COURT OF APPEALS
DECISION
DATED AND FILED

May 26, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2015AP886
2015AP887

Cir. Ct. Nos. 2012CF56
2012CF57

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL D. UTECHT,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Clark County: JON M. COUNSELL, Judge. *Affirmed*.

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

¶1 PER CURIAM. Daniel Utecht appeals two judgments of conviction for child sexual assault, following a jury trial in these consolidated cases: one count of repeated first degree sexual assault of L.J.H., and one count of repeated first degree sexual assault of T.C.H. Utecht also appeals the order denying his

WIS. STAT. § 974.06 (2013-14) postconviction motion for relief.[1] Utecht argues that his trial attorneys were ineffective by: (1) failing to object to or limit the admission of evidence of a previous "domestic incident" involving Utecht;[2] (2) failing to cross examine L.J.H. about whether she had lied to police about that "domestic incident;" (3) failing to elicit evidence that Utecht had offered to take a polygraph test; and (4) telling Utecht that they would not ask him any questions if he testified.[3] We conclude that Utecht's trial attorneys were not ineffective, and, therefore, we affirm.

BACKGROUND

¶2 The State alleged that Utecht sexually assaulted L.J.H., born in 1989, and her brother T.C.H., born in 1994, on multiple occasions when they and their mother lived with Utecht in Thorp, Clark County, between May 2004 and March 2005. L.J.H. and T.C.H. separately reported the assaults to other family members in 2009. After a two-day trial in May 2013, the jury found Utecht guilty as charged. Utecht filed a postconviction motion for relief. The court held a

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

[2] Before, during, and after trial, to the judge and to the jury, the parties referred to this domestic violence incident as a "domestic incident" and did not describe what took place during the incident. Although we would normally use the term "domestic violence incident," we will use the same term as the parties for purposes of this opinion.

[3] Utecht creates needless work and potential confusion for the judges, court staff, and opposing counsel by failing to provide page numbers for his argument in his table of contents, and by failing to provide citations to the record supporting statements of fact in his argument section, in his principal brief on appeal. We admonish counsel that WIS. STAT. RULE 809.19(1)(a) requires appropriate page references to various portions of the brief, including headings of each section of the argument, and that WIS. STAT. § 809.19(1)(e) requires citations to parts of the record relied on in the argument section of the brief.

Machner[4] hearing, at which Utecht and his two trial attorneys testified. The court denied the postconviction motion, and Utecht filed this appeal. We relate additional facts as relevant to each of the four issues that Utecht raises in the discussion that follows.

DISCUSSION

¶3 To succeed on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's representation was deficient and that the deficiency prejudiced the defendant. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). Both deficient performance and prejudice present mixed questions of fact and law. ***State v. Jeannie M. P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We uphold the circuit court's factual findings unless they are clearly erroneous. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. However, we review de novo whether counsel's performance was deficient or prejudicial. ***Jeannie M. P.***, 286 Wis. 2d 721, ¶6.

¶4 To prove deficient performance, a defendant must show that, under all of the circumstances, counsel's specific acts or omissions fell "outside the wide range of professionally competent assistance." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). We review counsel's strategic decisions with great deference, because a strong presumption exists that counsel was reasonable in his or her performance. ***Id.*** at 689. "A reviewing court can determine that defense counsel's performance was objectively reasonable, even if trial counsel offers no sound strategic reasons for decisions made. We will sustain counsel's strategic

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

decisions as long as they were reasonable under the circumstances." ***State v. Honig***, 2016 WI App 10, ¶24, 366 Wis. 2d 681, 874 N.W.2d 589 (citations omitted). "Deficient performance is judged by an objective test, not a subjective one. So, regardless of defense counsel's thought process, if counsel's conduct falls within what a reasonably competent defense attorney could have done, then it was not deficient performance." ***State v. Jackson***, 2011 WI App 63, ¶9, 333 Wis. 2d 665, 799 N.W.2d 461 (citations omitted).

¶5 To prove prejudice, a defendant must establish "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." ***Strickland***, 466 U.S. at 694.

¶6 If we conclude that the defendant has not proved one prong, we need not address the other. ***State v. Nielsen***, 2001 WI App 192, ¶12, 247 Wis. 2d 466, 634 N.W.2d 325. We address the instances of ineffective assistance alleged by Utecht in the sections that follow and conclude that Utecht fails to demonstrate that his trial attorneys were ineffective.

A. Evidence of the "Domestic Incident"

¶7 Utecht argues that his trial attorneys, Christopher Anderson and Philip Helgeson, provided ineffective assistance by failing to object to or limit the admission of evidence of a previous "domestic incident" involving Utecht, L.J.H., and her mother.

