COURT OF APPEALS
DECISION
DATED AND FILED

December 17, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2244-CR **Cir. Ct. No. 2011CF662**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH C. HAHN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: KAREN L. SEIFERT, Judge. *Affirmed.*

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

¶1 PER CURIAM. Kenneth C. Hahn appeals from a judgment of conviction entered after a jury found him guilty of second-degree sexual assault of a child and from an order denying his motion for postconviction relief. Hahn alleges that trial counsel provided ineffective assistance of counsel by failing to

(1) adequately impeach the victim, (2) object to the improper bolstering of her testimony, (3) introduce an audio tape of Hahn's interview, and (4) object to the trial court's response to a jury question. Hahn further contends that the trial court erred in ruling that trial counsel could not ask the victim certain questions on cross-examination. Because we conclude that trial counsel's performance was not deficient and the trial court did not err, we affirm.

¶2 KAC and her sister both took piano lessons from Hahn's wife. In September 2011, Hahn was charged with two counts of sexual assault of a child for touching KAC's breast on two separate occasions in March 2011. Both incidents allegedly occurred during her sister's lesson time, while KAC and Hahn sat alone in Hahn's living room. At trial, KAC testified that she and Hahn would engage in horseplay including pillow fights and a tickling game. She testified that on March 15, 2011, while Hahn was tickling her arm, he went up through the armhole of her shirt and touched the side of her right breast. She testified that the contact lasted a couple of seconds and that she "thought it was probably just an accident or something" and "didn't worry too much."

¶3 KAC testified that two weeks later, on March 29, 2011, she and Hahn were together on the couch when he reached down the front of her shirt, went underneath her bra, and touched all of her breast, including her nipple. She stated that he was moving his hand around her breast "in a circular motion" and that after about five seconds, she sat up. When asked what happened next, KAC testified that Hahn indicated she should lie back down and that she did so, but "farther down the couch" where "she wasn't touching him." Hahn again put his hand down the collar of her shirt and touched her breast under her shirt for another five seconds. KAC testified that she then got up and went into the piano room with her mother and sister.

¶4 The next day, KAC told her mother about both touching incidents, and her mother contacted the police. Deputy Stefanie McMillin responded and KAC said she did not wish to give a statement. Instead, KAC listened while her mother relayed KAC's story to McMillin, who then authored a police report. Eventually, KAC participated in a videotaped forensic interview at the Child Advocacy Center (CAC). The videotaped interview was not presented at trial.

¶5 Hahn testified that he had engaged in horseplay with KAC on numerous occasions. Though he recalled their pillow fights and tickle play, he denied having ever touched her breasts. The jury acquitted Hahn in connection with the first incident, but found him guilty of the sexual assault occurring on March 29, 2011.

¶6 Hahn filed a postconviction motion alleging that trial counsel was ineffective, the trial court erred, and a new trial should be granted in the interest of justice. After considering trial counsel's ***Machner***[1] hearing testimony along with the parties' written briefs, the trial court denied the postconviction motion in full. Hahn appeals.

Trial counsel's failure to impeach KAC with her prior inconsistent statements did not constitute ineffective assistance of counsel.

¶7 Hahn argues that trial counsel was ineffective for failing to impeach KAC with statements taken from the police report, the preliminary hearing transcript, and the CAC forensic interview. The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was

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

deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish 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. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight … and to evaluate the conduct from counsel's perspective at the time." ***Id***. at 689. Thus, "the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." ***Id***. at 690. To satisfy the prejudice prong, the defendant must demonstrate that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id***. at 694.

¶8 Whether counsel's actions were deficient or prejudicial is a mixed question of law and fact. ***Id***. at 698. The trial court's findings of fact will not be reversed unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's right to effective assistance of counsel is a legal determination, which this court decides de novo. ***Id***. We need not address both prongs of the test if the defendant fails to make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

¶9 Hahn first argues that trial counsel should have impeached KAC with certain inconsistent details contained in McMillin's police report.[2] At the postconviction hearing, trial counsel testified that he made a strategic decision not to impeach KAC with these statements:

> Well, first of all, it wasn't [KAC's] statement, she was sitting there as an observer of what her mother was saying; and, secondly, I don't think in the totality of the circumstances it really would have had any effect to go into something as whether it was a chair or whether it was a couch.
>
> Recall that it was always our plan to put Mr. Hahn on the witness stand and he would have testified exactly pretty much as the events unfolded what the child said happened as far as it being on the couch rather than a chair. And for me to become involved in the mother using the word "chair" but the child using the word "sofa" is not something that I was prepared to do nor would I do it.

