COURT OF APPEALS DECISION DATED AND FILED

January 22, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **WIS. STAT. § 808.10 and RULE 809.62.**

Appeal No. 2013AP2817

Cir. Ct. No. 2009CF332

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM E. BERLIN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed*.

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. William Berlin appeals an order denying Berlin's postconviction motion for relief under WIS. STAT. § 974.06 (2011-12).[1] Berlin contends that he was denied the effective assistance of counsel at trial when his counsel: (1) failed to object to, and introduced, inadmissible evidence; (2) inadequately prepared for trial; (3) inadequately cross-examined State witnesses; (4) failed to conduct an adequate investigation; and (5) failed to present a reasonable theory of defense. For the reasons set forth below, we reject each of these contentions. Because we reject each of Berlin's claims of ineffective assistance of counsel, we also reject Berlin's claim that the cumulative effect of those errors should undermine our confidence in the outcome of the trial. We affirm.

¶2 In December 2009, Berlin was charged with two counts of child sexual assault. The first count was based on allegations that Berlin sexually assaulted K.R. between May 1994 and September 1998. The second count was based on allegations that he sexually assaulted M.B. in the summer of 1991. An information was filed in March 2010, adding an additional count of child sexual assault based on allegations that Berlin sexually assaulted K.R. between July 1993 and April 1994, and one count of child enticement related to K.R. for the same time period. Following a jury trial, Berlin was convicted of the first three counts. In October 2011, the circuit court sentenced Berlin to ten years of imprisonment with a concurrent terms of fifteen years of probation.

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

¶3 In January 2013, Berlin filed a postconviction motion claiming his trial counsel was ineffective. The circuit court held an evidentiary hearing, and then determined that Berlin's trial counsel had not been ineffective. Berlin appeals.

¶4 Berlin argues that his trial counsel's performance was deficient in four areas, and that the deficiencies prejudiced Berlin's defense.[2] *See* ***Strickland v. Washington***, 466 U.S. 668, 687-94 (1984) (claim of ineffective assistance of counsel "must show that counsel's performance was deficient … [in that] counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and also that "the deficient performance prejudiced the defense," that is, that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable"). We address each category of claimed error in turn.

Evidentiary errors

¶5 Berlin argues first that trial counsel was ineffective by failing to object when State witnesses vouched for the victims' credibility. *See* ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984) ("[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally

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[2] Berlin groups his claims of trial counsel error under four headings, and we address Berlin's claims in that manner. To the extent Berlin also claims that the circuit court erred by admitting evidence, those arguments are outside the scope of this appeal and we decline to address them. *See* ***State v. Lo***, 2003 WI 107, ¶24, 264 Wis. 2d 1, 665 N.W.2d 756 ("procedural errors" such as erroneous admission of evidence cannot be raised in a § 974.06 motion because they do not raise constitutional or jurisdictional questions). Further, to the extent this opinion does not address any specific claims of trial counsel error that Berlin has attempted to raise in his brief, we have considered those arguments and have deemed them insufficiently developed to warrant a response. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

and physically competent witness is telling the truth."). Berlin identifies the following testimony as presenting ***Haseltine*** violations: (1) State's witness M.W. testified that Berlin's sister, Barb Ellis, asked M.W. to support Berlin after the victims pressed charges because Ellis believed that the victims were lying; M.W. told Ellis she did not believe the victims were lying, because Berlin had done the same thing to M.W. in the past;[3] (2) K.R.'s mother testified that, when she learned that Berlin had sexually assaulted M.B., "[i]t was horrific," and that she was "extremely" shocked; and (3) M.B.'s mother testified that, when she learned that Berlin had sexually assaulted M.B., her "heart dropped." Berlin argues that the testimony by M.W. and the victims' mothers all indicated that the witnesses believed the victims were telling the truth about the sexual assaults, violating ***Haseltine***. We disagree.[4]

¶6 "***Haseltine*** prohibits a witness from testifying that another witness is telling the truth at trial. The ***Haseltine*** rule is intended to prevent witnesses from interfering with the jury's role as the 'lie detector in the courtroom.'" ***State v.***

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[3] Berlin contends, in a one-sentence argument, that the prosecutor's comment on M.W.'s testimony in closing was a propensity argument in violation of WIS. STAT. § 904.04(2)(a). He faults counsel for failing to object. Because Berlin does not adequately develop an argument that counsel was ineffective by failing to object to the prosecutor's closing argument, we do not address that issue further.

