COURT OF APPEALS
DECISION
DATED AND FILED

February 11, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2280-CR **Cir. Ct. No. 2011CF45**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROGER M. PRATT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: RICHARD J. NUSS, Judge. *Affirmed*.

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

¶1 PER CURIAM. Roger M. Pratt appeals from a judgment of conviction entered after a jury found him guilty of repeated sexual assault of the same child, SLJ, occurring in 1999, and first-degree sexual assault of MEV, occurring in 2010, and from an order denying his motion for postconviction relief.

Pratt argues that trial counsel was ineffective for failing to challenge the misjoinder or move for severance of the charges in the complaint. In the alternative, Pratt requests a new trial in the interest of justice. Because we conclude that trial counsel's performance was neither deficient nor prejudicial, we affirm.

¶2 The State filed a four-count criminal complaint alleging that Pratt sexually assaulted two children. The first count alleged that in 1999, Pratt engaged in repeated sexual assaults of SLJ, his wife's granddaughter, when she was nine years old. According to SLJ, the assaults would occur in the computer room, while she and Pratt were playing computer games. Counts two, three and four alleged that on November 25, 2010, Pratt had sexual contact three separate times with MEV, his wife's ten-year old grandniece. The jury convicted Pratt of count one involving the 1999 sexual assault of SLJ, and of count four, which alleged that Pratt touched MEV's breasts while in the computer room of his home. Pratt was acquitted of counts two and three.

¶3 Pratt, by counsel, filed a postconviction motion requesting a new trial on the ground that trial counsel was ineffective for failing to request the severance of count one from counts two through four for purposes of trial. At a ***Machner***[1] hearing, trial counsel testified that he researched and considered filing a severance motion but decided against it because first, he believed it would not succeed, and second, Pratt wanted to have a single trial on all four charges. As to the merits of the motion, trial counsel testified that given the similarities of the allegations involving SLJ to those involving MEV, such as the children's ages,

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

offense location, and underlying activity (playing on the computer), and considering the greater latitude afforded other acts evidence in child sexual assault cases, he determined that a motion to sever was unlikely to succeed.

¶4 With respect to Pratt's desire to have all the counts tried together at a single trial, counsel testified:

> I came to the conclusion that I would lose a motion to sever, more than likely. In retrospect, perhaps I should have filed it anyway and argued it out. But the reason I didn't has to do with the second part of the answer here, and that is my discussions with my client regarding it.
>
> He wasn't worried about it at all. Now, that's not something that I would normally just give in on because my client isn't worried about it, but he had some specific reasons why. He felt very strongly that the late reporting of the older victim was so implausible that it helped his whole case and so for us to separate them would actually hurt him and cause him to go through two trials and he didn't want to do that.

Trial counsel testified to Pratt's additional reasons for wanting a joint trial and that he informed Pratt about the risks inherent in a joint trial.[2] Counsel testified that they specifically discussed the possibility of two jury trials and when directly asked about Pratt's opinion, trial counsel testified "I'm positive that he didn't want two jury trials." Ultimately, based on his analysis that they would likely lose a severance motion "combined with Roger not wanting me to pursue it I dropped it."

[2] Trial counsel testified that he discussed with Pratt the risk that the jury might consider the victims' stories more plausible if two separate witnesses accused him of sexual assault, and that despite their discussions, Pratt "was absolutely obsessed with the delayed reporting and how much it helped him. He was obsessed with the fact that you can't sexually assault someone while you're playing Scrabble because they were [such] spirited Scrabble players."

¶5 The trial court concluded that trial counsel's failure to seek separate trials was not deficient and that Pratt failed to establish prejudice. Citing to ***State v Locke***, 177 Wis. 2d 590, 502 N.W.2d 891 (Ct. App. 1993), the trial court stated that severance is not required if the charged counts would be admissible as other acts at separate trials on the other counts. The trial court described Pratt's case as one that "radiated of other acts" and determined that trial counsel had engaged in the proper analysis. Noting the similarities between the assaults, the court ruled that evidence of the counts concerning SLJ would have been admissible as other acts in a separate trial on the MEV charges, and vice versa.[3]

¶6 WISCONSIN STAT. § 971.12(1) (2011-12)[4] provides that two or more crimes may be charged in the same complaint or information if they "are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan." The joinder statute is to be construed broadly in favor of joinder. ***Locke***, 177 Wis. 2d at 596. Pursuant to § 971.12(3), even after initial joinder, the court may order separate trials "[i]f it appears that a defendant or the state is prejudiced by a joinder of crimes …." A motion for severance is addressed to the trial court's discretion and "when evidence of the counts sought to be severed

[3] The trial court determined that pursuant to ***State v. Sullivan***, 216 Wis. 2d 768, 773, 576 N.W.2d 30 (1998), the other acts evidence would have been offered for an acceptable purpose, was relevant, and was not unfairly prejudicial. In concluding that trial counsel was not deficient, the trial court also considered that Pratt, himself, advocated for a joint trial "because it may work to his advantage in that he would be looking at these multiple charges where issues of credibility may present themselves that could maybe work to his favor in one trial versus two."

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

would be admissible in separate trials, the risk of prejudice arising because of joinder is generally not significant." ***Locke***, 177 Wis. 2d at 597 (citation omitted).