Trial counsel testified that given the report's multiple layers of hearsay, KAC could have explained any inconsistencies on redirect "in about a millisecond," leaving the jury with the impression that the defense had resorted to nitpicking.

¶10 We conclude that trial counsel's decision not to impeach KAC with the police report was the result of reasonable trial strategy. Therefore, Hahn has not established that trial counsel's actions constituted deficient performance. ***Id.*** at 690 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.").

[2] The alleged inconsistencies in the police report include that: (1) in describing the March 15, 2011 incident, KAC's mother relayed that KAC told her Hahn stuck his hand up her shirt sleeve and made no mention of his touching her breast; (2) in describing the March 29, 2011 incident, KAC's mother relayed that the touching occurred while KAC was sitting in a chair as opposed to lying on the couch; and (3) KAC's mother mentioned only one incident of touching on March 29, 2011, whereas KAC testified at trial that Hahn touched her breast twice during that second incident.

¶11 Further, we conclude that trial counsel did not perform deficiently by failing to impeach KAC with her preliminary hearing testimony concerning her position on the couch and what occurred after Hahn touched her breast. Trial counsel testified that he thought the cross-examination suggested by postconviction counsel would have been counterproductive:

> I don't think that impeachment is a defense per se. I think impeaching a witness has to be used very delicately because sometimes my experience is that attempts to impeach can be extremely counterproductive, make a lawyer look like he is "beating up" on a youngster by bringing up incidents—information in the form of questions that isn't going to make any difference to the ultimate question and that's what I think lawyers got to do.
>
> You don't bring in every single inconsistency into a jury trial unless it's going to help the client and I don't think the things that you're asking me about would have helped Mr. Hahn, I think they would have hurt Mr. Hahn.

¶12 Trial counsel explained that he focused his cross-examination on the inconsistencies he considered more substantial. For example, he did impeach KAC with her testimony at the preliminary hearing that the incidents occurred in the summertime, when it was warm.[3] Counsel also explained that at trial, KAC's direct examination testimony was internally inconsistent and rife with failings of memory, all of which factored into his cross-examination strategy. Trial counsel reasonably determined that a scattershot approach might have come across to the jury as beating "on a witness on miniscule matters that the lawyer doesn't really feel are that important." *See* ***State v. DeLeon***, 127 Wis. 2d 74, 85, 377 N.W.2d

[3] Trial counsel also extensively cross-examined KAC on other significant topics, including: her refusal to tell police about the incidents when first interviewed, the physical mechanics of how Hahn could have touched her breast from the positions she described, that she had not previously used the word "nipple" in describing the contact, and that the allegations came only after she expressed a desire to quit piano but had not been allowed to quit.

635 (Ct. App. 1985) ("Impeaching a child witness with a prior inconsistent statement is a double-edged-sword—it may cast doubt on the child's credibility; on the other hand, it may cast both the defendant and defense counsel in a negative light."). Given trial counsel's intentionally focused cross-examination and KAC's inconsistent trial testimony, counsel's election not to attempt impeachment with every possible inconsistency was not deficient. *See* ***State v. Adams***, 221 Wis. 2d 1, 12, 584 N.W.2d 695 (citation omitted) ("Trial counsel is free, after considered judgment, to select a particular tactic among available alternatives.").

¶13 Hahn also contends that trial counsel should have impeached KAC with inconsistent statements taken from her CAC forensic interview. We disagree. At the postconviction hearing, trial counsel testified that he was "delighted" to learn that the prosecutor did not intend to admit the videotaped interview in the State's case-in-chief and that he deliberately avoided asking any questions that might lead the State to change its mind. Trial counsel testified "there was no way that I was going to open up any doors to that forensic interview" because this would allow the victim's story to be presented to the jury for "a fourth time" and because videotaped forensic interviews are generally not helpful to the defense:

> Well, I don't like those kind of interviews since they're basically nonadversarial. I think they give an impression of credibility and truthfulness when such might not be the case. The setting they're done in is not the kind of setting that is helpful to the defense in my experience.

Here again, we find no reason to second-guess trial counsel's reasonable strategy.[4] Hahn has not established that trial counsel's failure to impeach KAC with her forensic interview statements was deficient.

Trial counsel did not provide ineffective assistance of counsel by failing to object to a witness's characterization of KAC as articulate.

¶14 At trial, when asked about KAC's demeanor during the forensic interview, Detective Randy Woldt testified without objection:

> I believe she was soft spoken. She appeared to be somewhat nervous but at the same time she was articulate.

