COURT OF APPEALS
DECISION
DATED AND FILED

October 5, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2773-CR **Cir. Ct. No. 2008CF83**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GILBERT PEREZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: MARC A. HAMMER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Gilbert Perez appeals a judgment convicting him of repeated sexual assault of a child and an order denying his motion for postconviction relief. Perez argues he was denied the effective assistance of counsel. We disagree and affirm.

BACKGROUND

¶2 On January 21, 2008, Taylor S., the seven-year-old daughter of Perez's fiancée, told school social worker Michael Bauer that Perez had sexually assaulted her. Later that day, in a videotaped interview with social worker Melissa Tell and Green Bay Police Officer Rod DuBois, Taylor alleged Perez had sexually assaulted her anally on multiple occasions and orally on one occasion.

¶3 At the police station later that afternoon, DuBois questioned Perez for three-and-a-half hours in an attempt to elicit a confession. DuBois began by reading Perez his ***Miranda***[1] rights, which Perez waived. He then asked a number of background questions about Perez's work, his health, and his relationships with Taylor and her mother. Perez volunteered that he had gone through anger management classes the year before because he had hit Taylor. He also told DuBois that Taylor had blisters on her fingers from rubbing crayon marks off a wall.

¶4 DuBois then told Perez that Taylor had accused him of grabbing her by the throat. DuBois said he knew Taylor was telling the truth because there were "CSI guys" at the police station who could use a special light to confirm that Taylor's throat had recently been bruised. Perez admitted he had grabbed Taylor to get her attention, but he stated he did not mean to hurt her. At trial, DuBois conceded he lied to Perez about the "CSI guys." There were no such CSI analysts, and no one had examined Taylor's neck. DuBois testified that lying to a suspect

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

about evidence is a proper investigatory technique that is sometimes necessary to elicit a confession.

¶5 DuBois eventually told Perez that Taylor had accused him of coming into her room on multiple occasions, putting a hat over her head, and "putting his thing in [her] butt." Perez responded, "I've never done that." DuBois replied that police had collected sheets from Taylor's bed and found semen. DuBois told Perez, "I know that it happened because we have in CSI forensic stuff that is telling me this is what happened." DuBois also said, "By the time we get done doing all the tests on those bed sheets, linens, it's going to say that your fluid is mixed in with her fluid. Right now, the preliminary test … is telling us that." At trial, DuBois admitted police never examined Taylor's bed sheets and never subjected them to DNA testing.

¶6 During the interrogation, DuBois also told Perez that a sexual assault nursing assistant had examined Taylor and found evidence confirming she had been sexually assaulted. Again, DuBois admitted at trial that this was a lie.

¶7 Throughout the interrogation, DuBois also made a number of statements about the benefits of admitting guilt:

> If you're man enough to admit that you made a mistake and tell me what you did, I'm going to respect you for that. I'm going to punish you because you need to be punished, but I'm still going to respect you …. On the other hand, and I use this with my own kids as an example, when they lie to me, game on. If you're not man enough to admit when you make a mistake when everybody makes mistakes, now you're going to get punished because we have a credibility problem.
>
> ….
>
> Now you have a judge that you got to answer to that's going to treat you like his son. Does he treat you to punish

> you because you pissed him off because you lied, or does he treat you that, you know what, you made a mistake like everybody else because people make mistakes?
>
> ….
>
> Now, I have to write a police report and that police report is either going to say you maintain even in spite of all this evidence that he didn't do anything, here he is, judge, hammer him. Or it's going to say when we talked, he admitted that he made a mistake that there's these issues going on in his life and that he's sorry, doesn't know why he did it or he does know why he did it.

¶8 Despite DuBois' attempts to elicit a confession, Perez repeatedly denied he had sexually assaulted Taylor. However, he eventually said that he could not remember whether he had assaulted her. DuBois asked Perez to give a probability that he committed the assault, and Perez responded, "Since I can't remember, I would say probably fifty percent." Perez told DuBois he may have had a blackout, making it possible he had assaulted Taylor and did not remember it. At one point, Perez asked DuBois for a knife and stated, "If I fucking touched her, I'm going to fucking kill myself."