¶8 Testimony at trial established the following relevant facts related to this "domestic incident." L.J.H and T.C.H. lived together with their mother and Utecht in Hammond, St. Croix County, from 2001 to 2004. T.C.H., along with his

mother and Utecht, moved to Thorp, Clark County, on or shortly before May 18, 2004. L.J.H. stayed in Hammond to complete the school year there, but she visited the others in Thorp on the weekend of May 22, 2004. L.J.H. called law enforcement while in Thorp on May 22, 2004, alleging a "domestic incident" involving herself, her mother, and Utecht. Utecht was arrested, held in jail, and released two days later on bond with a provision that he have no contact with L.J.H. L.J.H. left immediately after the May 22 incident to live with her aunt for part of the summer, returning to live with her mother and Utecht before school started. L.J.H. enrolled in the Thorp school system on August 11, 2004. T.C.H. also left immediately after the May 22 incident to live with his father for the summer, returning to live with his mother and Utecht when school started in September.

¶9 At trial, the prosecutor and defense counsel questioned L.J.H. and T.C.H. about the timing of the sexual assaults they described relative to the timing of the May 22 "domestic incident." The prosecutor and defense counsel questioned the detective who had interviewed L.J.H. and T.C.H. on the same topic. The prosecutor and defense counsel also referred to the May 22 "domestic incident" and the time line involving the alleged sexual assaults in their opening statements and closing arguments. In particular, defense counsel used the May 22 "domestic incident" to highlight inconsistencies in L.J.H.'s and T.C.H's testimony about the timing of some of the sexual assaults that they described.

¶10 Utecht's attorneys testified at the hearing on Utecht's postconviction motion that they agreed to allow limited references at trial to the "domestic incident" to help establish a time line, because this was of value in impeaching the victims' credibility as to when the victims said certain of the sexual assaults that they described happened. The attorneys also testified that they agreed to allow

limited references to the no contact order that resulted from the "domestic incident," because the no contact order prevented contact between Utecht and L.J.H. "during some of the time that" L.J.H. testified that one of the sexual assaults happened.

¶11 Utecht argues that this strategy was unreasonable because it resulted in unjustified prejudice to Utecht for the jury to hear evidence that L.J.H. called the police, that Utecht was arrested and jailed, and that a no contact order was issued. Utecht argues that his trial attorneys' justification for use at trial of this "domestic incident" evidence fails because they could have developed the time line simply by referring to the move to Thorp, without reference to the "domestic incident" and Utecht's arrest and time in jail. Utecht also makes a related, broader argument that his trial attorneys should have moved to exclude all evidence of the "domestic incident" as inadmissible other acts evidence, and that if some reference to the "domestic incident" was admitted over this objection, then his attorneys should have requested a limiting jury instruction.

¶12 Regardless whether it was reasonable for Utecht's trial attorneys to fail to object to evidence of the "domestic incident," Utecht fails to persuade us that admission of that evidence prejudiced Utecht's defense. Utecht argues that prejudice clearly resulted from the admission of this "evidence of domestic abuse [by] Utecht against a child at" his trial on allegations that he had sexually abused the same child and her brother. However, Utecht fails to explain how this evidence of the *existence* of *one* previous incident of *domestic* abuse made a difference when the circuit court allowed the State, in a decision that Utecht does not challenge on appeal, to present evidence at trial of the *details* of *multiple* previous incidents of *sexual* abuse by Utecht of the victims in St. Croix County between 2000 and 2004. In light of this unlimited other acts evidence of previous

sexual assaults by Utecht of the victims, we conclude that Utecht fails to demonstrate that there is a reasonable probability that, but for the admission of limited evidence of the "domestic incident," the results would have been different.

B. L.J.H.'s Statement That She Lied About the "Domestic Incident"

¶13 Utecht argues that, given that the jury heard limited evidence regarding the "domestic incident," his trial attorneys were ineffective for failing to cross examine L.J.H. about a note she wrote in which she recanted her assertion to the police, relating to the "domestic incident," that Utecht hit her.

¶14 At trial, the only evidence related to any communication between L.J.H. and the police as to the "domestic incident" was T.C.H's testimony, namely, his statement that he recalled that his sister L.J.H. called law enforcement on May 22, 2004. No evidence was presented as to what L.J.H. told the police then or later. After trial, Utecht attached to his postconviction motion a copy of a handwritten note by L.J.H., dated June 10, 2004, nine years before the trial, in which she asked for the no contact order to be lifted, and went on to state, "I am not afraid of him and I know he would never hurt me. The night this happened I lied in my statement.... I'm sorry that I lied[.] I didn't expect any of this to go this far. I would just like all of this to go away."

