COURT OF APPEALS
DECISION
DATED AND FILED

November 18, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2069-CR **Cir. Ct. No. 2006CF1845**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDRE D. TANKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: DIANE M. NICKS and NICHOLAS McNAMARA, Judges. *Affirmed.*

Before Lundsten, Sherman and Anderson, JJ.

¶1 PER CURIAM. Andre D. Tankson appeals from a judgment of conviction for kidnapping, aggravated battery, first-degree recklessly endangering safety, and one count of second-degree sexual assault by use of force, and of the July 20, 2009 order denying his motion for postconviction relief. Tankson argues

that the State violated ***Brady v. Maryland***, 373 U.S. 83 (1963), by failing to disclose exculpatory evidence to him, that he received ineffective assistance of trial counsel, that the circuit court erred when it denied his motion for a new trial based on newly discovered evidence, and that he is entitled to a new trial in the interest of justice. We disagree, and affirm the judgment and order of the circuit court.[1]

¶2 Tankson was convicted after a jury trial of kidnapping, aggravated battery, first-degree recklessly endangering safety, and one count of second-degree sexual assault by use of force.[2] The court sentenced him to a total of forty-seven years of initial confinement and twenty years of extended supervision. After sentencing, Tankson moved for postconviction relief alleging ineffective assistance of counsel. In a supplemental motion, he also alleged a ***Brady*** violation, and newly discovered evidence. The court held hearings on the motions, and ultimately denied them.

¶3 Briefly, the facts of this case are that in the early morning hours of August 3, 2006, the police received two separate 911 calls reporting that a woman was screaming. One of the callers heard the woman say "Please no," and said that it sounded as if the woman was vomiting. An officer responded to the scene, and saw a woman standing next to a wall, with a man directly behind her. It appeared to the officer that the woman did not have any clothes on below the waist, and that "their pelvic areas were in contact." When the officer identified himself, the man

[1] The Honorable Diane M. Nicks presided over trial and entered the judgment of conviction. The Honorable Nicholas McNamara denied the postconviction motion.

[2] Tankson was acquitted of a second count of second-degree sexual assault.

took off running and the woman yelled "stop him, or catch him." When the police eventually caught the man, his pants were undone and an officer saw the man's semi-erect penis rubbing against the zipper of his pants. The man was Andre Tankson. Although Tankson did not testify at trial, he told his attorney that he had offered the victim $15 for sex, and that the sex was consensual.

¶4 When the police officer talked to the victim on the scene, she was visibly upset. The victim, an admitted drug addict, had used both cocaine and heroin that night. The police took the victim to a hospital where a Sexual Assault Nurse Examiner (SANE) exam was performed.

¶5 Tankson's first argument is that he is entitled to a new trial because the State withheld material impeachment evidence from him, namely, evidence that the victim had alleged twice in the past that she had been sexually assaulted by African-American men, and in both cases, the men had denied the allegations.[3]

¶6 "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." ***Brady***, 373 U.S. at 87. The prosecution's duty to disclose evidence favorable to the accused includes the duty to disclose impeachment evidence as well as exculpatory evidence. ***Strickler v. Greene***, 527 U.S. 263, 280 (1999). To establish a ***Brady*** violation, the defendant must show that the State suppressed the

[3] In his brief-in-chief, Tankson suggests that the State should have disclosed to him evidence that the victim had also made a false robbery accusation. In his reply brief, however, Tankson clarifies that he is not asserting a ***Brady*** violation based on the false robbery allegation. Rather, Tankson is asserting that his trial counsel was ineffective for failing to obtain this evidence and use it at trial.

evidence, that the evidence was favorable to the defendant, and that the evidence was "material" to the determination of the defendant's guilt or punishment. ***State v. Rockette***, 2006 WI App 103, ¶39, 294 Wis. 2d 611, 718 N.W.2d 269. Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ***Strickler***, 527 U.S. at 280 (citation omitted). On appeal, we independently apply this constitutional standard to the undisputed facts of the case. ***Rockette***, 294 Wis. 2d 611, ¶39.