¶9 At the end of the interrogation, DuBois prepared a written statement that Perez signed. The statement said that Perez did not know if he was blocking out the sexual assault, that he could not remember sexually assaulting Taylor, and that there was a fifty-fifty chance he had done so.

¶10 At trial, the State argued Perez's statements were "very close to just being straight out admissions that he did it." According to the State, throughout the interrogation Perez's story changed from complete denial to "admitting to what he can admit to without admitting to the crime." The prosecutor told the jury, "If he's innocent, the pressure will have no effect. The plan is going to [be

to] say, 'No, it's not me. I didn't do it. I don't care what you have. I didn't do it.' I think we know from life experience."

¶11 The jury convicted Perez of repeated sexual assault of a child. The trial court sentenced Perez to ten years' incarceration and five years' extended supervision. Perez moved for postconviction relief, alleging he was denied effective assistance of counsel. The trial court denied the motion following an evidentiary hearing, and Perez appeals.

DISCUSSION

¶12 Perez argues his trial counsel was deficient in four ways: (1) failing to seek suppression of Perez's incriminating statements on the ground they were not made voluntarily; (2) failing to present expert testimony regarding the extent to which the interrogation tactics DuBois used produce false confessions and regarding the interview techniques used with Taylor; (3) failing to seek exclusion of Perez's statements that he grabbed Taylor's neck, caused her to develop blisters on her fingers, and punched her; and (4) failing to introduce evidence that Taylor had seen Perez and his fiancée engaging in sexual intercourse.

¶13 A defendant claiming ineffective assistance of counsel must prove both that counsel's performance was deficient and that counsel's errors were prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If we conclude the defendant has not met one prong of this test, we need not address the other. ***Id.*** at 697.

¶14 To demonstrate deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of

professionally competent assistance." ***Id.*** at 690. We strongly presume that an attorney has rendered adequate assistance. ***Id.***

¶15 To demonstrate prejudice, a defendant must show that the alleged defect in counsel's performance actually had an adverse effect on the defense. ***Id.*** at 693. The defendant must show there is "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." ***Id.*** at 694.

¶16 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Reed***, 2002 WI App 209, ¶16, 256 Wis. 2d 1019, 650 N.W.2d 885. We uphold the trial court's findings of fact unless clearly erroneous. ***Id.*** Whether the defendant's proof satisfies either the deficient performance prong or the prejudice prong is a question of law that we review independently. ***Id.***

I. Failure to seek suppression of Perez's incriminating statements

¶17 Perez claims his trial counsel was deficient in failing to seek suppression of his incriminating statements to DuBois on the ground they were involuntary. The trial court rejected this claim on the basis that Perez's statements were voluntary and a motion to suppress therefore would have failed. Forgoing a suppression motion is not ineffective assistance if the motion would not have succeeded. *See* ***State v. Jackson***, 229 Wis. 2d 328, 344, 600 N.W.2d 39 (Ct. App. 1999) (defendant who alleges counsel was ineffective for withdrawing suppression motion must show the motion would have succeeded). We agree with the trial court that Perez's statements were voluntary and a motion to suppress them would have failed.

¶18 To determine whether a statement was voluntary, we weigh the defendant's personal characteristics against the pressures police imposed upon the defendant. ***State v. Triggs***, 2003 WI App 91, ¶13, 264 Wis. 2d 861, 663 N.W.2d 396. We consider whether, under the totality of the circumstances, the police tactics created sufficient pressure to overcome the defendant's free will. ***Id.*** In making this determination, we accept the trial court's findings of fact unless they are contrary to the great weight and clear preponderance of the evidence. ***Id.***, ¶11. However, we independently review the trial court's application of these facts to the legal standard of voluntariness. ***Id.***

¶19 Perez first argues his statements to DuBois were involuntary because DuBois repeatedly lied to him about the existence of inculpatory evidence. A misrepresentation by police, while relevant to the voluntariness inquiry, does not by itself make a defendant's statement involuntary. ***State v. Fehrenbach***, 118 Wis. 2d 65, 66-67, 347 N.W.2d 379 (Ct. App. 1984). The misrepresentation is but one factor in the totality of the circumstances analysis.

