COURT OF APPEALS
DECISION
DATED AND FILED

June 30, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1945-CR **Cir. Ct. No. 2011CF4807**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAMONT DONNELL SHOLAR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Order reversed and cause remanded*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Lamont Donnell Sholar appeals a judgment of conviction and an order denying his motion for postconviction relief. We conclude Sholar was entitled to a ***Machner*** hearing with respect to his trial

attorney's failure to object when hundreds of text messages were both admitted into evidence and provided to the jury during its deliberations.[1] We therefore reverse the order denying the postconviction motion and remand.

BACKGROUND

¶2 Sholar was charged with six counts related to the pimping of two women: E.C. (who was seventeen years old at the time of the offenses) and S.G. (who was about to turn twenty-two years old at the time of the offenses). He was charged with trafficking a child, soliciting a child for prostitution, human trafficking, two counts of pandering/pimping, and second-degree sexual assault as to S.G. *See* WIS. STAT. §§ 948.051(1), 948.08, 944.33(2), 940.302(2)(a), & 940.225(2)(a) (2011-12).[2]

¶3 The case proceeded to a jury trial where E.C. testified that she met Sholar through his alleged co-actor, Shawnrell Simmons. E.C. eventually contacted Simmons to work for him as a prostitute, but he told her he already had women working for him and directed her to Sholar. E.C. said she worked for Sholar for a period of a few months and gave him money she made from prostituting herself.

¶4 E.C. testified that provocative pictures of her were taken and uploaded to the website "Backpage." She explained that Sholar rarely took pictures of her; instead, she or the girls working for Sholar and Simmons would

[1] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

take the pictures. E.C. said that Sholar and Simmons drove her to and from houses and hotels to perform sex acts. She also said that on one occasion, Sholar punched her several times.

¶5 E.C. told police about the pimping/prostitution after she was arrested and questioned about her involvement in an alleged burglary. According to E.C., at Sholar's direction, she helped take a number of items from her friend's apartment.

¶6 The other victim in this case, S.G., testified that she agreed to do private dances for money at Sholar's suggestion. She explained that this turned into having sex with people, which she did for a period of roughly two weeks. S.G. said that Sholar took pictures of her with his cell phone and would put them on the internet. She believed he posted the pictures on the website "Backpage." S.G. testified that both Sholar and Simmons would drive her to locations to perform these acts, though mostly it was Sholar.

¶7 Regarding the sexual assault charge, S.G. testified that one night Sholar wanted to have sex, but she was tired and told him she "didn't feel like it." As she stood up from the bed to go to the bathroom, he grabbed her arm, turned her around, and had vaginal sex with her. S.G. testified that she had sex with Sholar multiple times after that and did not directly tell him no.

¶8 S.G. said that she stopped working for Sholar when her boyfriend got out of jail. She explained that after she quit, Sholar started threatening her.

¶9 The State presented evidence to show that Sholar rented rooms at an Econolodge motel, and data from the hotel's lobby computer showing an internet history of "Backpage" ads being posted and viewed. Additionally, the State

introduced as exhibits a number of "Backpage" ads with pictures of women, including ones with a contact number—the same as the phone number associated with the phone that was taken from Sholar. Photographs taken by police, which depicted condoms and lingerie retrieved by hotel staff from a room the State alleged Sholar operated, were also presented at trial.

¶10 Sholar testified that he stayed at the Econolodge with his son. While he was there, he met E.C., S.G., and other women he thought were working for Simmons. Sholar acknowledged that he developed a friendship with E.C., but said that he did not work as a pimp.

¶11 As for S.G., Sholar explained that he met her through her roommate and he saw her at the Econolodge but did not have further contact. He said he never had sexual contact with her.

¶12 Sholar denied putting ads up on "Backpage" and said he did not take any pictures of women for ads while at the hotel. He testified that the cell phone he had at the time of his arrest belonged to Simmons and that he was using it because the screen on his own phone had cracked.

¶13 To explain the alleged burglary, which led to E.C.'s allegations against him, Sholar testified that E.C. wanted him to sell her K2, an "over the counter" product similar to marijuana, and she told him to meet her at an apartment. When he arrived, she told him her friend was moving and wanted to sell items from the apartment. He claimed that he paid E.C. for a television she said was for sale. The owner subsequently returned to the apartment, saw Sholar carrying the television, and asked him what he was doing. Sholar gave the television back and said that he helped the owner look for E.C. until the police arrived, at which point he was arrested for the alleged burglary.

