COURT OF APPEALS
DECISION
DATED AND FILED

May 17, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2015AP2296-CR

Cir. Ct. No. 2012CF271

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DOUGLAS M. YANKO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: SANDY A. WILLIAMS, Judge. *Affirmed*.

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Douglas M. Yanko appeals a judgment of conviction entered after a jury found him guilty of repeated acts of sexual assault of the same child, and an order denying his motion for postconviction relief. He argues he is entitled to a new trial based on the ineffective assistance of trial

counsel. Yanko also requests sentencing relief, asserting that trial counsel performed deficiently by not requesting that Yanko be exempted from the sex offender registry, and because the sentence imposed was excessive. Additionally, Yanko contends that the circuit court erroneously denied his motion to adjourn the postconviction hearing.[1] We reject Yanko's claims and affirm.

BACKGROUND

¶2 Yanko was charged with having sexual contact with K.W. in August 2012, when Yanko was seventeen-years old and K.W. was thirteen-years old. At a status hearing the day before the scheduled jury trial, the State informed the court and defense it was "not planning on using any audio/visual" evidence and did not have any such evidence in its file. Late that afternoon, the State obtained a recorded interview of K.W. on disc from the Saukville Police Department and provided a copy to trial counsel. The recording was about thirty to thirty-five minutes long. Trial counsel was unable to play the disc on his equipment and viewed it for the first time at the District Attorney's Office at 9:00 a.m. on the morning of trial.

¶3 In court, trial counsel asked for an adjournment to review the disc, compare it with K.W.'s other statements and, if necessary, redact it. The circuit court declined to adjourn but allowed the case to be recalled at noon to facilitate trial counsel's review of the disc. After a short recess, the parties informed the court there was a joint agreement not to play the recording for the jury.

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[1] Yanko also suggests that the circuit court erroneously denied his postconviction motions to supplement and seal the record. This claim is unclear, undeveloped, and unsupported by legal reasoning, and we do not address it further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

¶4 The trial proceeded that day. The State presented K.W. as its only witness, and Yanko and his mother testified for the defense. The jury found Yanko guilty and the circuit court imposed a sixteen-year bifurcated sentence, with nine years of initial confinement and seven years of extended supervision.

¶5 Yanko filed a postconviction motion seeking a new trial due to the ineffective assistance of counsel, or resentencing. The ***Machner***[2] hearing was started but continued to a later date. The circuit court granted two adjournments, allowing Yanko to try to procure confidential records from the juvenile court. Yanko's third adjournment request was denied and after the conclusion of trial counsel's testimony and the parties' arguments, the court denied the postconviction motion in full. Yanko appeals.

DISCUSSION

Trial counsel did not provide ineffective assistance at Yanko's jury trial.

¶6 Yanko claims that trial counsel performed deficiently at various points during trial. To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel's actions or inaction constituted deficient performance which caused prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. "To prove constitutional deficiency, the defendant must establish that counsel's conduct" fell "below an objective standard of reasonableness." ***Love***, 284 Wis. 2d 111, ¶30. A defendant must show specific acts or omissions that were "outside the

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[2] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) (where a defendant claims he or she received the ineffective assistance of trial counsel, a postconviction hearing "is a prerequisite … on appeal to preserve the testimony of trial counsel").

wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. Judicial review of an attorney's performance is "highly deferential" and the reasonableness of an attorney's acts must be viewed from counsel's contemporary perspective to eliminate the distortion of hindsight. ***State v. Maloney***, 2005 WI 74, ¶25, 281 Wis. 2d 595, 698 N.W.2d 583. To prove constitutional prejudice, the defendant must show that but for counsel's unprofessional errors a reasonable probability exists that the result of the proceeding would have been different. ***Strickland***, 466 U.S. at 696; ***Love***, 284 Wis. 2d 111, ¶30.

¶7 Whether counsel's actions were deficient or prejudicial is a mixed question of law and fact. ***Strickland***, 466 U.S at 698. 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.

¶8 Yanko's chief complaint is that trial counsel failed to impeach K.W. with her allegedly inconsistent recorded interview statements. Assuming without deciding that trial counsel performed deficiently, we conclude that Yanko has

failed to establish prejudice.[3] At trial, K.W. testified that Yanko pulled down her pants and rubbed his penis on her vagina, and that he was making contact with her breasts. Yanko complains that in the recorded statement, K.W. first told police he only touched her breasts, then said he touched her vagina with his hands. He asserts this contradicts her trial testimony wherein she described penis to vagina contact and indicated that he tried to insert his penis in her vagina.