¶20 In ***Holland v. McGinnis***, 963 F.2d 1044 (7th Cir. 1992), the Seventh Circuit observed that police misrepresentations about the strength of the evidence against the accused are the type of deception least likely to render a confession involuntary:

> Of the numerous varieties of police trickery, however, a lie that relates to a suspect's connection to the crime is the least likely to render a confession involuntary. Such misrepresentations, of course, may cause a suspect to confess, but causation alone does not constitute coercion; if it did, all confessions following interrogations would be involuntary because "it can almost always be said that the interrogation caused the confession." Thus, the issue is not causation, but the degree of improper coercion .... Inflating evidence of [the defendant's] guilt interfered little, if at all, with his "free and deliberate choice" of whether to confess, for it did not lead him to consider anything beyond his own

> beliefs regarding his actual guilt or innocence, his moral sense of right and wrong, and his judgment regarding the likelihood that the police had garnered enough valid evidence linking him to the crime. In other words, the deception did not interject the type of extrinsic considerations that would overcome [the defendant's] will by distorting an otherwise rational choice of whether to confess or remain silent.

Holland, 963 F.2d at 1051 (citations omitted).

¶21 In ***Triggs***, we cited with approval ***Holland***'s explanation of why police lies regarding inculpatory evidence are unlikely to render a statement involuntary. ***Triggs***, 264 Wis. 2d 861, ¶19. Because the misrepresentation at issue in ***Triggs*** went directly to the strength of the evidence against the defendant, we determined the misrepresentation "[bore] little upon our analysis of whether under the totality of the circumstances the confession was involuntary." ***Id.***, ¶20.

¶22 As in ***Triggs***, the misrepresentations Perez complains of all go to the strength of the evidence against him. We therefore give little weight to these misrepresentations in analyzing whether Perez's statements were voluntary under the totality of the circumstances.

¶23 Perez attempts to distinguish ***Triggs*** by suggesting that lying about DNA evidence is inherently different from lying about other evidence. The two cases Perez cites for this proposition do not support it.

¶24 In ***State v. Cayward***, 552 So. 2d 971, 973-74 (Fla. Dist. Ct. App. 1989), the court upheld an order suppressing the defendant's confession, not because the police had lied about DNA evidence, but because they had fabricated laboratory reports indicating that semen stains found on the victim's underwear came from the defendant. The key distinction in ***Cayward*** was not that DNA

evidence was involved. Rather, the court drew a line between "verbal assertions," which are permissible, and "manufactured documentation," which is not. ***Id.***

¶25 In ***State v. Phillips***, 30 S.W.3d 372, 374 (Tenn. Crim. App. 2000), an investigator falsely told the defendant police had obtained DNA samples from the victim. The appellate court affirmed an order suppressing the defendant's confession, but not on the misrepresentation basis alone. Instead, the court found the defendant's confession involuntary because of the combination of: (1) the DNA misrepresentation; (2) statements that law enforcement officials would be involved if the defendant did not confess; and (3) promises that the defendant and his victim would only receive treatment if he fully confessed. ***Id.*** at 377.

¶26 Perez also attempts to distinguish his case from ***Triggs*** on the basis that ***Triggs*** involved one lie, while DuBois told multiple lies. This argument is unpersuasive. All of DuBois' misrepresentations involved the existence of inculpatory evidence, the type of deceit least likely to result in an involuntary confession. Thus, the fact that DuBois told several lies instead of one does not make a perceptible difference in our analysis. Accordingly, we give little weight to DuBois' misrepresentations in analyzing whether Perez's statements were voluntary.

¶27 Perez also argues his statements to DuBois were involuntary because DuBois offered Perez significant inducements to confess. On multiple occasions during the interrogation, DuBois made statements to Perez about the benefits of admitting guilt. *See supra*, ¶7. However, DuBois did not promise Perez leniency in exchange for his confession. "An officer telling a defendant that his cooperation would be to his benefit is not coercive conduct, at least so long as leniency is not promised. Similarly, coercive conduct does not occur when … an

officer, without promising leniency, tells a defendant that if he or she does not cooperate the prosecutor will look upon the case differently." ***State v. Deets***, 187 Wis. 2d 630, 636-37, 523 N.W.2d 180 (Ct. App. 1994) (citations omitted).

