COURT OF APPEALS
DECISION
DATED AND FILED

August 3, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1820-CR **Cir. Ct. No. 2008CF1287**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AARON B. WORLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Aaron B. Worley appeals from a judgment entered upon a jury verdict convicting him of first-degree sexual assault of a child and from an order denying his motion for postconviction relief. Worley argues that he

merits either a new trial or resentencing because the mother's testimony about the victim's statement to her was wrongly admitted, his trial counsel rendered ineffective assistance at sentencing, the trial court erroneously exercised its sentencing discretion, the evidence was insufficient to support his conviction and it is likely that justice miscarried. Worley's arguments are unpersuasive. We affirm the judgment and order.

¶2 As is relevant to this appeal, the State charged Worley with two counts of first-degree sexual assault of a child. The charges stemmed from an incident involving six-year-old Dayna E., who had spent the night at the apartment Worley shared with his girlfriend, Jacqueline Amman. Amman, Dayna's former baby-sitter, was a good friend of Dayna's mother, Day McCrary.

¶3 According to Dayna's testimony, she told her mother the next day that when she spent the night, she, Amman and Worley were lying in bed watching a movie and, after Amman fell asleep, Worley unbuttoned Dayna's pants, pulled them and her panties down to her knees and rubbed her "crotch" and "butt" with his hand on her bare skin. She said she was "fake sleeping" while Worley engaged in that activity. The court refused to allow McCrary to testify as to what Dayna told her, rejecting the State's argument that Dayna's statements to her were an excited utterance under WIS. STAT. § 908.03(2) (2009-10).[1]

¶4 After Dayna's direct examination and the testimony of several other State's witnesses, the State played a videotaped interview a social worker conducted of Dayna. The jury heard Dayna tell the social worker that, while in

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

bed between Worley and Amman, Worley kissed her, unbuttoned her pants, pulled down her pants and underpants, rubbed her privates with his open hand, which hurt, and then rubbed her butt twice. Dayna also told the interviewer that Amman "woked up" and asked "why she was coloring with me. He … said she is coloring with me. And then, um, she colored with me" and then they "went back to bed" and "he started doing it again."[2]

¶5 On cross-examination, defense counsel questioned Dayna about differences between her trial testimony and the videotaped interview. The State later argued that, by attacking Dayna's credibility, Worley had opened the door to prior consistent statements. *See* WIS. STAT. § 908.01(4)(a)2. The court allowed the State to recall McCrary, Dayna's mother. McCrary then testified that Dayna told her she "did not want to go to [Amman's] house anymore" because Worley "was messing with her," by which McCrary said Dayna meant that Worley was "[r]ubbing her privates." The jury found Worley guilty of the first count of first-degree sexual assault (sexual contact with the vaginal area) and acquitted him of the second count (sexual contact with the buttocks).

¶6 At the sentencing hearing, after the prosecutor and defense counsel had completed their arguments, the court asked Worley if he had anything to say before he was sentenced. Worley announced that he was firing Rose, alleging a conflict of interest because Rose had represented Dayna's father ten years earlier. Worley claimed that Amman heard Dayna's father say at the pretrial that he

[2] The videotaped interview was played at the preliminary hearing. The court reporter transcribed the interview as it was played so that it is part of the hearing transcript. The State argued that a portion of the transcription was mistaken and that Dayna had said "cuddling" and "cuddled" rather than "coloring" and "colored." The court ultimately did not allow the transcribed interview to be either altered or distributed to the jury.

"know[s] Terry Rose and everything is taken care of." Worley told the court he "believe[d] perhaps Mr. Rose threw my trial on purpose."

¶7 Indicating surprise at Worley's allocution, Rose continued:

> In terms of throwing the case, well, I'll let the record speak for itself. It is absolutely ridiculous and I don't think that there is anybody who saw that case who would agree with that in one single solitary way. I don't like to sit here and listen to what Mr. Worley has to say which I think is a bunch of nonsense…. He's just looking for things here to be critical and I understand he's very frustrated but to turn against me I think he's turning against the wrong person and I don't feel that there is any kind of conflict of interest whatsoever in this case. [Had I] at any time felt there was a conflict of interest, I would have withdrawn from the Worley case. I am very busy and I don't need to sit here in this case and either listen to this kind of nonsense or proceed with a case on behalf of Mr. Worley where I feel there's a conflict of interest because of some financial reasons or any other reasons. It just isn't the situation at all so I take exception to what Mr. Worley has to say here and I think there's nothing further I need to say with respect to sentencing.

The court determined it was appropriate to adjourn the sentencing hearing and appoint new counsel.

¶8 At the adjourned hearing, the court imposed a twenty-year bifurcated sentence. Worley's motion for postconviction relief seeking a new trial and/or resentencing was denied, and he appeals.

¶9 Worley first argues that the trial court erroneously denied his postconviction motion for a new trial in regard to admitting McCrary's testimony regarding Dayna's prior consistent statement about Worley's alleged conduct. We review an order denying a postconviction motion seeking a new trial under the erroneous exercise of discretion standard. ***State v. Randall***, 197 Wis. 2d 29, 36, 539 N.W.2d 708 (Ct. App. 1995). Worley contends that the trial court simply

admitted McCrary's testimony without analysis and a "conclusion without explanation" shows a lack of an exercise of discretion. He further argues that the record does not salvage the court's determination because the testimony was not offered to rebut a charge of recent fabrication or improper influence or motive, *see* ***State v. Mainiero***, 189 Wis. 2d 80, 103, 525 N.W.2d 304 (Ct. App. 1994), nor—contrary to the State's position—does it reflect an excited utterance. A trial court misuses its discretion if it makes an error of law. *See* ***State v. Peters***, 166 Wis. 2d 168, 175, 479 N.W.2d 198 (Ct. App. 1991).