Additionally, Berlin argues that his trial counsel bolstered M.W.'s credibility by asking M.W. whether anyone had expressed criticism about her story, to which M.W. answered, "no," and by eliciting testimony from M.W. that a detective told her that the police believed that, when one victim comes forward, other victims will as well. Again, Berlin fails to develop an argument as to how this amounted to ineffective assistance of counsel, and we decline to address this issue further.

[4] Because we conclude that Berlin has not identified any inadmissible testimony under ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984), we need not address Berlin's argument disputing his trial counsel's testimony at the motion hearing that he sometimes chooses not to object based on strategy, and that the real reason counsel failed to object was because his hearing aid was not working.

Snider, 2003 WI App 172, ¶27, 266 Wis. 2d 830, 668 N.W.2d 784 (citation and quoted source omitted). Here, none of the testimony that Berlin argues violated the ***Haseltine*** rule was testimony by one witness that another witness was telling the truth at trial. M.W.'s testimony—that she told Ellis that she would not support Berlin on grounds she believed the victims' allegations, since Berlin had done the same thing to her—was a description of what M.W. believed at the time she learned of the allegations against Berlin and explained why M.W. told Ellis she would not help with Berlin's defense. This type of testimony does not violate the ***Haseltine*** rule. *See* ***id.***, ¶¶25-27 (no ***Haseltine*** violation when a detective testified that he believed the victim's version of events and disbelieved the defendant's version; the detective was testifying "to what he believed at the time he was conducting the investigation, not whether [the defendant] or the victim was telling the truth at trial. The detective, in response to questions on cross-examination, recounted how he conducted the interrogation and his thought processes at that time"). For the same reason, the testimony by K.R.'s mother and M.B.'s mother as to how they felt upon hearing allegations that Berlin had sexually assaulted M.B. was descriptive of the witnesses' thoughts and behaviors at the time they learned of the allegations, not whether the witnesses believed the victims were telling the truth at trial.

¶7 Berlin also claims trial counsel erred by failing to object to, or by introducing, the following: (1) testimony by K.R.'s brother that he now thought there was something suspicious about a time he saw Berlin exiting K.R.'s bedroom at night; (2) K.R.'s testimony as to the details of Berlin's separation from K.R.'s mother and K.R.'s feelings about Berlin; (3) testimony by K.R.'s mother that K.R.'s brothers would not have witnessed the sexual assaults because the brothers were preoccupied with their video games upstairs; (4) testimony by

M.B.'s mother that she told both K.R. and K.R.'s mother that M.B. had been sexually assaulted by Berlin; and (5) testimony by M.W. that her family had disowned her when she came forward with her allegations against Berlin. Berlin asserts, in conclusory fashion, that the testimony was irrelevant or speculative, or impermissibly supported the victims' credibility. However, Berlin does not develop an argument as to why any of that evidence was inadmissible, or why counsel's performance was both deficient and prejudicial by failing to move to exclude the testimony. Accordingly, we reject Berlin's claim of ineffective assistance of counsel.

Inadequately prepared for trial

¶8 Next, Berlin argues that his trial counsel was ineffective by failing to adequately prepare for trial. First, Berlin argues his trial counsel erred by making an uninformed decision to move to exclude any evidence that Berlin had used or possessed pornography. Berlin argues that, had his trial counsel not successfully moved to exclude references to Berlin's use of pornography, K.R. would have testified that the frequent sexual assaults generally began with Berlin watching pornography. He argues that, had counsel interviewed the other children living in the house at that time, counsel would have known he could have attacked K.R.'s credibility with evidence that none of the other children in the house ever saw Berlin watching pornography and that the television had a block for ordering movies. He contends that counsel moved to exclude the pornography evidence without any rational basis, pointing to research that negates negative inferences that may be drawn from a defendant's use of pornography.

¶9 We conclude that Berlin has not shown prejudice based on exclusion of the pornography evidence. That is, our confidence in the outcome of the trial—

which was based on detailed testimony by victims K.R. and M.B. that Berlin had sexually assaulted them, as well as supporting testimony by M.W. that Berlin had sexually assaulted her as well—is not undermined by the exclusion of the pornography evidence. At best, Berlin could have established that none of the other children in the house saw Berlin viewing pornography with K.R. on any of the many occasions that K.R. claimed the sexual assaults began with Berlin viewing pornography, and Berlin could have testified that there was a block for ordering movies and that he never viewed pornography with K.R. We are not convinced that that evidence would have so undermined K.R.'s credibility that the jury would have disbelieved all three women's claims of child sexual assault on that basis. Accordingly, we need not address the deficient performance prong of Berlin's claim of ineffective assistance of counsel claim on this topic. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996) ("if the defendant has failed to show prejudice, omit the inquiry into whether counsel's performance was deficient").