¶28 The statements DuBois made are similar to those in ***State v. Berggren***, 2009 WI App 82, 320 Wis. 2d 209, 769 N.W.2d 110, which we found were not improper or coercive. In ***Berggren***, a detective interrogating the defendant conveyed "the idea that if [the defendant] confessed he would get treatment … and his confession would have a large impact on the district attorney's position." ***Id.***, ¶29. Just as the detective in ***Berggren*** merely predicted what the district attorney would do, here DuBois merely predicted what the judge would do if Perez confessed. Because DuBois did not promise leniency, his statements inducing Perez to confess were not inherently coercive or improper.

¶29 Because DuBois' inducements to confess were not inherently improper, the only police conduct we must weigh against Perez's personal characteristics is DuBois' deception about inculpatory evidence. After conducting this balancing test, we conclude Perez's statements were voluntary.

¶30 Perez cites his eleventh-grade education as a factor that makes him particularly vulnerable to police pressure. However, in ***In re Shawn B.N.***, 173 Wis. 2d 343, 365, 497 N.W.2d 141 (Ct. App. 1992), we found voluntary the confession of a thirteen-year-old boy who almost certainly had no more than an eighth-grade education.

¶31 Perez also argues his lack of prior contact with police made him vulnerable. Perez testified at the postconviction hearing that he had never been interrogated before his encounter with DuBois. However, on cross-examination Perez admitted talking to police at his workplace on a prior occasion when he was

accused of punching Taylor in the forehead. Thus, before he was interrogated by DuBois, Perez had been questioned by police about potentially criminal behavior involving the same victim.

¶32 Perez next argues he was vulnerable to police pressure because he had quit smoking less than two weeks before the interrogation. However, Perez has not presented any evidence that nicotine withdrawal affected the voluntariness of his statements. At the postconviction hearing, Perez testified that his desire for a cigarette may have affected his stress level during the interrogation. He has never claimed, though, that his desire to smoke interfered with his ability to think clearly or to decide what to say to DuBois.

¶33 Perez also argues his failure to receive an insulin shot or food during the interrogation made him vulnerable to police pressure. Perez testified at the postconviction hearing that when he does not take his insulin shot at the appropriate time he experiences "mood swings" and feels "kinda woozy." However, Perez admitted under cross-examination that his lack of insulin did not affect his ability to think clearly during the interrogation. Perez's trial counsel testified Perez never told her he had asked DuBois for food and never indicated he had been disoriented during the interrogation. The record is devoid of evidence that Perez's diabetes adversely affected his ability to withstand police pressure.

¶34 Finally, Perez argues he was vulnerable to police pressure because he is a conflict-averse person. The only evidence of this is Perez's fiancée's testimony that he reacts to stressful situations by attempting to avoid conflict. We do not believe this testimony demonstrates a particular susceptibility to police stratagems.

¶35 The personal characteristics Perez claims made him vulnerable to police pressure should be viewed in light of the fact that he was thirty-four years old, was given ***Miranda*** warnings and said he understood them, and had recent experience being questioned by police. After balancing Perez's personal characteristics against the police tactic of lying about the existence of inculpatory evidence, we conclude Perez's statements were voluntary. Because a motion to suppress on voluntariness grounds would have failed, Perez's trial counsel was not ineffective for failing to make such a motion.

II. Failure to present expert testimony

¶36 Perez next claims his trial counsel was ineffective because she failed to present expert testimony that the interrogation techniques DuBois used can induce false confessions. However, ***State v. Van Buren***, 2008 WI App 26, 307 Wis. 2d 447, 746 N.W.2d 545, forecloses this argument.