¶7 Tankson argues that under ***Brady*** and WIS. STAT. § 971.23(1)(h) (2007-08),[4] the State was required to disclose that the victim had twice claimed to have been assaulted by African-American men, both apparently in the context of a drug deal having gone bad. Tankson argues that the evidence was directly connected to his theory of defense that the sexual encounter was an exchange of sex for drugs. Tankson further argues that the evidence is admissible as an exception to the rape shield statute, *see* WIS. STAT. § 972.11(2)(b)3, and as other acts evidence.

¶8 We conclude that the State did not violate ***Brady***. In particular, we are not convinced that there is a reasonable probability that, had the evidence been admitted, the verdict would have been different.

¶9 First, the defense would not have been able to use extrinsic evidence to prove that the victim had made prior false allegations. *See* ***State v. Rognrud***, 156 Wis. 2d 783, 788, 457 N.W.2d 573 (Ct. App. 1990). In other words, the

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

defense would not have been able to call the men against whom the allegations were made. Rather, the defense would have been limited to cross-examining the victim about the incidents, and there is nothing to suggest that she ever recanted these claims. Accordingly, it appears the jury simply would have heard some evidence that the victim had been victimized before while living on the street.

¶10 Second, there was already evidence in this case that the victim was a drug addict with credibility problems. The victim admitted at trial to nine prior convictions, and admitted that she had used crack cocaine and heroin on the night of the incident. The State's case was not based on the credibility of the victim. The State had substantial independent evidence that supported the victim's story: the testimony of the two women who had independently called 911 to report the incident; the testimony of the SANE nurse and the police officer that the victim had physical marks consistent with having been strangled; and the testimony of the officer who first arrived on the scene. The officer saw Tankson having sex with the victim against a wall in an alley, saw Tankson run away as the officer approached, heard the victim yell "stop him," and saw that the victim was upset. Further, the jury was told that the victim was a drug addict who lived an admittedly rough street life.

¶11 In sum, the evidence that the victim may have made false allegations against others in the past was not "so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." ***Strickler***, 527 U.S. at 281. We conclude that Tankson is not entitled to a new trial on the basis of a ***Brady*** violation.

¶12 Tankson also argues that he received ineffective assistance of trial counsel on four grounds: (1) counsel failed to introduce evidence that the victim

made a false robbery charge; (2) counsel failed to object to Detective Morgan's testimony, which was improper under ***State v. Haseltine,*** 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984); (3) counsel failed to object to the testimony of Nurse Krumrei, which violated ***Miranda v. Arizona***, 384 U.S. 436 (1966); and (4) counsel failed to properly investigate and litigate Tankson's defense.

¶13 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. Counsel is not ineffective for failing to make meritless arguments. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). 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) (citations omitted).

¶14 Tankson asserts that trial counsel was ineffective for failing to introduce evidence that the victim had previously made a false robbery charge

because this evidence, like the sexual assault allegations, would have undercut the victim's credibility. As we have explained, however, the prosecution case did not rest heavily on the victim's credibility, there was other evidence affecting the victim's testimony, and strong independent evidence of the crime. Eliciting testimony that the victim may have lied about a different type of crime in the past would not have made a difference. Tankson has not shown that he was prejudiced by his counsel's decision not to elicit this testimony.

¶15 Tankson argues that trial counsel was ineffective because he did not make a ***Haseltine*** objection to Detective Morgan's testimony that the victim's injuries were consistent with strangulation. Tankson argues that the purpose of the detective's testimony was to tell the jury that the victim had been strangled, and that such testimony is improper under ***Haseltine***. In ***Haseltine***, we ruled that: "No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." ***Haseltine***, 120 Wis. 2d at 96. In that case, a psychiatrist effectively informed the jury that he believed the child was telling the truth and that a relative had committed a crime. *See* ***Elm***, 201 Wis. 2d at 459.

¶16 In contrast, Detective Morgan testified about her observations and said that, in her experience, the victim's injuries were consistent with being strangled. Detective Morgan did not offer an opinion about whether the victim was telling the truth or whether the defendant had committed the crime. She testified about physical evidence and offered an opinion about what could have caused the injuries she observed. Because ***Haseltine*** does not bar Detective Morgan's testimony, counsel did not perform deficiently by not objecting to the testimony.