Hahn argues that trial counsel should have objected to Woldt's use of the word "articulate" because it implied that KAC was truthful and therefore constituted an impermissible comment on her credibility. *See* ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984) (the credibility of a witness is a determination for the jury, and therefore, a witness may not testify that another witness is telling the truth). At the postconviction hearing, trial counsel testified that he did not object to Woldt's use of the word articulate because he did not view it as a comment on KAC's truthfulness.

¶15 We conclude that trial counsel's failure to object to Woldt's testimony was not deficient because we do not construe Woldt's use of the word "articulate" as synonymous with "truthful" or "believable." Given the lack of any well-founded grounds on which to object, trial counsel reasonably chose not to

[4] Trial counsel additionally testified that though it was his goal to avoid using the forensic interview as impeachment fodder, he was an experienced attorney and had familiarized himself with the interview's contents such that he could and would have reconsidered his strategy if necessary.

draw additional attention to Woldt's testimony. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel's failure to raise meritless claim not deficient performance); *see also* ***State v. Cooks,*** 2006 WI App 262, ¶44, 297 Wis. 2d 633, 726 N.W.2d 322 (counsel's decision to forego an objection in order to avoid drawing unwanted attention to the subject testimony was reasonable).[5]

Trial counsel did not perform deficiently in deciding not to play a portion of Hahn's audiotaped interview at trial.

¶16 At trial, Detective Woldt confirmed that during his interview, Hahn denied ever having touched KAC's breast. Woldt testified that when he asked Hahn whether he might have accidentally touched KAC's breast, "[Hahn] paused for a moment and then he said I doubt it." On further questioning, Woldt agreed it was "safe to say that sometimes, as a detective" people would pause before answering his questions, and characterized the length of Hahn's pause as "[f]our or five seconds." Hahn asserts that in listening to his interview, it is clear there is "virtually no pause" and that trial counsel performed deficiently by not playing this portion of the audiotaped interview to the jury.[6] We disagree.

¶17 At the postconviction hearing, trial counsel testified that he made a decision not to play that portion of Hahn's taped interview out of concern that it

[5] Additionally, the trial court instructed the jury that it was the sole judge of witness credibility. Jurors are presumed to follow the court's instructions. ***State v. Adams***, 221 Wis. 2d 1, 12, 584 N.W.2d 695 (Ct. App. 1998). Thus, we conclude that Hahn has also failed to establish prejudice.

[6] Hahn's appellate brief characterizes the pause as "merely courteous and not evidence of some consciousness of guilt."

would open the door for the State to play other portions or the entire interview for the jury. Trial counsel explained that there were matters on the tape he did not want the jury to hear, such as "the commentary that [Hahn] had been accused of some form of sexual misdeed or assault before." Trial counsel also explained that he did not think Woldt's testimony was particularly damaging because it is generally understood that length-of-time estimates are often inaccurate.

¶18 Hahn has failed to overcome the presumption that trial counsel's decision represented sound trial strategy.[7] Counsel's decision not to risk playing the tape was based on the totality of the circumstances, including his assessment that Woldt's testimony was not particularly damaging. Woldt agreed that he did not know why Hahn had paused and implied that it was not unusual for people to pause in response to police questioning. Hahn, himself, was asked and answered as follows:

> [Trial Counsel]: So when he would ask you a question, you would answer him?
>
> [Hahn]: Yes.
>
> [Trial Counsel]: As a matter of fact when he would ask you a question, sometimes you would think, pause, and answer?
>
> [Hahn]: Yes.

[7] Though Hahn characterizes trial counsel's concern about opening the door as unreasonable and unsupported by legal doctrine, our approach is not so cavalier. Once the audiotape was deemed admissible and introduced as evidence, trial counsel could not control whether and how the State would attempt to introduce additional portions. In the heat of trial, counsel determined that it would be reckless to try and demonstrate a seconds-long discrepancy in the face of unknown consequences.

It was reasonable for trial counsel to determine that any slight value in demonstrating that the short pause at issue was even shorter than Woldt described was not worth the risk of opening a door to the unknown.

Trial counsel did not perform deficiently by not objecting to the trial court's proposed answer to a jury question.

¶19 During deliberations, the jury asked: "Is there a reason why the child advocacy report was not presented? Any legal reason?" The State suggested:

> In terms of the CAC report, my concern is obviously the report wasn't submitted because the child testified and there was no need to do that because of her testimony. So if we could phrase it something along the lines of the CAC report was not submitted because the child testified. You are to based your decision on the testimony presented during the case.

Trial counsel said he agreed with the prosecutor's assessment, and with the parties' approval, the court answered:

> Since the child testified there is no reason to admit the child advocacy report. The jury is to use their collective memory of the evidence to reach a verdict.