¶7 Pratt raises two related claims of ineffective assistance of counsel. Pratt first argues that trial counsel was ineffective for failing to object to the misjoinder of count one with counts two through four because given the eleven-year period between the allegations, the counts were neither "of the same or similar character" nor "connected together" for purposes of WIS. STAT. § 971.12(1). *See* ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988) (crimes are of the "same or similar character" when they are the same types of offenses occurring over a relatively short period of time and the evidence of each overlaps). Second, Pratt argues that even if the charges were properly joined, counsel was ineffective for failing to move to sever count one from counts two through four as provided in § 971.12(3).[5] To succeed on either claim, Pratt must demonstrate that trial counsel's performance was deficient, and that the deficient performance was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, a defendant must overcome a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment" and point to specific acts or omissions that were "outside the wide range of professionally competent assistance." ***Id***. at 690. To satisfy the prejudice prong,

[5] Pratt urges this court to analyze the initial misjoinder claim separately from trial counsel's failure to file a motion to sever under WIS. STAT. § 971.12(3). Though Pratt correctly points out that "[t]he issues of misjoinder and severance are analytically distinct" and that whether crimes are properly joined in a complaint (or, misjoinder) is a question of law, *see* ***State v. Hoffman***, 106 Wis. 2d 185, 208, 316 N.W.2d 143 (Ct. App. 1982), this distinction makes little difference where as here, both claims of error are raised under the rubric of ineffective assistance of counsel.

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." ***Id***. at 694.[6]

¶8 We conclude that trial counsel did not perform deficiently by failing to move the court for separate trials, either on grounds of misjoinder under WIS. STAT. § 971.12(1), or as a motion to sever under § 971.12(3). Trial counsel testified that after conducting the relevant other acts analysis and considering "the way this Court rules in terms of practical matters," he determined that a motion to sever was unlikely to succeed. He further determined that even if the charges were severed, the evidence of both victims' allegations would have been admissible at both victims' trials, either as evidence of the crime charged or as other acts evidence under WIS. STAT. § 904.04(2).[7] Along with this legal analysis, trial counsel considered Pratt's desire to have a single trial. *See* ***Strickland***, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions."). Trial

[6] Whether counsel's actions were deficient or prejudicial is a mixed question of law and fact. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). The circuit 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.

[7] Pratt does not dispute that pursuant to ***Sullivan***, 216 Wis. 2d at 773, the other acts evidence would have been offered for an acceptable purpose and was relevant. Rather, Pratt argues that the third ***Sullivan*** prong precludes admissibility because the probative value of the other acts was substantially outweighed by the danger of unfair prejudice. ***Id***., at 772-773. We disagree. As the trial court determined, the similarity of the acts made them highly probative of one another. The children were the same age and gender, and were related to Pratt by marriage. The acts occurred in Pratt's home and involved allegations that the girls were sitting in Pratt's lap viewing a computer. Given the high probative value, the trial court properly determined that the evidence was not "unfairly prejudicial [.]"

counsel weighed the options and made a reasonable strategic decision to forego attempting to sever the charges.

¶9 We also conclude that Pratt has failed to establish that he was prejudiced by trial counsel's failure to seek separate trials as to each victim. Even if the counts were severed, the evidence of each assault would have been properly admitted as other acts evidence in separate trials pursuant to WIS. STAT. § 904.04(2). Though Pratt argues that because of the almost eleven-year gap, the two assaults were not of the same or similar character for purposes of joinder under WIS. STAT. § 971.12(1), they were not so remote as to preclude their admissibility as other acts evidence. In determining the relevance or probative value of other acts evidence in child sexual assault cases, "remoteness must be considered on a case-by-case-basis." *See* ***State v. Hunt***, 2003 WI 81, ¶64, 263 Wis. 2d 1, 666 N.W.2d 771 (citing cases upholding the admissibility of other acts evidence despite gaps of ten, thirteen, and sixteen years). Given the greater latitude rule in child sexual assaults, the trial court did not erroneously exercise its discretion in determining that the evidence involving the two victims would have been admissible as other acts evidence at separate trials. Therefore, there was no prejudice in having that same evidence admitted at a joint trial. [8]

[8] Our determination that there was no prejudice also takes into account that the trial court expressly instructed the jury to consider and decide each count separately, and that the "verdict for the crime charged in one count must not affect your verdict on any other count." *See* ***Hoffman***, 106 Wis. 2d at 213 (an instruction directing the jury to consider each count separately and to not let a verdict on one count affect any other "presumptively cured any prejudice" arising from joinder). Jurors are presumed to follow the court's instruction. ***State v. Searcy***, 2006 WI App 8, ¶59, 288 Wis. 2d 804, 709 N.W.2d 497.

¶10 Finally, Pratt seeks a new trial under WIS. STAT. § 752.35 on the ground that the real controversy was not fully tried. Pratt 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).

¶11 We have already concluded that trial counsel's performance was neither deficient nor prejudicial. Though Pratt alleges that count one was misjoined with and should have been severed from counts two, three and four, we accept the trial court's determination that the evidence involving each victim constituted proper other acts evidence admissible at separate trials. Accordingly, we conclude that there is no reason to exercise our discretionary authority to grant Pratt 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.