¶14 After a six-day trial, the jury found Sholar guilty of all the charges. He was sentenced to forty-five years, comprised of thirty years of initial confinement and fifteen years of extended supervision.

¶15 Sholar filed a postconviction motion. He argued that his trial counsel was ineffective for failing to lodge a clear objection to the jury twice hearing a recording of the interrogation where he said that he had been to prison three times and had just "beat" an armed robbery charge. He further argued that the circuit court erred when it denied his trial counsel's subsequent request for a mistrial.

¶16 Additionally, Sholar argued that trial counsel was ineffective for failing to object when nearly 1400 text messages, "rampant with hearsay and prejudicial other[ ]acts evidence" of him dealing drugs and making threats were both admitted into evidence and provided to the jury during deliberations. Beyond these claims, Sholar argued that the more than forty-year disparity between the sentence he received and the one Simmons received constituted a new factor warranting sentence modification.

¶17 The circuit court issued a written decision denying the motion without an evidentiary hearing.

DISCUSSION

A. Ineffective Assistance

¶18 Sholar raises a number of claims on appeal. We begin our analysis with his allegations of ineffective assistance of counsel. Sholar argues that his trial counsel was ineffective because he failed to properly object to the admission of the recording of Sholar's interrogation prior to it being played to the jury and

because he failed to object when hundreds of text messages were both admitted into evidence and provided to the jury during deliberations.

¶19 Whether counsel rendered ineffective assistance is a mixed question of fact and law. ***State v. Nielsen***, 2001 WI App 192, ¶14, 247 Wis. 2d 466, 634 N.W.2d 325. We uphold the circuit court's findings of fact unless they are clearly erroneous. ***Id.*** However, whether the defendant's proof is sufficient to establish ineffective assistance is a question of law that we review independently. ***Id.***

¶20 To prevail on an ineffective assistance claim, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must point to specific acts or omissions by counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To demonstrate prejudice, the defendant must show 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. If a defendant fails to make a sufficient showing on one prong of the ***Strickland*** test, we need not address the other. ***Id.*** at 697.

¶21 It is a prerequisite to appellate review of an ineffective-assistance claim that the challenged attorney explain his or her actions at a postconviction evidentiary hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). The circuit court must hold a ***Machner*** hearing if the defendant's motion "on its face alleges sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the defendant's motion meets this standard is a question of

law that we review independently. ***Id.*** "[I]f the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," the circuit court has discretion to deny the defendant's motion without a hearing. ***Id.***

1. Playing the Recording

¶22 Sholar testified at trial that the phone taken from him upon arrest belonged to Simmons. The State then explained that it wished to play for the jury portions of police interrogations of Sholar where he made statements reflecting that the phone instead belonged to him.

¶23 The circuit court received the CD recording into evidence and played it for the jury. After ten minutes and thirty-five seconds of the recording, the court stopped playing it because one of the jurors was having difficulty hearing. The State then replayed the entire recording. In it, Sholar states, more than once, that he has been to prison three times and that he had "just beat" an armed robbery.

¶24 Sholar asserts trial counsel was ineffective for not objecting (before it occurred) to the State playing the recording of his interrogation. He acknowledges that his trial counsel lodged a "relevance" objection, but asserts that counsel failed to object and explain to the court the prejudicial other acts evidence contained in the interrogation.[3]

[3] Sholar's trial counsel objected to the recordings on grounds that "[t]o the extent that they are relevant, they contain things on them that may not be."

¶25 In essence, Sholar's claim centers on his trial counsel's failure to say the words "other acts evidence." This argument fails. By objecting, Sholar's trial counsel preserved the objection. As such, we are not convinced that he was deficient. A defendant is entitled to a fair trial, not a perfect one, with an adequate lawyer, not the best one. ***State v. Hanson***, 2000 WI App 10, ¶20, 232 Wis. 2d 291, 606 N.W.2d 278.

¶26 Further, Sholar does not adequately develop an argument as to prejudice. He does not argue that if his trial counsel had objected on the basis that the recording constituted other acts evidence, the objection would have resulted in the circuit court concluding that the recording was inadmissible. *See* ***Strickland***, 466 U.S. at 694. Sholar's factual allegations on this issue are insufficient to warrant a ***Machner*** hearing.

2. The Text Messages

¶27 Both E.C. and S.G. testified that they had conversations with Sholar concerning prostitution via text messages. A detective testified that he extracted data from an iPhone police obtained from E.C., and the State moved into evidence both a CD and a printout of the data recovered from the phone without objection by the defense. The detective testified that he recovered forty-eight text messages including: "Hello star. I'm Rob. I'm cumin to Milwaukee for a conference. I will have a hotel room right at the airport," and "Hey there. I'm looking for some fun… Can you help me? I am 23 and white." The detective stated, however, that neither Sholar's name nor his phone number appeared in the contacts or messages on this phone. During deliberations, the jury requested and was provided with the printout of E.C.'s phone records.

