COURT OF APPEALS
DECISION
DATED AND FILED

September 10, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2736-CR **Cir. Ct. No. 2011CF4068**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADRIAN O. COTTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Adrian O. Cotton appeals a judgment of conviction entered after a jury found him guilty of second-degree sexual assault of a child.

See WIS. STAT. § 948.02(2) (2011-12).[1] He also appeals an order denying his motion for postconviction relief. He claims that his trial counsel was ineffective for failing to call a witness on his behalf and for failing to object to the State's closing argument. We reject his contentions and affirm.

BACKGROUND

¶2 The State charged Cotton with sexually assaulting L.A.G. He disputed the charge, and the matter proceeded to trial.

¶3 The trial evidence revealed that L.A.G. is a cognitively limited young woman. On June 15, 2011, when she was fifteen years old, she and her friend Alexis Smiley rode their bicycles to a house on 39th Street in their Milwaukee, Wisconsin neighborhood. L.A.G testified that Cotton later arrived with his brother and another man. She said that she then went with Cotton into the basement, which contained a bed. She told the jury that she got into the bed with Cotton, who put on a condom and had penis-to-vagina intercourse with her for about ten minutes. When the incident ended, L.A.G. left the house with Smiley. The police stopped the pair because L.A.G.'s mother had reported L.A.G. missing approximately twenty minutes earlier when she did not come home on time. L.A.G. did not disclose a sexual assault or otherwise make a complaint when the police stopped the girls, and the police directed L.A.G. and Smiley to go home.

¶4 Later that summer, L.A.G. told her brother that she might be pregnant, and she told her mother "little bits" about what had happened to her on

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

June 15, 2011. L.A.G.'s mother took L.A.G to the hospital, where police interviewed her and she reported that Cotton had sexually assaulted her.

¶5 Smiley testified that, on the day she went with L.A.G to the house on 39th Street, Cotton and L.A.G. did not go into the basement together. She admitted, however, that she had previously told police that she saw L.A.G. and Cotton sitting on a bed in the basement that day. Smiley further testified that she and Cotton remained friends but that she no longer maintained a friendship with L.A.G.

¶6 Cotton testified in his own defense. He said that he lived for a time with his friend Sherelle Melendez in her home on 39th Street, but he denied ever going with L.A.G. to the basement of Melendez's house, and he denied ever having sex with L.A.G.[2] His brother, Alvon Cotton, also testified for the defense. Alvon Cotton told the jury that he was at the house on 39th Street when L.A.G and Smiley stopped by but that Cotton was not there that day. Cotton did not call any additional witnesses. The jury found him guilty as charged.

¶7 Cotton moved for postconviction relief. He first alleged that his trial counsel was ineffective for failing to call Melendez to testify. In support of that claim, Cotton filed an affidavit from an associate attorney employed by his postconviction counsel's law firm. According to the affidavit, Melendez told the associate attorney that she was present when L.A.G. and Smiley stopped at Melendez's home, but Cotton was not at the house that day. Melendez also told the associate that Cotton's trial counsel spoke to her but never asked her to testify.

[2] Several spellings of Melendez's given name appear in the record. We adopt the spelling that Cotton uses in his postconviction and appellate submissions.

Based on this affidavit, Cotton argued that his trial counsel prejudiced his defense by failing to call Melendez as a witness.

¶8 Cotton also claimed that his trial counsel was ineffective for failing to object to the State's closing argument. In his view, the State improperly argued that L.A.G. had testified truthfully and that Cotton had not. The circuit court denied Cotton's claims without a hearing. He appeals, seeking a postconviction hearing and, ultimately, a new trial.

DISCUSSION

¶9 We assess claims of trial counsel's alleged ineffectiveness by applying the two-prong test set forth in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A convicted defendant must establish both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. To demonstrate deficiency, a defendant must identify specific acts or omissions by trial counsel that are "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To demonstrate prejudice, "[t]he 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.*** at 694. If a defendant fails to satisfy one prong of the analysis, a reviewing court need not address the other prong. *See* ***id.*** at 697. "[W]hether counsel's performance was deficient and whether such deficient performance was prejudicial are questions of law, which we review *de novo*." ***State v. Tulley***, 2001 WI App 236, ¶5, 248 Wis. 2d 505, 635 N.W.2d 807.

