COURT OF APPEALS
DECISION
DATED AND FILED

October 1, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2013AP330-CR
2013AP331-CR
2013AP332-CR

Cir. Ct. Nos. 2010CF110
2010CF184
2010CF321

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM R. STARCK,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Chippewa County: STEVEN R. CRAY, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. William Starck appeals judgments convicting him of three counts of third-degree sexual assault. He also appeals an order denying his postconviction motion to withdraw his no contest pleas in which he alleged ineffective assistance of counsel. He contends his attorney failed to adequately

review the evidence against him before advising him to enter no contest pleas, leaving Starck unaware of weaknesses in the State's case. We affirm the judgments and order.

BACKGROUND

¶2 In the initial complaint (No. 2010CF110), Starck was charged with two counts of first-degree sexual assault of N.S.H., repeated sexual assault of K.M.T., and first-degree sexual assault of A.J.H. Two months later, the State filed a second complaint (No. 2010CF184), charging Starck with first-degree sexual assault of T.S.B. and first-degree sexual assault of M.M.L. Four months later, the State filed a third complaint (No. 2010CF321), alleging first-degree sexual assault of B.E.S. The three complaints were scheduled for separate trials. Three days before the scheduled trial on the first complaint, Starck's counsel negotiated a comprehensive plea agreement.[1] Under the terms of the agreement, the State reduced the charges to third-degree sexual assault of K.M.T., M.M.L. and B.E.S. All of the other charges were dismissed. Starck accepted the plea agreement and entered no contest pleas to the three reduced charges. The court imposed consecutive sentences totaling twelve years' initial confinement and twelve years' extended supervision.

¶3 Starck filed a postconviction motion to withdraw his no contest pleas based on his trial counsel's failure to familiarize himself with all of the evidence

[1] At the time the State filed its brief, these appeals had not been consolidated. Parts of the State's brief faults Starck's brief because it argues issues that relate to the second and third complaints. The appeals were subsequently consolidated with the State's consent, but the State did not redact the portions of its brief that were no longer applicable.

related to each of the three complaints. Specifically, he alleged counsel did not review the videotaped interviews with the victims in the second and third complaints and a medical record disclosing A.J.H.'s sexually transmitted disease. Starck contends: (1) he was not aware of A.J.H.'s disease at the time he accepted the plea agreement and he would not have accepted the plea agreement if he had known this information because he could not have transmitted the disease; (2) he was not aware that B.E.S., in his videotaped interview, said the sexual touching happened "yesterday," an impossibility because Starck was in jail at that time; and (3) in her videotaped statement, M.M.L. said she talked to K.M.T. before the interview, which Starck contends shows she knew what the interviewer expected her to say. He also contends a child who witnessed suspicious activity, E.J.H., showed a willingness to agree with any detail the interviewer asked about. The circuit court denied the motion to withdraw the pleas, concluding Starck had not established a manifest injustice because he demonstrated neither his counsel's deficient performance nor prejudice. The court found Starck was aware that the central issue in the case was the credibility of the children and he made a reasoned decision to accept the plea agreement to reduce his exposure to multiple charges.

DISCUSSION

¶4 Whether counsel rendered ineffective assistance is a mixed question of law and fact. ***State v. Nielsen***, 2001 WI App 192, ¶14, 247 Wis. 2d 466, 634 N.W.2d 325. The circuit court's findings of fact will be upheld unless they are clearly erroneous. However, whether the defendant's proof is sufficient to establish ineffective assistance of counsel is a question of law that we review without deference to the circuit court's conclusions. ***Id.*** To establish ineffective assistance of counsel, Starck must show his counsel's performance was deficient

and counsel's errors prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). This court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and Starck must overcome the presumption that the challenged action might be considered sound trial strategy. ***Id.*** at 689. To establish prejudice, Starck must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See* ***id.*** at 694. In the context of a motion to withdraw no contest pleas, he must show that, but for counsel's error, he would not have entered the pleas. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311-12, 548 N.W.2d 50 (1996). A reasonable probability is one that undermines our confidence in the outcome. ***Strickland***, 466 U.S. at 694.