¶37 Van Buren argued his trial attorney was ineffective for failing to present testimony from a false-confession expert. ***Id.***, ¶17. At the postconviction hearing, Van Buren's expert "describ[ed] different factors that make false confessions more likely and not[ed] factors that could make Van Buren more or less likely to confess falsely." ***Id.***, ¶16. We rejected Van Buren's claim of ineffective assistance, concluding that counsel's failure to present expert testimony on false confessions was not deficient performance. ***Id.***, ¶18. We reasoned:

> The issue is not whether the evidence could have come in, but whether Van Buren's counsel, by not offering it, fell below an objective standard of reasonableness as measured against prevailing professional norms. Even if Van Buren is correct and false-confession expert testimony should be admitted, the published and unpublished cases contain only one instance of its introduction at a trial in Wisconsin, nearly fifty years ago. Given this fact, we could not hold

> that the failure to introduce such testimony falls below "prevailing professional norms."

Id., ¶19 (citation and footnote omitted). As in ***Van Buren***, Perez's trial counsel's failure to present expert evidence on false confessions was not deficient performance.

¶38 Perez also argues his trial counsel was ineffective for failing to introduce expert testimony concerning the techniques Tell and DuBois used to interview Taylor. At the postconviction hearing, Perez's trial counsel testified she retained an expert to evaluate Taylor's credibility, and the expert's opinion was unfavorable to the defense. Additionally, counsel had viewed the video of Taylor's interview and believed the protocol Tell and DuBois used was largely appropriate. Counsel noted the interviewers did not use leading questions, and Taylor spontaneously accused Perez of sexually assaulting her in response to the open-ended question, "Who is Gilbert." At the postconviction hearing, Perez's expert agreed that "the interview [of Taylor] was conducted for the most part in a proper way." Given these facts, a reasonable attorney could conclude that having an expert testify about the interview techniques used on Taylor would not be fruitful. Counsel's decision to forego expert testimony fell within "the wide range of professionally competent assistance," *see* ***Strickland***, 466 U.S. at 690, and did not amount to deficient performance.

III. Failure to seek exclusion of Perez's statements that he grabbed Taylor's neck, caused her to develop blisters, and punched her

¶39 Perez argues his trial counsel should have moved to exclude his statements that he: (1) picked Taylor up by the neck; (2) made Taylor clean a wall, causing her to develop blisters; and (3) punched Taylor.[2]

¶40 At trial, Bauer testified Taylor told him that "Gilbert picks her up by the throat and holds her up off the ground when he is angry with her. And she said that she didn't like it because she can't breathe during that time." During his interrogation, Perez admitted doing something similar to what Taylor described, but he minimized the seriousness of his conduct. He explained he was trying to get Taylor's attention, not inflict pain:

> I didn't squeeze her. I just went like that, you know, so she would look at me because she kept putting her head down. I didn't do it to hurt her.
>
> ….
>
> I didn't grab her hard. I went like that, you know, to get her attention because she kept yelling … I started crying, and I wasn't hurting her. I wasn't hurting anyone …. I was trying to get her controlled because she kept running back and forth.

¶41 At the postconviction hearing, Perez's trial counsel testified she understood the incident as Perez putting his palm "basically underneath the chin

[2] In Claim 3 of his postconviction motion, Perez argued his attorney was ineffective for failing to move for exclusion of all evidence that Perez had picked Taylor up by the neck, made her clean the wall, and punched her. On appeal, Perez has significantly narrowed this claim, challenging only counsel's failure to object to "statements made by Perez during the interrogation." Consistent with this framing of the issue, Perez's brief cites solely to statements he made to DuBois during the interrogation. Perez has therefore abandoned his trial court claims that counsel was ineffective for failing to object to statements Taylor made during her interview, and to testimony by DuBois and Bauer. *See* ***State v. Ledger***, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993) (issues not briefed or argued are deemed abandoned).

and just kind of getting [Taylor's] attention." Because counsel viewed what Perez had done as an effective way to get the attention of a rambunctious child, she did not want Perez's statements about the incident suppressed. Perez's statements countered Bauer's testimony that Perez had picked Taylor up by the neck and made it difficult for her to breathe. Absent Perez's explanation, the jury would have been left with Bauer's testimony and Taylor's statement that Perez "pulled my neck and he pulled me up" and that "sometimes … it hurts." Because Perez's statements to DuBois about the incident cast his conduct in a less blameworthy light, counsel's decision not to seek their exclusion was not deficient performance.