¶10 When a defendant pursues postconviction relief based on trial counsel's alleged ineffectiveness, the defendant must preserve trial counsel's

testimony in a postconviction hearing. ***State v. Curtis***, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998). Nonetheless, a defendant is not automatically entitled to a hearing upon filing a postconviction motion that alleges ineffective assistance of counsel. A circuit court must grant a hearing only if the motion contains allegations of material fact that, if true, would entitle the defendant to relief. ***Allen***, 274 Wis. 2d 568, ¶9. This also presents a question of law for our independent review. ***Id.*** The motion must contain within its four corners specific allegations of material fact showing how the defendant would successfully prove at an evidentiary hearing that he or she is entitled to a new trial. *See* ***id.***, ¶¶23-24. The motion must offer enough such allegations as to "'allow the reviewing court to meaningfully assess the defendant's claim.'" ***Id.***, ¶21 (citation and brackets omitted).

¶11 We first consider the claim that Cotton's trial counsel was ineffective for not calling Melendez to testify at trial. The circuit court correctly denied this claim because Cotton failed to support it.

¶12 "'A defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding.'" ***State v. Prescott***, 2012 WI App 136, ¶11, 345 Wis. 2d 313, 825 N.W.2d 515 (citations omitted). Cotton, however, did not file an affidavit from Melendez showing what she would have said had she testified. Instead, he offered information that Melendez purportedly gave to an associate attorney working for postconviction counsel. The recitation in the affidavit is hearsay, as would be the associate attorney's testimony about anything Melendez told him. *See* WIS. STAT. § 908.01(3); *see also* ***State v. Lass***, 194 Wis. 2d 591, 599, 535 N.W.2d 904 (Ct. App. 1995). Hearsay is generally not admissible, except as provided by rule or

statute. *See* WIS. STAT. § 908.02. Because the affidavit contains no admissible evidence, the affidavit does not serve to show anything that a jury could have heard if trial counsel had called Melendez to the stand, nor does the affidavit reveal anything that could have affected the outcome of the trial.

¶13 To be sure, a defendant does not need to propose a theory of admissibility as to each fact supporting a claim for postconviction relief. *See* ***State v. Love***, 2005 WI 116, ¶36, 284 Wis. 2d 111, 700 N.W.2d 62. The defendant must, however, show prejudice as a consequence of his or her attorney's actions. ***Strickland***, 466 U.S. at 694. Here, Cotton presented only inadmissible hearsay to support his claim that counsel was ineffective by failing to call Melendez as a witness.[3] Therefore, he failed to demonstrate that his trial counsel's actions prejudiced him by preventing the jury from hearing favorable testimony.

¶14 Because Cotton shows no prejudice from his trial counsel's failure to call Melendez to testify, we need not address the deficiency prong of the ***Strickland*** analysis. *See* ***id.*** at 697. We do so here for the sake of completeness. We conclude that the associate attorney's affidavit that Cotton submitted to support his claim, if that affidavit were admissible evidence, does not reveal any deficiency in trial counsel's performance.

[3] Cotton offered nothing in his postconviction motion to justify submitting only hearsay in support of his claim that trial counsel was ineffective for failing to call Melendez. In his reply brief on appeal, he suggests a reason to excuse his action, but that reason finds no support in the record. "We are not a fact-finding court." ***State ex rel. Ford v. Holm***, 2004 WI App 22, ¶36, 269 Wis. 2d 810, 676 N.W.2d 500. Moreover, we are limited to and "'bound by the record as it comes to us.'" *See* ***State v. Linton***, 2010 WI App 129, ¶11 n.3, 329 Wis. 2d 687, 791 N.W.2d 222 (citation omitted). Accordingly, we do not consider Cotton's proffered excuse for failing to obtain an affidavit from Melendez.

¶15 First, the affidavit reflects that trial counsel interviewed Melendez, an allegation that tends to demonstrate, not disprove, trial counsel's diligence in seeking out potential witnesses in this case. Second, nothing in the affidavit describes any information that Melendez gave to trial counsel. The affidavit recites only the information that Melendez purportedly gave to postconviction counsel in September 2012, long after the trial ended in November 2011.[4] Absent material facts showing that Melendez described exculpatory information to trial counsel, we will not presume that trial counsel ignored a helpful defense witness. To the contrary, "the law affords counsel the benefit of the doubt." ***State v. Balliette***, 2011 WI 79, ¶27, 336 Wis. 2d 358, 805 N.W.2d 334. Thus, we indulge

[4] The affidavit of the associate attorney states, in pertinent part:

