COURT OF APPEALS
DECISION
DATED AND FILED

September 7, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2091-CR **Cir. Ct. No. 2008CF4403**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LOUIS TORRES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Louis Torres appeals a judgment convicting him of three counts of second-degree sexual assault with use of force or violence. He also appeals an order denying his postconviction motion. He argues that: (1) the evidence was insufficient to support the conviction; (2) he received ineffective

assistance of counsel because his attorney should have called his nephew, Michael Torres, as an alibi witness; and (3) he was denied his constitutional right to confront the witnesses against him. We affirm.

¶2 Torres argues that the evidence was insufficient to support the conviction. When reviewing the sufficiency of the evidence, we look at whether "'the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (quoting ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)).

¶3 At trial, the victim testified at length about what occurred the night of the assault. She testified that she asked Torres, who was her apartment manager, to come over to her apartment in the early evening to help her assemble a desk. Torres made unwanted sexual advances and kept urging her to take some morphine pills he brought with him. She testified that she eventually took the pills because she was trying to get him to leave her apartment, and she thought he would leave her alone if she did what he wanted. The victim then drove to her boyfriend's apartment, but her boyfriend refused to see her because he was angry that she had taken morphine and that Torres had been in her apartment earlier in the evening.

¶4 The victim testified that she then returned to her apartment, but was very frightened because she thought that she was going to die from the morphine she had taken. She called her boyfriend repeatedly and left messages asking him to come over. Sometime between 2 a.m. and 4 a.m., Torres returned to her apartment. The victim testified that she let him in because she was frightened and

thought he might be able to help. The victim testified that she went into her bedroom to get something, and Torres followed her. She testified that he had his pants off and forced her to have vaginal, oral and anal sex over the next several hours, despite her attempts to fight him. The victim testified that she sustained severe physical injuries as a result of the rape, which included getting a tooth knocked out during forced oral sex. She also required catheterization after the assault because she could not urinate. The victim's testimony was corroborated by testimony from the Sexual Assault Nurse Examiner who treated the victim at the hospital after the assault. Torres did not testify on his own behalf, but his attorney argued that Torres and the victim had consensual sex.

¶5 Looking at the evidence in the light most favorable to the State and the conviction, as we are required to do, *see* ***Zimmerman***, 266 Wis. 2d 1003, ¶24, the victim's testimony that she was assaulted by Torres, coupled with the evidence of the physical damage to the victim, was more than sufficient to support the jury's verdict of guilt on the charges. Torres contends that the jury should not have believed the victim's testimony because it was inconsistent and the victim lacked memory of crucial details. The credibility of the witnesses is a matter committed to the jury as the trier of fact. ***State v. Young***, 2009 WI App 22, ¶17, 316 Wis. 2d 114, 762 N.W.2d 736. The fact that the victim did not remember how certain things occurred, or that her testimony had some minor inconsistencies, does not render her testimony incredible as a matter of law. The jury rejected Torres' contention that the sex had been consensual, and believed the victim's testimony that she had been brutally and repeatedly raped. The evidence presented at trial was sufficient to support the jury's verdict.

¶6 Torres argues that he received ineffective assistance of counsel because his trial attorney should have called his nephew, Michael Torres, as a

defense witness. Michael Torres submitted an affidavit stating that he was with the defendant from 8:30 a.m. until 9:30 a.m. the morning after the assaults occurred. The defendant contends Michael Torres' testimony would have shown that Michael Torres was with the defendant at the time the victim claimed he was at her apartment assaulting her, which would have provided both a partial alibi and undermined the victim's credibility. Torres argues that the circuit court should have held a ***Machner***[1] hearing so that he could have shown the facts necessary to prove his claim.