¶10 We will assume for the sake of argument that Dayna's statement to McCrary that Dayna "did not want to go to [Amman's] house anymore" because Worley "was messing with her" by "[r]ubbing her privates" does not qualify as a prior consistent statement. In light of the entire trial, however, *see* ***State v. Koller***, 2001 WI App 253, ¶62, 248 Wis. 2d 259, 635 N.W.2d 838, we conclude that any error in allowing McCrary's brief testimony, less detailed than Dayna's, was harmless, *see* ***Mainiero***, 189 Wis. 2d at 103-04.

¶11 Worley next contends that the trial court wrongly denied his postconviction request for a new sentencing hearing based on ineffective assistance of trial counsel at sentencing.[3] To succeed on an ineffective-assistance-of-counsel claim, a defendant must prove both deficient performance and prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must point to specific acts or omissions of the

[3] Worley's postconviction motion alleged two instances of ineffective assistance, one involving trial counsel Terry Rose and the second involving Andrea Rufo, the attorney appointed to represent him at the adjourned sentencing hearing. He apparently has abandoned the claim against Rufo on appeal.

lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. Proving prejudice demands that he or she establish a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Id.*** The defendant's failure to establish one prong relieves the reviewing court of considering the other. ***Id.*** at 697.

¶12 Worley basically asserts that Rose should have limited his on-the-record comments to an expression of surprise at the content of Worley's allocution and a request to withdraw as counsel. Worley complains that Rose's actual comments left the court with a negative last impression of him about which, with the adjournment, the court had "substantial time to ruminate."

¶13 Worley offers no authority for the proposition that Rose performed deficiently by responding as he did to the accusation that he "threw [the] trial on purpose." Worley has not come close to overcoming the "strong presumption that counsel acted reasonably within professional norms." *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Further, Rose was removed from the case, as Worley requested. We are at a loss as to what remedy he seeks.

¶14 Worley next calls into question the trial court's exercise of sentencing discretion under ***State v. Gallion***, 270 Wis. 2d 535, 678 N.W.2d 197 (2004), and WIS. STAT. § 973.017(10m).[4] Worley contends that the court failed to

[4] Worley notes that his postconviction motion "inaccurately references WIS. STAT. § 973.017(2)(a)" but that "it is clear from the postconviction motion and decision hearings that all parties and the circuit court understood the defense was referencing [] § 973.017(2)(10m)." We presume Worley means § 973.017(10m).

identify the sentence's objectives until the postconviction motion hearing, and even then did not consider probation as the first alternative. We disagree.

¶15 On appeal, review is limited to determining if discretion was erroneously exercised. *See* ***Gallion***, 270 Wis. 2d 535, ¶17. Where the exercise of discretion has been demonstrated, this court follows a consistent and strong policy against interfering with the trial court's discretion in passing sentence. ***Id.***, ¶18. "The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." ***McCleary v. State***, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971) (citation omitted). The trial court has an additional opportunity to explain its sentence when challenged by postconviction motion. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

¶16 The trial court considered Worley's educational, employment and criminal history, noting that the latter was "minimal," except for a recent incident of "extremely assaultive behavior" that involved "[a]ttacking [Amman's brother] with a baseball bat." The court adequately, if implicitly, rejected probation when it ruled that Worley "need[s] to be confined" because "[t]he public is outraged by crimes like this as they are by few other crimes, particularly when it is a child of such tender years." The court also stated that it intended to impose a sentence geared toward punishment rather than opportunities for rehabilitation because of the seriousness of the offense at issue, calling it "opportunistic, predatory, and especially aggravating" given the age disparity. *See* ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20 (stating that it is within the court's wide discretion to determine how much weight to assign the various factors). We

conclude that the trial court gave proper consideration to the relevant factors and amply explained the basis of the sentence.

¶17 We also reject Worley's claim that the evidence was insufficient to convict him. His challenge goes to the credibility of the witnesses. That is a matter for the jury, not this court. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (1990). This court looks at the evidence in the light most favorable to the verdict, accepts reasonable inferences the jury has drawn, and from there determines whether the jury, acting reasonably, could be so convinced by evidence that it had a right to believe and accept as true. *See* ***id.***

¶18 To find Worley guilty, the State had to prove that he intentionally touched Dayna's vaginal area with the intent to become sexually aroused, and that Dayna was under the age of thirteen. It is undisputed that Dayna was six. Her trial testimony and videotaped statements that Worley pulled down her pants and underwear and rubbed her vaginal area with his hand supports the jury's findings. His sufficiency-of-the-evidence claim fails.

¶19 Finally, Worley suggests he is entitled to a new trial on grounds that admitting Dayna's prior consistent statement through McCrary caused justice to miscarry. *See* WIS. STAT. § 752.35. We already have determined that any error in that respect was harmless. It does not appear from the record that it is probable that justice miscarried in any other regard.

By the Court.—Judgment and order affirmed.

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