¶42 A similar analysis applies to the wall-scrubbing incident. Bauer testified, "[Taylor] said that her step dad, Gilbert Perez, made her scrub … crayon off the wall with her bare fingers." This testimony implied that Perez purposely caused Taylor to scrub so vigorously that she developed blisters on both hands. During the interrogation, Perez offered a more innocuous explanation. He said Taylor had seen him scrubbing crayon off the wall and offered to help. He did not realize until later that she had scrubbed so vigorously her hands blistered. Perez stated, "[I]f I knew that was going to happen, I would have finished it myself."

¶43 Perez's statements provided an alternate, innocent explanation for the blisters on Taylor's fingers. Counsel testified at the postconviction hearing that her trial strategy was to portray the wall-scrubbing incident as an example of Taylor trying to be helpful rather than as an incident of physical abuse. Thus, given Bauer's testimony, failure to seek exclusion of Perez's statements about the wall-scrubbing incident was not deficient performance.

¶44 Perez also argues his trial counsel should have moved for exclusion of his statements that he previously punched or hit Taylor. Although counsel had

watched the video of Perez's interrogation "multiple times" before trial, by the time she testified at the postconviction hearing she had not seen the video in more than a year. She had no recollection of Perez making any references during the interrogation to hitting or punching Taylor. Therefore, she could not recall any strategic reason for not seeking to exclude these statements.

¶45 However, a motion to exclude these statements would have failed. At trial, the defense argued that DuBois used deceit and other interrogation tactics to convince Perez he could have sexually assaulted Taylor and blocked out the memory of doing so. Perez's statements about the punching incident were relevant to rebut this theory. Perez stated he had been accused of punching Taylor and police had interviewed him about the allegation. These statements show that Perez had prior contact with police, a factor that tends to reinforce the voluntariness of his incriminating statements and rebut the defense theory that they were the product of DuBois' overreaching. Because a motion to exclude Perez's statements about the punching incident would not have succeeded, counsel's failure to file such a motion was not deficient performance. *See* ***Jackson***, 229 Wis. 2d at 344.

IV. Failure to present evidence that Taylor had seen Perez and his fiancée engaging in sexual intercourse

¶46 Perez argues his trial counsel should have presented evidence that Taylor had seen Perez and his fiancée having sexual intercourse. At the postconviction hearing, Perez and his fiancée testified that on at least one occasion Taylor had come into their bedroom and seen them engage in sex "from behind." Perez argues his counsel should have introduced this evidence at trial because it provides an alternate explanation for Taylor's knowledge of anal intercourse.

¶47 At the postconviction hearing, Perez's trial counsel testified she "didn't see the similarities" between Taylor's allegations and what Taylor had seen Perez and his fiancée doing. While counsel admitted she knew Taylor had seen Perez and his fiancée having sex, she could not recall ever being told what position Taylor had observed. Perez testified he told his counsel about the incident, but he admitted he could not recall "if I told her what position it was." Thus, it is far from clear that Perez's counsel had specific information before trial that Taylor had seen Perez and his fiancée having sexual intercourse "from behind." Additionally, seeing sexual intercourse "from behind" could not have explained Taylor's knowledge of oral intercourse. Given these facts, a reasonable attorney could conclude that introducing evidence Taylor had seen Perez and his fiancée having sex would not help her client's case.

¶48 Furthermore, while counsel initially stated she had no strategic reason for failing to introduce this evidence, she later indicated it would have been at odds with other evidence that Perez's diabetes affected his ability to perform sexually. Counsel believed evidence that Perez and his fiancée engaged in sexual intercourse "would cloud the issue" of his sexual functioning and she "wanted to steer clear of that." Counsel's strategic decision not to introduce this evidence fell within "the wide range of professionally competent assistance," *see* ***Strickland***, 466 U.S. at 690, and did not amount to deficient performance.

By the Court.—Judgment and order affirmed.

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