¶20 Hahn argues that trial counsel should have objected because the trial court's answer constituted improper commentary on the evidence by suggesting to the jury that KAC's forensic interview statements were consistent with her trial testimony. At the postconviction hearing, trial counsel testified that he did not object to the court's proposed answer because he believed it accurately stated the law and was not legally improper.

¶21 We conclude that the trial court's instruction did not constitute impermissible commentary on the evidence.[8] The trial court's response appropriately addressed the jury's question as to whether there was "any legal reason" why the videotaped interview was not presented.[9] We are not persuaded that the instruction implied to the jury that KAC's trial testimony was consistent with and therefore obviated the need to play the videotaped interview. The trial court's instruction was a neutral, impartial, and accurate statement of the law, and trial counsel did not perform deficiently by failing to lodge a meritless objection. *See* ***Wheat***, 256 Wis. 2d 270, ¶14.

The trial court did not commit reversible error in limiting the scope of cross-examination.

¶22 KAC testified that Hahn touched her breast twice on March 29, 2011. When asked what happened after the first touching, she testified as follows:

> [KAC]: I just sat there and looked at him and then he indicated that I should lay down again and I did but I wasn't touching him, I was farther down on the couch.

[8] Hahn has also raised this as a stand-alone claim of trial court error. Because trial counsel did not object, this claim is appropriately analyzed under the rubric of ineffective assistance of counsel. Regardless, because we conclude that the trial court's answer was not improper, we reject Hahn's "plain error" argument.

[9] WISCONSIN STAT. § 908.08 (2011-12) provides for the admission under the hearsay rules of a videotaped statement of a child witness under certain conditions. The statute was enacted "for the purpose of minimizing the mental and emotional strain that child witnesses in criminal proceedings experience as a result of having to testify." ***State v. James***, 2005 WI App 188, ¶17, 285 Wis. 2d 783, 703 N.W.2d 727. Where as here, the prosecutor apparently determined the child witness could testify without undue strain, the State did not seek to introduce the video under this provision.

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

> [The State]: And then what happened?
>
> [KAC]: He did the same thing again.
>
> [The State]: And when you say the same thing again, I need you to tell us what you mean by that.
>
> [KAC]: He put his right hand down the collar of my shirt and touched my breast.

¶23 On cross-examination, trial counsel attempted to ask KAC why she stayed in the room with Hahn after the first touch occurred.[10] The State objected to this line of inquiry and the trial court sustained the objection on relevance grounds. Hahn argues that the trial court erred in disallowing these questions because they were relevant to KAC's credibility or the veracity of her story.

¶24 The scope of cross-examination is within the trial court's discretion. ***State v. Olson***, 179 Wis. 2d 715, 722, 508 N.W.2d 616 (Ct. App. 1993); *see also* ***State v. Sveum***, 220 Wis. 2d 396, 405, 584 N.W.2d 137 (Ct. App. 1998) (whether to admit or exclude evidence lies within the sound discretion of the trial court). This court will uphold a discretionary determination if the trial court examined the relevant facts and applied a proper legal standard. ***Sveum***, 220 Wis. 2d at 405.

¶25 We conclude that the trial court properly exercised its discretion in precluding this line of questioning. First, consent or the lack thereof is neither a defense to nor an element of the crime of sexual assault of a child. Therefore, KAC's reasons for staying in the room were irrelevant to the issues before the jury. Second, allowing trial counsel to question the child victim about why she did not leave the room created a genuine risk of injecting legally irrelevant and

[10] Specifically, trial counsel asked, "Well, why didn't you just get up and walk away?" and "Did you attempt to leave the area between the first and second time he touched you?"

prejudicial matters into the trial. *See* WIS. STAT. § 904.03 (even relevant evidence is properly excluded if its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues or misleading the jury). Finally, the information sought had little to no probative value. The jury was presented with the undisputed fact that KAC did not leave the room after the first touch and was able to consider this behavior in determining her credibility.

Hahn is not entitled to a new trial in the interest of justice.

¶26 Finally, Hahn seeks a new trial under WIS. STAT. § 752.35 on the ground that the real controversy was not fully tried. Hahn must convince us "that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoting ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996)). An appellate court will exercise its discretion to grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶27 We have already concluded that trial counsel did not perform deficiently and the trial court did not err. "Adding them together adds nothing. Zero plus zero equals zero." ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976). Accordingly, we determine that such exceptional relief is unwarranted and decline to grant Hahn a new trial.

By the Court.—Judgment and order affirmed.

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