¶28 The State also moved into evidence a CD and a printout of the 181-page report containing the contents of the phone taken from Sholar, including nearly 1400 text messages and pictures of women in suggestive poses, some of which appeared to be the same images as pictures from "Backpage" ads previously entered into evidence. Sholar's trial counsel did not object.

¶29 During deliberations, the jury asked: "Can we request Lamont's phone records, 544 0125, looking for in—slash—out bounds regarding I got dollars text messages while with client." In response, the circuit court inquired: "[I]sn't it all obtained in the one exhibit that Detective McKee had, has put in the one big thick one, would all those things be answered in there? Because I don't want to be parceling out. I just want to give them the exhibit that they seem to be requesting." Both the State and Sholar's trial counsel agreed to provide the printout documenting the contents of the phone taken from Sholar to the jury in it is entirety.

¶30 Sholar argues that the more than one hundred pages of text messages in the printout of the phone taken from him, which were provided to the jury during deliberations, are rife with conversations about illegal drug dealing, violence, and other subjects that are irrelevant and extremely prejudicial. He submits that the messages fail to pass the ***Sullivan*** test regarding the admissibility of other acts evidence and that there was no apparent strategic reason for his trial counsel to allow their admission.[4] *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73,

[4] WISCONSIN STAT. § 904.04(2)(a) provides that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." The statute, however, "does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ***Id.*** Admissibility of evidence pursuant to § 904.04(2) is governed by a three-step inquiry: (1) whether the evidence is offered for a (continued)

576 N.W.2d 30 (1998). He further contends that there was no strategic reason for his trial counsel's failure to object to providing E.C.'s phone records to the jury in their entirety.

¶31 In terms of prejudice, Sholar argued in his postconviction motion that the hearsay text messages improperly bolstered the victims' allegations that Sholar was involved in the prostitution business and made threats to S.G. He contends the jury's requests for the messages and the fact that they were provided with the entirety of those phone records demonstrate that the text messages were central to deliberations.

¶32 In its decision denying his postconviction motion, the circuit court concluded that even if the text messages contained improper other acts evidence, Sholar had not demonstrated that he was prejudiced given the amount of evidence against him. We are not so sure. As Sholar points out, at the very least, the impact of this evidence could have been significant as to the sexual assault charge.

> S[.]G[.] testified that she did not want to have sex with Mr. Sholar and told him she "didn't feel like it." When asked whether she remembered telling police that she did not believe that she actually verbalized the word "no," she noted that she said it was not a good idea and that she did not feel like it, but then further acknowledged that she had sex with him multiple times after that and did not directly tell him no during those instances. Mr. Sholar testified that he did not have sex with her. The State presented no other direct evidence of sexual assault. The evidence presented thus set up a direct credibility contest, wherein S[.]G[.]'s credibility was questionable because of her prior statement to police.

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permissible purpose, as required by § 904.04(2)(a); (2) whether the evidence is relevant within the meaning of WIS. STAT. § 904.01; and (3) whether the probative value of the evidence is substantially outweighed by the concerns enumerated in WIS. STAT. § 904.03. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

> But then the jury … was handed one-hundred pages of text messages suggesting that he is the type of person who threatens violence against others and is involved in the dealing of multiple hardcore narcotics. The jury was also given hearsay text messages indicating that the police said that someone with S[.]G[.]'s name told them that Mr. Sholar threatened to kill her, and also that another third-party has reported Mr. Sholar to the sheriff for an unknown reason. There is more than a reasonable likelihood that the one-hundred pages of text messages containing improper, irrelevant other acts evidence and hearsay evidence affected the jury's decision to convict him of forcible sexual assault.

(Record citations omitted.)

¶33 We conclude Sholar's allegations in this regard, if true, are sufficient to entitle Sholar to a ***Machner*** hearing.[5] Therefore, we reverse and remand on this issue.

B. Sholar's Remaining Claims

¶34 Sholar makes three other arguments that we briefly address. First, he argues that the circuit court erred when it denied his trial counsel's request for a mistrial after the State played the recording of his interrogation. Rather than granting a mistrial, the circuit court modified the jury instruction addressing how the jury is to consider prior convictions. The curative instruction provided that "[a]ny possible punishment the defendant may have received in the past is not relevant and should not be considered by you in any way." Sholar argues that the cautioning instruction was insufficient to address his statement in the interrogation that he recently "beat" an armed robbery.