¶15 At the postconviction motion hearing, defense attorney Anderson testified that he did not cross examine L.J.H. based on her note stating that she had lied to the police about the "domestic incident" because "the more we could keep out of that case ... the better. We got the bail bond conditions in, and we got the time line in. But if we use [L.J.H's statement], then we start talking about that case in more detail ...." Attorney Anderson also testified that he did not ask L.J.H. on cross examination whether she had lied about the "domestic incident," because

the June note itself, in which she said she had lied, was extrinsic evidence that would not have been admissible to impeach her under WIS. STAT. § 906.08(2).[5]

¶16 Regardless whether it was deficient for Utecht's trial attorneys to fail to cross examine L.J.H. about her recanting her initial statement to the police regarding the "domestic incident," Utecht does not persuade us that that failure prejudiced his defense. Rather, had his attorneys succeeded in presenting to the jury that L.J.H. had lied to the police when she reported the "domestic incident," that evidence would have been merely cumulative to the numerous other times she changed her story as to what happened in 2004 and 2005. Utecht's trial attorneys elicited numerous inconsistencies between what L.J.H. told the detective in 2011, what she testified to at the preliminary hearing in 2012, and what she testified to at trial in 2013, as to the timing and nature of the sexual assaults she described. In light of these many other inconsistencies, Utecht fails to explain how this additional evidence of L.J.H. changing her story, this time about the "domestic incident," would have tipped the balance so that the jury could not believe her testimony at trial that she was sexually assaulted by Utecht.

[5] WISCONSIN STAT. § 906.08(2) provides: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than a conviction of a crime or an adjudication of delinquency as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11(2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross−examination of the witness or on cross−examination of a witness who testifies to his or her character for truthfulness or untruthfulness."

C. Offer to Take Polygraph Test

¶17 Utecht argues that his trial attorneys provided ineffective assistance by failing to elicit evidence that Utecht had offered to take a polygraph test to show his innocence.

¶18 At the pretrial bond hearing in May 2012, after the prosecutor stated the names of the two victims, the circuit court asked Utecht whether he had any question as to who they were. Utecht stated, "No. But I do have a request.... I would request that ... they have to take lie detector tests and myself take a lie detector test, too." The court responded that Utecht would have to discuss that with his attorney. No evidence about or reference to a polygraph test was presented at trial.

¶19 At the hearing on Utecht's postconviction motion, Utecht testified that he first offered to take a polygraph test at the bond hearing, that he reiterated that offer to attorney Anderson, that Anderson told him that a polygraph test is not admissible, and that he, Utecht, still demanded to take a polygraph test in order to prove to his family and to attorney Anderson that he did not commit the crimes charged.

¶20 Attorney Anderson agreed that Utecht did offer to take a polygraph test when they first met. Anderson testified that he decided not to use that offer at trial because: (1) the results of any test taken would not be admissible and the jury would be left wondering about whether Utecht actually took the test and about why they were not being told the results and, therefore, they would likely speculate that the results must have been adverse to Utecht; and (2) the only way to present the offer was for Utecht to testify, and Utecht decided not to testify.

¶21 "While a polygraph test result is inadmissible in Wisconsin, an offer to take a polygraph test is relevant to an assessment of the offeror's credibility and may be admissible for that purpose." ***State v. Pfaff***, 2004 WI App 31, ¶26, 269 Wis. 2d 786, 676 N.W.2d 562 (citation omitted). However, "such an offer is only relevant to the state of mind of a person making the offer [so] long as the person making the offer believes that the test ... is possible, accurate, and admissible." ***State v. Shomberg***, 2006 WI 9, ¶39, 288 Wis. 2d 1, 709 N.W.2d 370 (internal quotation marks and citations omitted).

¶22 Utecht argues that because he made his offer in open court before he had talked to his attorney, and reiterated that offer when he met with his attorney, both times before his attorney told him the test results were not admissible, we should infer that he believed the results were admissible when he made the offer. The circuit court rejected that inference, because Utecht never testified that he believed the results were admissible when he made the offer. However, even accepting that inference, we agree with the circuit court that Utecht's trial attorneys were properly concerned about presenting the offer because the jury might reasonably wonder about the results and hold it against Utecht for opening the door but not telling the complete story. *See* ***Pfaff***, 269 Wis. 2d 786, ¶30 (an offer to take a polygraph test, whose results are not admissible, can take the jury "into the realm of speculation and likely confusion").

¶23 Utecht argues that his attorneys' concern about leading the jury to speculate against Utecht could have been alleviated by the court informing the jury that the results of any polygraph test are not admissible by statute. However, such information would not cure the prospect of speculation from the mere mention of the offer to take the test. Finally, Utecht does not explain how evidence of the offer could have been presented to the jury when Utecht did not testify.