¶7 To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's errors were prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "To prove deficient performance, a defendant must show specific acts or omissions of counsel that were 'outside the wide range of professionally competent assistance.'" ***State v. Nielson***, 2001 WI App 192, ¶12, 247 Wis. 2d 466, 634 N.W.2d 325 (citation omitted). "To demonstrate prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.***, ¶13. "If we conclude that the defendant has not proven one prong, we need not address the other." ***Id.***, ¶12. The circuit court must hold a hearing on a postconviction motion when a defendant "alleges sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. "This is a question of law that we review de novo." ***Id.***

[1] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶8 Assuming the facts alleged by Michael Torres are true, the defendant is not entitled to relief. The victim did not testify that Torres was at her apartment assaulting her between 8:30 a.m. and 9:30 a.m.; she testified that she did not recall exactly when the defendant left her apartment. She testified that it was "early in the morning, anywhere between seven in the morning and nine in the morning," and she also testified that her sister had called her around 10 a.m. and Torres had been gone "longer than like 45 minutes" at that point. The victim testified that the assault began between 2 a.m. and 4 a.m. in the morning, and lasted several hours, so Michael Torres' testimony would *not* have placed the defendant elsewhere during the assaults. Moreover, the time the defendant said he left the apartment was not relevant to the central issue in the case—whether the sexual activity between the victim and Torres, which Torres did not deny, was consensual. Torres has not shown that his counsel's failure to introduce Michael Torres' testimony constituted deficient performance or that he was prejudiced by it. Therefore, we reject the argument that Torres received ineffective assistance of trial counsel.

¶9 Finally, Torres argues that his right to confront the witnesses against him was violated because one of the State's witnesses, Janice Maly, who is a forensic scientist in the DNA analysis unit at the State Crime Laboratory, testified that her colleague identified Torres' DNA on beer cans found at the scene.

¶10 "A Wisconsin criminal defendant's right to confront witnesses is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 7 of the Wisconsin Constitution." ***State v. Hoover***, 2003 WI App 117, ¶6, 265 Wis. 2d 607, 666 N.W.2d 74 (footnotes omitted). "The right of confrontation includes the right to cross-examine adverse witnesses to expose potential bias." ***Id.*** "The fundamental inquiry in deciding

whether the right of confrontation was violated is whether the defendant had the opportunity for effective cross-examination." ***Id.***

¶11 Maly testified that she tested DNA found in a condom at the scene, which matched Torres' DNA profile. Maly then explained that her colleague, Susan Noll, had analyzed DNA found in two beer cans at the scene, which also matched Torres' profile. Torres did not object to this testimony or cross-examine Maly about the testing of the beer cans. Torres also did not raise this confrontation clause claim in his postconviction motion.

¶12 Torres has waived his right to raise this argument because he did not object to Maly's testimony at trial. *See* ***State v. Boshcka***, 178 Wis. 2d 628, 642, 496 N.W.2d 627 (Ct. App. 1992) (failing to contemporaneously object to an evidentiary or constitutional error waives it). He also did not raise the issue in his postconviction motion. *See* ***State v. Hayes***, 2004 WI 80, ¶21, 273 Wis. 2d 1, 681 N.W.2d 203 ("'[I]ssues not raised in the circuit court will not be considered for the first time on appeal.'") (citation omitted). Even if the issue were not waived, however, it would be unavailing because any error was harmless. "Violation of the Confrontation Clause 'does not result in automatic reversal, but rather is subject to harmless error analysis.'" ***State v. Hale***, 2005 WI 7, ¶59, 277 Wis. 2d 593, 691 N.W.2d 637 (citation omitted). "An error is harmless if the beneficiary of the error proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" ***Id.***, ¶60 (citation omitted). As aptly pointed out by the State, the testimony that Torres' DNA was found on beer cans in the victim's apartment "showed only that Torres was present in [the victim's] apartment, a fact he never contested" and, if anything, "*supports* [the] argument that [the victim] consented to sex, as it shows Torres at least had permission to be in the apartment at some point and was drinking beer there, rather than simply

breaking in intent on rape." We conclude that any error in admitting Maly's testimony about the beer cans did not contribute to the verdict obtained, and was thus harmless.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).