[5] We must accept the allegations in Sholar's postconviction motion as true for purposes of determining whether Sholar was entitled to a ***Machner*** hearing. *See* ***State v. Allen***, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433.

¶35 "Where the [circuit] court gives the jury a curative instruction, this court may conclude that such instruction erased any possible prejudice, unless the record supports the conclusion that the jury disregarded the [circuit] court's admonition." ***State v. Sigarroa***, 2004 WI App 16, ¶24, 269 Wis. 2d 234, 674 N.W.2d 894; *see also* ***State v. Adams***, 221 Wis. 2d 1, 12, 584 N.W.2d 695 (Ct. App. 1998) ("Jurors are presumed to follow the court's instructions."). We agree with the circuit court's assessment that given the context, where there had been four days of testimony from the State's witnesses presenting evidence against Sholar and where the jury had already heard that Sholar had been convicted of a crime four times, the curative instruction was sufficient.

¶36 Furthermore, the circuit court found that given the context of Sholar's statement that he beat an armed robbery, he was really "saying he faces up to his charges and that was an example." In other words, this amounted to Sholar telling police that he had been wrongfully accused before and had won his case. And, that because he had prior convictions, he was improperly targeted. We agree that this information was not sufficiently prejudicial to warrant a new trial. Consequently, the circuit court properly exercised its discretion when it denied the motion for a mistrial.

¶37 Second, he argues that we should order a new trial in the interest of justice. He submits that "[t]he magnitude and severity of the improperly-admitted character evidence clouded the jury's ability to fairly consider the charges, particularly the sexual assault charge." 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). We decline to do so here. We have already rejected most of Sholar's arguments and to the extent we have not rejected an argument outright, more facts need to be presented during

the ***Machner*** hearing that is to follow. Consequently, based on the record before us, we are not convinced that this is an "exceptional" case.

¶38 Third, he argues that the disparate sentence he received constitutes a new factor warranting sentence modification. Sholar received a forty-five year sentence.[6] After his sentencing, one of the victims decided not to testify at Simmons's trial. The State offered a plea deal to Simmons, and as a result, Simmons received a four-year sentence. According to Sholar, the circumstances of Simmons's plea and the resulting ten-fold disparity in sentencing constitute a new factor the renders Sholar's sentence shocking in comparison.

¶39 We disagree. As Sholar acknowledges in his brief, Simmons pled guilty to fewer charges than Sholar was found guilty of and consequently faced less time. Additionally, differences existed between Sholar's and Simmons's prior records. And, as the circuit court point out in its decision denying Sholar's motion for sentence modification: "The court expressed no desire for parity between the defendant's and Simmons'[s] sentences. Indeed, at sentencing, the court expressly stated that Simmons'[s] conduct was 'irrelevant' because 'Mr. Sholar acted as Mr. Sholar, and no one was forcing him to do anything." *See* ***State v. Toliver***, 187 Wis. 2d 346, 362-63, 523 N.W.2d 113 (Ct. App. 1994) (holding that if court does not express a desire for parity in sentences between co-defendants, a disparity in co-defendants' sentences is not a new factor), *clarified or modified on other grounds by* ***State v. Harbor***, 2011 WI 28, ¶48, 333 Wis. 2d 53, 797 N.W.2d 828. *See also* ***State v. Curbello-Rodriguez***, 119 Wis. 2d 414, 435-36, 351 N.W.2d 758

[6] Portions of Sholar's sentence were subsequently commuted; however, the sentence still totaled forty-three years.

(Ct. App. 1984) (each defendant should have individualized sentences even though they may have committed the same offense).

¶40 In summary, we conclude Sholar was entitled to a ***Machner*** hearing on his claim that counsel was ineffective for failing to object when hundreds of text messages were both admitted into evidence and provided to the jury during deliberations. Without a ***Machner*** hearing we cannot determine whether counsel's decision not to object was a reasonable strategic choice. With respect to prejudice, Sholar's motion establishes a reasonable probability that, had the text messages not been admitted into evidence and provided to the jury during deliberations, the result of the trial, at least as to the sexual assault charge, would have been different. We therefore reverse that portion of the circuit court's order denying Sholar's claim that his attorney was ineffective for failing to object when hundreds of text messages were both admitted into evidence and provided to the jury during deliberations. We remand for the circuit court to conduct a ***Machner*** hearing on that claim.

By the Court.—Order reversed and cause remanded.

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