¶24 In sum, we conclude that Utecht's trial attorneys' decision not to elicit evidence that Utecht had offered to take a polygraph test to show his innocence was objectively reasonable and, therefore, was not deficient.

D. Utecht's Decision Not To Testify

¶25 Utecht testified at the postconviction motion hearing that during or prior to trial, his attorneys told him that "they would not ask [him] any questions if [he testified at trial]." Utecht argues that "[b]y threatening to abandon him should he choose to testify," his trial attorneys provided ineffective assistance.

¶26 Defense counsel are permitted to call a defendant without questioning him or her where they "know[] that the [defendant] intends to testify falsely." ***State v. McDowell***, 2004 WI 70, ¶43, 272 Wis. 2d 488, 681 N.W.2d 500 (2004). Where defense counsel knows that a defendant will testify falsely, for defense counsel to take steps to persuade the defendant to testify truthfully, to withdraw from representation, or to call the defendant without questioning him or her, does not deprive the defendant of the right to counsel or the right to testify. *See* ***id***., ¶¶45-47. Here, where Utecht asserts that there is no evidence of such knowledge on the part of his trial attorneys in the record, Utecht is claiming that his attorneys were ineffective by telling him that they would abandon him, where it appears that they had no lawful grounds to do so, and that Utecht decided not to testify based on that erroneous statement. We conclude that Utecht has forfeited this threat to abandon argument, which we will generally call the abandonment issue, as we proceed to explain.

¶27 At trial, after the last defense witness other than, potentially, Utecht, testified, Utecht's trial attorneys requested a break to discuss the status of the case with Utecht. The circuit court explained to Utecht that a break would be taken for

Utecht to consult with his attorneys about choosing whether to testify. Upon reconvening, the circuit court held a colloquy with Utecht about his decision whether to testify, after which the court concluded that Utecht was "making an intelligent and informed decision" not to testify.

¶28 Utecht moved for postconviction relief based on thirteen grounds, none of which concerned the abandonment issue, or any other aspect of Utecht's decision not to testify. At the postconviction motion hearing, Utecht's postconviction counsel did ask Utecht's trial attorneys about when and why they advised Utecht not to testify, but no questions were asked about the abandonment issue.

¶29 After his trial attorneys completed their testimony, Utecht testified, in response to questions by his postconviction counsel, that he understood that he could testify at trial, he wanted to do so, he demanded to do so, "and [his trial attorneys'] exact words were they would not ask [him] any questions if [he] did." There was no other evidence or questioning on the topic.

¶30 After the postconviction motion hearing Utecht filed a brief in which he raised the abandonment issue for the first time. He asserted then, as he does now on appeal, that his testimony—that his attorneys told him they would abandon him—was "uncontroverted." However, Utecht's "uncontroverted" assertion mischaracterizes the record. It is more accurate to say that Utecht's abandonment testimony is uncontroverted only in the sense that his approach to the postconviction hearing gave no opportunity for contradiction because Utecht did not reasonably apprise the State or the circuit court that his brief testimony was offered to support an abandonment argument. Utecht's postconviction counsel did not ask Utecht's trial attorneys whether they said anything to Utecht about how

they intended to proceed if he chose to testify. In particular, postconviction counsel did not confront the trial attorneys with Utecht's threat-to-abandon allegation and, of course, neither did the prosecutor. Accordingly, there was no opportunity for a contrary factual record as to the abandonment issue to be developed and, correspondingly, no basis on which the circuit court could have reasonably made factual findings on the topic.

¶31 We clarify that to the extent Utecht argues that he was deprived of counsel, his argument has no merit. Utecht did not testify and his attorneys did not abandon him. Rather, as Utecht also argues, the issue is ineffective assistance based on Utecht's assertion that his trial attorneys improperly threatened to abandon him without a justification and that information caused him to forego testifying. By not plainly raising the abandonment issue before or during the hearing, Utecht deprived the parties and the circuit court of the opportunity for factual development and fact finding on whether his trial attorneys had any justification for their asserted threat to abandon him, and whether and how that situation might have affected Utecht's decision not to testify.

¶32 In sum, we conclude that Utecht forfeited his argument on the abandonment issue because his argument is premised on the proposition that it is undisputed that his trial attorneys, without justification, told him they would abandon him if he chose to go against their advice that he not testify. It is misleading for Utecht to assert that it is undisputed that his trial attorneys told him they would not ask him any questions if he testified, when those attorneys had no opportunity to address the issue. Utecht's raising the abandonment issue for the first time after the postconviction evidentiary hearing prevented fact finding by the circuit court on the issue, and prevents us from resolving it on appeal.

CONCLUSION

¶33 For the reasons stated, we hold that the trial attorneys' representation of Utecht was not ineffective. Therefore, we affirm.

By the Court.—Judgments and order affirmed.

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