> On or about September 25, 2012, I contacted Sherelle Melendez who resides in the home in which the alleged criminal incident occurred in the above entitled matter.
>
> Ms. Melendez was present on the date of the alleged incident, and informed me that she was contacted by Cotton's trial counsel, Jessica Stroebel.
>
> Ms. Melendez informed me that she was not asked to testify as [sic] trial, even though she would have corroborated Cotton's story.
>
> Ms. Melendez told me that she saw the victim, L[.]A[.]G[.], that day along with her friend Alexis Smiley, and that while they did stop by the house, Cotton was not there when the girls were.
>
> Ms. Melendez further stated that she allowed one of the girls to use the bathroom but that nobody was ever in the basement or on a bed.
>
> I believe that Ms. Meledez's [sic] statements to myself constitute exculpatory evidence that the jury should have heard at trial because her statements directly support the testimony of Adrian Cotton.

(Paragraph numbering and introductory paragraphs omitted.)

a strong presumption that trial counsel was effective unless the defendant shows otherwise. *See* ***id.***, ¶¶26-27. Indeed, we presume that the law firm representing Cotton in postconviction proceedings carefully crafted the affidavit filed in support of his motion for a new trial to "push his arguments as far as the facts allowed."[5] *See* ***State v. Burton***, 2013 WI 61, ¶63, __ Wis. 2d __, 832 N.W.2d 611. On the record presented here, those facts do not include a showing that Melendez offered trial counsel any exculpatory information when trial counsel contacted Melendez. Because Cotton does not demonstrate that Melendez was a cooperative defense witness before trial, he does not demonstrate that trial counsel performed deficiently by choosing not to call her to testify.

¶16 We turn to the claim that Cotton's trial counsel was ineffective for failing to object during the State's closing argument. Cotton complains that the State vouched for L.A.G.'s credibility, told the jury that she had no reason to lie, and, relatedly, told the jury that Cotton was not telling the truth. He shows no error.

¶17 The Wisconsin Supreme Court "has rejected the strict rule against a prosecutor expressing an opinion based on the evidence." ***State v. Cydzik***, 60 Wis. 2d 683, 694, 211 N.W.2d 421 (1973). Rather, the prosecutor may "'comment on the evidence, detail the evidence, argue from it to a conclusion, and state that the evidence convinces him or her and should convince the jurors.' Further, 'a prosecutor is permitted to comment on the credibility of witnesses as long as that comment is based on evidence presented.'" ***State v. Miller***, 2012 WI

[5] The affidavit includes a statement after the jurat reflecting that the law firm representing Cotton in postconviction proceedings drafted the document.

App 68, ¶20, 341 Wis. 2d 737, 816 N.W.2d 331 (quoted source and internal citation omitted). Thus, "[t]he line between permissible and impermissible argument is drawn where the prosecutor goes beyond reasoning from the evidence and suggests that the jury should arrive at a verdict by considering factors other than the evidence." ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995).

¶18 We must consider the prosecutor's remarks in context. *See* ***id.*** Therefore, we have reviewed the entirety of the closing arguments in light of the trial testimony. While the State argued that L.A.G. had no reason to lie and that she, not Cotton, told the truth, the arguments were not objectionable. As Cotton recognized in his own closing remarks, "this case [wa]s about credibility. It's a he said/she said case." In cases where the credibility of witnesses is plainly the issue, the State may argue that its witnesses told the truth, and, indeed, may use the word "liar" to characterize the defendant and the word "lie" to describe disputed testimony. *See* ***State v. Johnson***, 153 Wis. 2d 121, 132 n.9, 449 N.W.2d 845 (1990). Here, the State compared and discussed the testimony offered by the various witnesses and explained why the jury should credit L.A.G.'s testimony and disbelieve the testimony offered by the defense. Cotton's trial counsel had no cause to object to such an argument. *See* ***id.*** Therefore, his trial counsel did not perform deficiently by foregoing such an objection.

¶19 Moreover, the circuit court instructed the jury that the arguments of counsel are not evidence and that the jury is the sole judge of the credibility of the witnesses. *See* WIS JI—CRIMINAL 160, 300. We presume that the jury followed the circuit court's instructions. *See* ***State v. Delgado***, 2002 WI App 38, ¶17, 250 Wis. 2d 689, 641 N.W.2d 490. Accordingly, were we to agree that the State's closing argument was improper—and we do not—Cotton offers no basis to

believe that he suffered any prejudice when his trial counsel did not object. For the foregoing reasons, 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.