Gallentine does not explain why this evidence was irrelevant or why it had a significantly prejudicial effect in light of Robert's testimony. We will not develop Gallentine's arguments for him. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).

¶14 Finally, this case does not warrant exercise of our discretionary reversal authority under WIS. STAT. § 752.35. Where, as here, the defendant contends the real controversy has not been fully tried, we may exercise this authority if the jury was deprived of important testimony bearing on an important issue of the case, or if the jury had before it "evidence not properly admitted which so clouded a crucial 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). Gallentine argues the cumulative effect of defense counsel's alleged errors hindered his improper identification defense. The record demonstrates the jury was apprised of the incomplete nature of the DNA evidence and the fact that Robert was unable to make a definitive identification during the photo lineup. This is not one of those "exceptional cases" justifying exercise of our discretionary reversal authority. *See* ***State v. Cuyler***, 110 Wis. 2d 133, 141-42, 327 N.W.2d 662 (1983).

By the Court.—Judgment and order affirmed.

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