¶10 Next, Berlin argues that his trial counsel's trial preparation was inadequate because counsel failed to engage in a significant discussion with Berlin as to the State's plea offer. Berlin contends that he was unable to make an informed decision as to whether to accept a plea offer because his counsel did not have a meaningful discussion with him about the offer. Rather, he asserts, counsel advised him to go to trial on the erroneous belief that Berlin could win the case. He faults counsel for relying on Berlin's professed innocence rather than highlighting for Berlin that there was no reasonable defense.

¶11 A claim of ineffective assistance of counsel during plea negotiations must show that "the outcome of the plea process would have been different with competent advice." ***Lafler v. Cooper***, 132 S.Ct. 1376, 1384 (2012). The

defendant must show that "but for the ineffective advice of counsel there is a reasonable probability that … the defendant would have accepted the plea." ***Id.*** at 1385. Here, at the motion hearing, both Berlin and his trial counsel testified that counsel informed Berlin that there was a plea offer, that Berlin maintained his innocence, and that Berlin did not take the plea offer. Berlin did not testify that he would have accepted the plea deal if counsel had explained it more thoroughly and advised Berlin to accept it.[5] Thus, Berlin has failed to show that the outcome of the plea process would have been different if counsel had discussed the plea offer with Berlin more extensively.

¶12 Berlin's final claim of inadequate preparation is that trial counsel misadvised Berlin that he should not testify in his own defense and failed to prepare Berlin to testify. Berlin argues that, had he testified, he could have impeached the credibility of the complaining witnesses and proclaimed his innocence. However, counsel testified at the motion hearing that he advised Berlin not to testify because he believed that the State had not proven its case, he thought Berlin's testimony could only make things worse, and, based on counsel's conversations with Berlin, counsel did not believe Berlin would do well on the witness stand. Berlin has not established that counsel's strategic advice was unreasonable. *See* ***State v. Avery***, 2011 WI App 124, ¶72, 337 Wis. 2d 351, 804 N.W.2d 216 (we will not second guess strategic advice from counsel if it is rationally based on the facts and law).

[5] Additionally, Berlin does not assert in his brief-in-chief that he would have taken the plea deal if counsel had discussed the deal more thoroughly with him. Berlin does assert in his reply brief that he would have accepted the plea deal, but does not explain why, and does not point to any testimony or other evidence to support that assertion. Berlin cites his motion hearing testimony as to the limited conversations he had with his counsel as to the plea offer, but does not point to any testimony that would indicate that Berlin wanted to accept a plea offer.

Inadequately cross-examined State witnesses

¶13 Berlin argues that his trial counsel was ineffective by failing to adequately cross-examine the State's witnesses as to details in the recounting of the abuse and the reporting of the abuse to family members. Specifically, Berlin argues his counsel should have raised the following to impeach the State's witnesses: (1) M.B.'s mother testified that she learned of the sexual assaults in 2002, but had told a detective she only found out about the sexual assaults "recently"; (2) K.R. testified that Berlin sexually assaulted her only in the living room and her mother's bedroom, but had testified at the preliminary hearing that Berlin had assaulted her in her bedroom, as well; (3) K.R. told police that Berlin sexually assaulted her at night, but Berlin would not have been at the house before 10:00 p.m., and there was no explanation as to why K.R. was awake after 10:00 p.m.; (4) K.R. testified that she could not remember if Berlin had said anything to her, but had told a detective that Berlin had threatened her not to report the abuse; (5) lack of details as to where occupants of the house slept; (6) whether K.R.'s mother had told Berlin that M.B. was not truthful; (7) M.W.'s inconsistent statements about what she reported to her parents, and when; (8) M.W. stated that she cried after the first time Berlin sexually assaulted her during a large family gathering, but there was no evidence of family noticing she was upset and certain other minor details were not explored; and (9) inconsistency as to whether the victims had had any contact with each other in recent years.