¶9 Yanko cherry-picks statements from the recording and overlooks that in it, K.W. told police that while they were in the basement, Yanko rubbed his penis on her vagina and it "Almost" went inside. In the recorded statement, she said the same thing happened upstairs in his bedroom, specifying that he pulled down her pants, sat on top of her, touched her breasts, rubbed his penis on her vagina, and tried to insert it. We fail to see any material unexplored inconsistency which would lead us to question the reliability of the proceeding.

¶10 Yanko also points out that whereas K.W. testified at trial that she did not say anything to get him to stop, she said in her recorded statement that she repeatedly told Yanko "no" when he tried to pull her pants down in the basement. To the extent this constitutes a potential inconsistency, K.W.'s trial testimony was more favorable than the version in her recorded statement. Yanko has not met his

[3] We stop short of finding trial counsel's performance deficient. It appears that trial counsel may have opted to proceed without the recording because he felt forced to choose between completing his ongoing trial preparation or spending his few remaining hours poring over a recording of unknown utility which, he said, "cuts both ways." From our reading of the record, it is uncertain that the circuit court would have adjourned the trial at noon, even if trial counsel believed he needed more time after reviewing the recording. Yanko's appellate brief seems to assume that trial counsel could have used the statements in the recording to impeach K.W. without consequence, such as an unwanted playing of the video for the jury. Though we reject Yanko's claim based on lack of prejudice, it is not clear that trial counsel's decision to take the recording out of the equation was unreasonable on the facts presented.

burden to establish constitutional prejudice. With regard to the remaining alleged inconsistencies cited by Yanko, none is of sufficient materiality to demonstrate prejudice.

¶11 Next, Yanko complains that trial counsel provided ineffective assistance by employing an unsound theory of defense. In particular, he criticizes counsel's attempts to elicit from Yanko's mother that K.W. was not in the basement during the charging period. It is undisputed that K.W. was unable to pinpoint the date of the assault beyond saying it occurred in August 2012. Yanko's mother is confined to a wheelchair and is generally housebound. K.W. confirmed that Yanko's mother was present in the home on the date in question. Trial counsel explained at the ***Machner*** hearing that he had numerous discussions with Yanko's mother, found her credible, and planned to use her testimony to show that K.W. was not alone in the basement with Yanko during the charging period.

¶12 We reject Yanko's characterization of this strategy as "a crazy race … to have Yanko's mother prove that K.W. was never in the basement" that added an unnecessary element for Yanko to prove. According to Yanko, it was irrelevant whether K.W. had ever been in the basement of Yanko's house because even if she had, that "doesn't mean Yanko sexually assaulted her." Yanko mischaracterizes the defense, which was that K.W. was never in the basement in August 2012.[4] Yanko further complains that trial counsel unnecessarily elicited

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[4] For this same reason, we are not persuaded that trial counsel undercut the defense theory by acknowledging that K.W.'s description of his basement might be accurate. It was undisputed that Yanko and K.W.'s brother were friends; Yanko testified that prior to the charging period, K.W. may have been inside his house, among other reasons, to play video games with her brothers.

that he was on juvenile supervision during August 2012. Given the broad charging period, the defense reasonably attempted to use the testimony of Yanko's wheelchair-bound mother who was closely watching Yanko during that month due to his status on juvenile supervision to debunk K.W.'s story that they engaged in sexual activity in the basement. Yanko has failed to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" ***Strickland***, 466 U.S. at 689 (citation omitted).

¶13 Yanko criticizes trial counsel for telling the jury that "no one can provide an alibi for 27 days" and suggesting that the broad charging period put Yanko in an unfortunate posture. Yanko states "it was both deficient and prejudicial for defense counsel to claim that just because he did not have an alibi, he was in a difficult position" because this somehow functioned as a "concession" of guilt that lent credibility to the State's case. We fail to see how highlighting that K.W.'s lack of specificity made Yanko's case more difficult by precluding an alibi defense was deficient or prejudicial.

¶14 Yanko next claims that trial counsel performed deficiently by failing to inform the jury that according to K.W., a potentially corroborating witness, R.H., was also at Yanko's house during the assault. Yanko is mistaken. On cross-examination, K.W. testified that R.H. was at Yanko's house before, during and after the assault. She testified that R.H. then drove her and Yanko to K.W.'s house. Trial counsel elicited from K.W. that R.H. maintains he does not remember the facts of that day. In closing, trial counsel argued:

> Where is the final witness, [R.H.]? He's a friend of [K.W.'s], a friend of [Yanko's]. Obviously he's been over there many times. Why didn't he come in here and say that he drove her over there? …

Trial counsel explored this avenue and did not perform deficiently.

