COURT OF APPEALS
DECISION
DATED AND FILED

September 23, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP1963-CR **Cir. Ct. No. 2005CF581**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MONTE B. SEMLAR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: MICHAEL J. MULROY and ELLIOTT M. LEVINE, Judges. *Affirmed.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Monte Semlar appeals from a judgment convicting him of four counts of sexual assault and a drug charge, and from an order denying his motion for postconviction relief. The issues on appeal are whether: (1) trial

counsel provided ineffective assistance by failing to explore redacted portions of the victim's medical records; (2) the State failed to provide the defense with useful impeachment materials by redacting the victim's medical records; (3) the circuit court erred in refusing to instruct the jury on a lesser-included sexual assault charge; and (4) the interests of justice require a new trial. We affirm for the reasons discussed below.

Assistance of Counsel

¶2 Claims of ineffective assistance of counsel present mixed questions of law and fact. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). We will not set aside the circuit court's findings about counsel's actions and the reasons for them, unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's constitutional right to the effective assistance of counsel is ultimately a legal determination, which this court decides *de novo*. ***Id.***

> The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them.

State v. Swinson, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12 (internal citations omitted).

¶3 Here, Semlar argues that trial counsel provided ineffective assistance by failing to seek disclosure of the victim's psychiatric records prior to trial, or to cross-examine her about any mental illness or medications that may have affected her perception of events or ability to relate the truth. A postconviction examination of the victim's medical records showed that the victim suffered from mild mental retardation and Dysthemia (a form of chronic depression) and was taking numerous medications at the time of the offense.

¶4 We will assume for the sake of argument that counsel should have made some effort to explore the victim's mental illness and medication history either through cross-examination or by requesting a hearing[1] to determine whether the victim's mental health status might have affected her ability to perceive events or relate the truth. We do not agree with the defendant, however, that any deficient performance in this regard was prejudicial given the evidence at trial.

¶5 First, Semlar made no showing at the postconviction hearing that the victim's actual mental health diagnoses or the medications she was taking would, in fact, have affected her ability to perceive events and/or relate the truth. She was not suffering from a delusional disorder, and there was nothing in the medical records to indicate any delusional side effects from her prescribed medications, which were intended to treat asthma, allergies, diabetes, high blood pressure, high cholesterol, depression, anxiety, and insomnia. Like the circuit court, we see no

[1] A court may perform an in-camera inspection of medical records in order to balance a defendant's right to present a meaningful defense against the State's interest in protecting otherwise confidential information about its citizens. *See* ***State v. Green***, 253 Wis. 2d 356, 646 N.W.2d 298 (2002).

reasonable possibility that learning that the victim suffered from depression would have led the jury to doubt her credibility regarding the sexual assaults.

¶6 Secondly, the State's case did not rest solely on the victim's testimony. The victim's account that the defendant had sexually assaulted her on the trunk of a dusty vehicle in a garage was corroborated in various respects by the testimony of: (1) a neighbor who saw the victim enter the garage laughing and exit it crying; (2) another neighbor who saw both the defendant and victim enter and exit the garage; (3) an investigating officer and two people at the bar where the victim went for help who all saw her crying shortly after the incident; (4) the examining nurse, who noted that the victim's elbows were blackened; (5) another investigating officer, who noted that the dust on the trunk of a vehicle in the garage had been disturbed; and (6) a lab analyst who testified that a partial DNA sample recovered from the victim's teeth did not exclude Semlar as a possible match.

¶7 Third, the court observed that the victim's cognitive disability would have been readily apparent to the jury. As trial counsel pointed out, attacking such a vulnerable victim could just as well have alienated the jury, who could already take into consideration whether the victim's perception might have been impaired in some way. In sum, the evidence about the victim's mental or emotional health and medications would have been of only marginal impeachment value, at best, and its absence does not undermine our confidence in the outcome of the case.

Discovery Violation

¶8 Due process requires the prosecution to turn over "evidence favorable to an accused upon request … where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." ***Brady v. Maryland***, 373 U.S. 83, 87 (1963). This may include impeachment evidence, where the "reliability of a given witness may well be determinative of guilt or innocence." *See* ***United States v. Bagley***, 473 U.S. 667, 676 (1985) (quoting ***Giglio v. United States***, 405 U.S. 150, 154 (1972)). Thus, to establish a ***Brady/Giglio*** violation, a defendant must show that: (1) the State suppressed evidence within its possession at the time of trial; (2) the evidence was favorable to the defendant; and (3) the evidence was material to a determination of the defendant's guilt or punishment. *See* ***Brady***, 373 U.S. at 87. Evidence is material when there is a reasonable probability that its disclosure would have led to a different result in the proceeding. ***State v. Garrity***, 161 Wis. 2d 842, 850, 469 N.W.2d 219 (Ct. App. 1991).

¶9 Semlar asserts that the State committed a ***Brady/Giglio*** violation by explicitly redacting the victim's medical records to exclude information about her mental health history and the medications she was taking. For the same reasons we determined that Semlar was not prejudiced by counsel's failure to pursue the victim's mental health and medication history, we conclude that the redacted portions of the medical records were not material to a determination of the defendant's guilt or punishment. There was nothing in the redacted material that would have shown that the victim's mental health or medications adversely affected her ability to perceive events or tell the truth.

Jury Instructions

¶10 The decision whether to instruct the jury on a lesser-included offense involves two steps. First, the circuit court must determine whether the requested instruction relates to an offense that qualifies as lesser-included as a matter of law. If it does, the court must determine whether the evidence of record provides a reasonable factual basis for acquittal on the greater offense and conviction on the lesser offense. ***State v. Muentner***, 138 Wis. 2d 374, 385, 406 N.W.2d 415 (1987).

¶11 Here, the State does not dispute that third-degree sexual assault is a lesser-included offense of second-degree sexual assault, thus the only question before us is whether the evidence would have supported an instruction on the lesser-included offense. We review the sufficiency of the evidence to support instruction on the lesser-included offense *de novo*. ***State v. Peters***, 2002 WI App 243, ¶12, 258 Wis. 2d 148, 653 N.W.2d 300.

¶12 Semlar asserts in a single sentence that the jury "could have reasonably concluded that Semlar and [the victim] had sex, but Semlar did not threaten or use force." He does not address the circuit court's reasoning that the victim's testimony established the force element, and if the jury did not believe her, it would acquit, not find the defendant guilty of a lesser charge. Nor does Semlar provide this court with any authority addressing a similar factual scenario in which an instruction on a lesser-included offense was determined to be warranted. We need not consider arguments which are undeveloped or unsupported by references to relevant legal authority, and will not do so here. ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

Discretionary Reversal

¶13 Finally, Semlar asks this court to exercise our discretionary reversal power under WIS. STAT. § 752.35 to order a new trial in the interest of justice, either on the grounds that the real controversy has not been tried or that there has been a miscarriage of justice. In order to establish that the real controversy has not been fully tried, a party must show "that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (citation omitted). To establish a miscarriage of justice, there must be "'a substantial degree of probability that a new trial would produce a different result.'" ***Id.*** (citation omitted). We will exercise our discretion to grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶14 Semlar's request for a discretionary reversal is entirely premised on the three errors he alleged above. We have already explained why additional evidence relating to the victim's mental heath status and medications would not have produced a different result at trial and why Semlar's complaint about the jury instruction is so undeveloped as to warrant no further discussion. Accordingly, we decline to order a new trial.

By the Court.—Judgment and order affirmed.

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