¶14 We reject Berlin's claim that his counsel's failure to raise minor inconsistencies and omissions as to the victims' disclosures of the sexual assaults rendered counsel's assistance ineffective. Again, we conclude that Berlin has not shown prejudice. None of the claimed inconsistencies in testimony by the State's witnesses would have rendered the victims' version of the events unbelievable.

Our confidence in the outcome of the trial is not undermined by Berlin's counsel's failure to highlight the minor inconsistencies set forth above.

Failed to adequately investigate

¶15 Berlin argues that his counsel failed to adequately investigate because counsel did not: (1) interview K.R.'s brothers to determine whether any of them ever witnessed Berlin viewing pornography or sexually assaulting K.R.; (2) interview M.W.'s parents to determine what, and when, she told them about the sexual assaults; (3) consult with an expert as to M.W.'s statement that Berlin had sexual intercourse with her when she was five or six years old and she had only light bleeding following the assault, to show that more extensive injuries would have been expected;[6] and (4) seek M.W.'s therapy records to determine whether she had reported the sexual assaults to her therapist. Berlin has not established, however, that any of the evidence he believes his counsel should have obtained would have been significant to his defense.

¶16 First, as explained above, we are not convinced that evidence that K.R.'s brothers never witnessed Berlin viewing pornography or sexually assaulting K.R. would have had a significant impact on K.R.'s credibility. While Berlin asserts that it would have been likely the brothers would have witnessed those events if they occurred as K.R. stated to police, he does not develop an argument that K.R.'s version would have been impossible without the brothers witnessing them. Second, it is unclear why Berlin places significance on clarifying M.W.'s reporting of the abuse to her parents. At trial, M.W. testified

[6] In his reply brief, Berlin abandons his argument that counsel was ineffective by failing to consult with an expert as to a five-year-old's ability to control her emotions.

that she first told her parents in 2001, when she was in her early twenties, that Berlin had sexually assaulted her when she was between the ages of five and eight, and testified at the postconviction motion hearing that she first told her parents about the childhood sexual assaults in 2001, but provided "[v]ery little detail." Berlin does not explain what information he believes M.W.'s parents would have provided that would have contradicted M.W.'s statements. As to Berlin's arguments that his trial counsel should have obtained an expert report that a five-year-old child would be likely to have vaginal bleeding following intercourse beyond what M.W. reported, we are not convinced that such evidence would have had a significant impact on M.W.'s credibility. Evidence that more bleeding would have been expected than M.W. remembered experiencing would not be the type of evidence that would so significantly impact M.W.'s credibility that it would undermine our confidence in the outcome of the trial. Finally, Berlin has not explained what would have been in M.W.'s therapy records that could have been used to impeach her credibility at trial, and we reject that argument as well.

Failed to present a reasonable theory of defense

¶17 Berlin's final claim of trial counsel error is that counsel should have presented a different theory of defense. Berlin argues that the theory of defense advanced at trial—that all three of the complaining witnesses were lying—was not reasonable, because M.W. had no connection to the other two and there was no reason for her to lie for them.[7] Berlin argues that his counsel should have advanced a defense based on the complaining witnesses having false childhood

[7] As the State points out in its respondent's brief, Berlin actually argued at trial that M.B. and K.R. were lying, and that M.W. had other complicated issues in her life that caused her to come forward with a claim of abuse that she believed was true, but that defied common sense.

memories rather than that they knowingly lied. Berlin presented expert testimony at the motion hearing as to the process by which memory decays and may be distorted over time, and that children are more subject to suggestibility than adults. However, Berlin does not develop an argument as to why it would have been a more reasonable defense to argue that all three complaining witnesses—one of whom had no connection to the other two—would have had implanted memories of abuse by Berlin. That is, Berlin does not explain why it would have been more believable to the jury that all three women had false childhood memories of abuse by Berlin rather than that all three women were lying about the abuse. Additionally, evidence that memory distortion occurs in some cases does not establish that it would have been a reasonable defense in this case. Berlin has not established that his trial counsel was ineffective by failing to advance the theory of defense that Berlin now argues would have been more successful.

¶18 Because we reject Berlin's individual claims of ineffective assistance of counsel, we also reject his claim that the alleged errors, cumulatively, amounted to ineffective assistance. *See* ***State v. Thiel***, 2003 WI 111, ¶61, 264 Wis. 2d 571, 665 N.W.2d 305. We affirm.

By the Court.—Order affirmed.

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