¶15 The last complaint we individually address is Yanko's assertion that trial counsel performed deficiently by agreeing to present the jury with the following stipulation addressing how K.W.'s allegations came to light:

> That on November 9, 2012, [K.W.] relayed what had occurred between her and Mr. Yanko to her cousin. Her cousin then relayed to [K.W.'s] parents what [K.W.] told him. [K.W.'s] parents then contacted social services. Social services then contacted the Saukville Police Department.

According to Yanko, "This was prejudicial because it does not make sense that the defense would stipulate to anything that [K.W.] said or did."

¶16 We agree with the State that this proposition is "[n]onsense." Yanko wanted the jury to know that the incident was not reported for several months. The stipulation informed the jury about the chain of events leading up to police involvement while avoiding potential admissibility issues (such as a hearsay objection) and the risk attendant to unpredictable live testimony.[5]

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[5] Yanko also complains that the stipulation did not allow the jury to learn that K.W. had unrelated police contact in September 2012 but did not report the incident. The circuit court expressed concern that this line of questioning was impermissibly prejudicial. Yanko points out that the circuit court previously stated trial counsel could ask K.W., "back in September would you have had the opportunity to tell law enforcement about this?" We reject the proposition that trial counsel's failure to ask this question was in any way prejudicial. K.W. had the opportunity to tell police or anyone else about the incident prior to November 2012. The stipulation highlighted both the delayed reporting and that K.W. did not take it upon herself to involve the police.

¶17 Finally, we have reviewed Yanko's remaining claims alleging counsel's ineffective assistance at trial.[6] We conclude that none of these asserted errors, whether viewed individually or cumulatively, prejudiced Yanko. ***Strickland***, 466 U.S. at 697 ("[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.").

Trial counsel's failure to request that Yanko be exempted from the sex offender registry at sentencing was not ineffective.

¶18 The sentencing court ordered Yanko to register as a sex offender under WIS. STAT. § 973.048(2m) (compliance with WIS. STAT. § 301.45 registration is generally mandatory for certain convictions, including those under WIS. STAT. § 948.025). Pursuant to § 301.45(1m)(a), there is an exception to the mandatory registration requirement for underage sexual activity where the circuit court determines that at the time of the offense the defendant was under age eighteen and within four years of the victim's age, and "It is not necessary, in the interest of public protection, to require the person to comply with the reporting requirements under this section." WIS. STAT. § 301.45(1m)(a) 2-3. Yanko argues that trial counsel was ineffective for failing to request that he be exempted from registration. We disagree.

¶19 Yanko had already been ordered to register as a sex offender at the time he committed the instant offense. The sentencing court was familiar with

[6] These include complaints about trial counsel's "multiple objectionable questions and statements," his failure to object to the prosecutor's minor misstatement of testimony in closing or to move for dismissal or judgment notwithstanding the verdict, and statements made by trial counsel in closing argument for which he offered a strategic reason at the ***Machner*** hearing.

Yanko's prior sexual assault case and found him to be a danger to the community. The presentence investigation report (PSI) recommended registration. Against this backdrop, a request to exempt Yanko from registration would have been futile. *See* ***State v. Swinson***, 2003 WI App 45, ¶59, 261 Wis. 2d 633, 660 N.W.2d 12 (counsel's failure to bring a meritless motion does not constitute deficient performance); *see also* ***Quinn v. State***, 53 Wis. 2d 821, 827, 193 N.W.2d 665 (1972) (counsel not ineffective when he did not file motions that "would have been an exercise in futility"). Yanko has not established either deficient performance or prejudice.

The circuit court did not erroneously exercise its discretion in imposing Yanko's sentence.

¶20 Yanko argues that the circuit court erroneously exercised its discretion by imposing an excessive sentence based in part on an alleged misunderstanding of Yanko's testimony. It is well-established that we afford the sentencing court a strong presumption of reasonability, and if discretion was properly exercised, we follow "a consistent and strong policy against interference" with the court's sentencing determination. *See* ***State v. Gallion***, 2004 WI 42, ¶¶17-18, 270 Wis. 2d 535, 678 N.W.2d 197. We will sustain a sentencing court's reasonable exercise of discretion even if this court or another judge might have reached a different conclusion. ***State v. Odom***, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695.