¶17 Tankson next argues that counsel was ineffective because he did not prevent the introduction of evidence obtained in violation of ***Miranda***. Tankson argues that the court had earlier suppressed a statement Tankson made to the police after he invoked his right to remain silent. The statement the court suppressed was "I'm an angry guy." At trial, the SANE nurse testified that when she first examined Tankson, he was not cooperative and would not talk to him. Then, when she was collecting blood and urine from Tankson, he said to her: "I'm done talking, no one's going to take my blood against my will, it's my Constitutional Right." Although the argument is not fully developed, Tankson says that a "prudent and capable attorney" would have taken steps to keep testimony such as this from being introduced, and that the circuit court's rationale, expressed at the hearing on the postconviction motion, did not "fully factor in what the court actually did at trial when the evidence was coming in without objection." The circuit court concluded both that the statement was not incriminating and that the testimony did not violate ***Miranda*** because the statement was not made in response to questioning.

¶18 ***Miranda*** requires that law enforcement officers conducting a custodial interrogation must use procedural safeguards to protect a defendant's Fifth and Fourteenth Amendment rights against self-incrimination. ***State v. Armstrong***, 223 Wis. 2d 331, 351-52, 588 N.W.2d 606 (1999). We agree with the circuit court that Tankson was not responding to a question from a law enforcement officer who was interrogating him. Tankson blurted out the statement in response to a nurse who was trying to get him to cooperate with her. Because ***Miranda*** does not prohibit the introduction of this statement, trial counsel did not perform deficiently when he did not object to it on ***Miranda*** grounds.

¶19 Tankson also argues that his trial counsel was ineffective for failing to investigate and litigate his defense. Tankson asserts that trial counsel should have called the victim's mother as a witness at trial because the mother had written to Tankson while he was in jail saying that her daughter was a liar and a thief.

¶20 Trial counsel testified at the postconviction hearing; he was aware that the victim's mother had written Tankson a letter, and that counsel did talk with the mother. Counsel concluded, however, that the mother's testimony would make the jury feel more sympathetic towards the victim because of the difficult relationship the victim had with her mother. Counsel also thought that the mother was changing her mind and might refuse to repeat her assertions about her daughter. For these reasons, counsel decided not to call the mother as a witness at trial.[5]

¶21 Under all of these circumstances, we agree with the circuit court's determination that counsel made a reasonable effort to locate the mother and a reasonable strategic decision not to call her as a witness. The jury learned from other sources that the victim was a drug addict and possibly a liar, and the mother's evidence would have shown that she and her daughter had a "tumultuous" relationship. Such evidence was not needed to cast doubt on the victim's credibility and carried with it the substantial risk of garnering sympathy

[5] The victim's mother died before the postconviction hearing was held.

for her. We believe counsel made a reasonable strategic decision not to have the mother testify at trial.[6]

¶22 We conclude that Tankson has not established that he received ineffective assistance of trial counsel.

¶23 Tankson argues in the alternative that he is entitled to a new trial on the basis of newly discovered evidence because he was not aware prior to trial of the evidence that the victim had made a false robbery charge. He asserts that this evidence was material to a determination of whether the victim was telling the truth.

> To obtain a new trial based on newly discovered evidence, a defendant must establish by clear and convincing evidence that "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." Once those four criteria have been established, the court looks to "whether a reasonable probability exists that a different result would be reached in a trial." The reasonable probability factor need not be established by clear and convincing evidence, as it contains its own burden of proof.

State v. Edmunds, 2008 WI App 33, ¶13, 308 Wis. 2d 374, 746 N.W.2d 590 (citations omitted). As we have explained, however, the evidence was not material and was merely cumulative. We are also not convinced that a different result would have been reached had this evidence been introduced. Tankson is not entitled to a new trial based on newly discovered evidence.

[6] Detective Morgan testified at the postconviction hearing that she had met with the victim's mother between six to twelve times prior to trial, and that the mother had mental health and addiction issues, and that her relationship with the victim was "very mercurial" and "tumultuous."

¶24 Tankson's final argument is that he is entitled to a new trial in the interest of justice because the real controversy was not tried. He argues that the jury did not hear evidence that would have undermined the victim's testimony and bolstered his defense. For all the reasons we have explained, we disagree. Tankson is not entitled to a new trial on this basis, and 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.