¶5 Starck has not established deficient performance from his counsel's failure to review all of the evidence relating to all three complaints before negotiating the plea agreement and urging Starck to accept it. Counsel reasonably focused his attention on the first of the cases that would come to trial. He reasonably believed the verdict in the first case could be dispositive of the other two cases. Counsel negotiated a comprehensive plea agreement that reduced Starck's prison exposure to thirty years from 420 years. Starck's prison exposure from the first case alone was 240 years. Counsel's review of the evidence regarding the initial complaint established sufficient likelihood of conviction to justify focusing on the comprehensive plea agreement. Counsel's representation did not fall below an objective standard of reasonableness. *See* ***id.*** at 688.

¶6 Starck's argument that he was unaware of A.J.H.'s diagnosis of a sexually transmitted disease fails for two reasons. First, the charge relating to her was dismissed. As the circuit court noted, Starck could not have been prejudiced

by that alleged lack of knowledge. Starck's brief on appeal does not acknowledge the trial court's ruling on that point, much less establish that it is erroneous. Second, the fact that the victim had a sexually transmitted disease does not conclusively establish that Starck did not have sexual contact with her. A defense based on her disease and the fact that Starck could not have transmitted the disease to her would be a weak defense.

¶7 Starck next contends his counsel was ineffective for not knowing or not communicating with Starck about B.E.S.'s credibility because four-year-old B.E.S. told a social worker that the sexual assault happened "yesterday." At the postconviction hearing, Starck's counsel testified he remembered B.E.S. saying that and was aware the statement could not be true. Counsel made a reasonable strategic decision to encourage Starck to accept the plea agreement despite that defect in B.E.S.'s statement. As noted in ***State v. Fawcett***, 145 Wis. 2d 244, 249, 426 N.W.2d 91 (Ct. App. 1988), young children cannot be held to an adult's ability to comprehend and recall dates and other specifics. From the details provided in the complaint and police reports, counsel could reasonably believe a jury would not be concerned about B.E.S.'s confusion as to the time of the assault, and accepting a generous plea agreement was a better strategy than attempting to undermine B.E.S.'s credibility based on the time of the offense.

¶8 Starck next argues the videotaped interview of M.M.L. could be used to challenge her credibility because she had spoken with another victim before the interview and she appeared to be "prepared to offer any detail that the social worker suggested." Starck contends M.M.L. and a non-victim witness, E.J.H., were so impressionable that a jury would not believe their testimony. As the circuit court noted, "This is a peripheral issue to the credibility of both of these

young persons." M.M.L.'s discussion with another of the victims before the interview does not render her account of the assault incredible.

¶9 E.J.H. described a scary movie they were watching when he witnessed suspicious behavior, but could not remember the name of the movie. When he said it started with a "P", the interviewer asked if it was Predator, and E.J.H. readily agreed. His confirmation that they were watching Predator does not seriously undermine his credibility or establish inordinate suggestibility. Starck's knowledge or lack of knowledge about the possibility of cross-examining the witnesses on these peripheral matters would not reasonably influence the decision of whether to accept the plea agreement.

¶10 Finally, Starck has not established that he would not have accepted the plea offer had he been aware of all of the alleged weaknesses in the State's case. The circuit court found Starck was aware that the central issue in the case was the children's credibility and Starck made a reasonable decision to accept the plea agreement to reduce his exposure to multiple charges. Starck does not argue, much less demonstrate, that the circuit court's finding is clearly erroneous. *See* ***Nielsen***, 247 Wis. 2d 466, ¶14. In fact, Starck confirmed in the alternate presentence investigation report that he pled no contest because he wanted to reduce the risk of being found guilty of all of the charges at trial. Because Starck established neither deficient performance nor prejudice from his counsel's decisions, he has not established a manifest injustice that would justify withdrawing his no contest pleas.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).