¶21 At sentencing the circuit court commented that Yanko had claimed "the only time [the victim] might have been at [his] the residence would have been outside the residence." Postconviction, Yanko clarified that his trial testimony was that K.W. was not at his house during the charging period but had been in his

house at other times. His postconviction motion suggested that the court misunderstood his testimony and this may have negatively impacted his sentence. At the postconviction hearing, the circuit court rejected the notion that the claimed misunderstanding predisposed it to impose a harsher sentence, observed it had not imposed the maximum and, pointing out it had considered myriad factors, determined its sentence was not excessive.

¶22 We review a circuit court's conclusion that its sentence imposed was not unduly harsh and unconscionable for an erroneous exercise of discretion. ***State v. Giebel***, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995). We will not set aside a discretionary ruling if it appears from the record that the court applied the proper legal standards to the facts before it, and through a process of reasoning, reached a result which a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). In the instant case, the circuit court identified proper objectives, considered relevant factors, and imposed a sentence within a range authorized by law. Yanko has not shown any "unreasonable or unjustified basis" for his sentence that would cause us to question its propriety. *See* ***State v. Taylor***, 2006 WI 22, ¶18, 289 Wis. 2d 34, 710 N.W.2d 466 (citation omitted).

The circuit court properly denied Yanko's request to further adjourn the postconviction hearing.

¶23 Yanko's postconviction motion was first heard on July 8, 2015. Trial counsel began his testimony but the hearing was continued to July 23, 2015. Postconviction counsel requested and was granted two adjournments and the matter was eventually scheduled for October 19, 2015. Days before the hearing, postconviction counsel sent a letter requesting another adjournment, explaining

she was attempting to obtain juvenile records from another branch in order to supplement her postconviction motion with additional claims. Counsel was told to appear as scheduled. At the hearing, counsel renewed the adjournment request, explaining she had learned that K.W.'s brothers were charged in juvenile court with sexually assaulting K.W. and had received favorable dispositions, including reduced misdemeanor battery adjudications. Counsel recounted her unsuccessful attempts to procure these records from the juvenile court, and stated that Yanko was in the process of appealing the juvenile court's orders denying access. The circuit court declined to adjourn and the hearing proceeded with trial counsel's testimony and the parties' arguments. Yanko appeals this ruling.

¶24 The decision whether to grant or deny an adjournment request is left to the trial court's discretion and will not be reversed on appeal absent an erroneous exercise of that discretion. ***State v. Leighton***, 2000 WI App 156, ¶27, 237 Wis. 2d 709, 616 N.W.2d 126. In making its decision, the circuit court balances these factors: (1) the length of the delay requested; (2) whether the lead counsel has associates prepared to try the case in his or her absence; (3) whether other continuances were requested and received by the defendant; (4) the convenience or inconvenience to the parties, witnesses and the court; (5) whether the delay seems to be for legitimate reasons or whether its purpose is dilatory; and (6) other relevant factors. *See* ***Phifer v. State,*** 64 Wis. 2d 24, 31, 218 N.W.2d 354 (1974). Because the denial of a continuance "may raise questions relative to a defendant's sixth amendment right to counsel and fourteenth amendment right to due process of law … this court's task on review is to balance the defendant's right to adequate representation by counsel against the public interest in the prompt and efficient administration of justice." ***State v. Fink***, 195 Wis. 2d 330, 338, 536 N.W.2d 410 (Ct. App. 1995). However, "'probing appellate scrutiny' of

a decision to deny a continuance is not warranted." ***Id***. at 338-39 (citation omitted).

¶25 We conclude that the circuit court properly exercised its discretion in denying Yanko's request for another adjournment. The circuit court had already granted two adjournments at Yanko's request, Yanko had been transported from prison to court for the proceeding, trial counsel and the prosecutor both appeared, and the circuit court had cleared its calendar. Postconviction counsel's request for the brothers' juvenile records was denied.[7] In addition, trial counsel testified he was aware of the allegations by K.W. against her brothers but did not believe he had any basis to seek their juvenile records:

> I was aware that there were allegations. I was also aware they were amended to I believe battery, something other than sexual assault, and I did not believe I would be successful in filing those motions.

The facts before the postconviction court undercut Yanko's claim that additional time would yield a developed, colorable claim for relief, and suggested that a further adjournment would only delay the inevitable.[8]

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited under RULE 809.23(3)(b).

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[7] Indeed, we subsequently affirmed the other circuit court branch's order denying Yanko access to the juvenile records requested. ***State v. A.S.W./J.P.W.***, Nos. 2015AP2119/2120, unpublished slip op. ¶30 (WI App Oct. 5, 2016).

[8] To the extent we have not addressed any other argument raised by Yanko on appeal the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc***., 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").