COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 2017

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. 2015AP2629-CR **Cir. Ct. No. 2013CF33**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROSS R. THILL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jackson County: ANNA L. BECKER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Ross Thill appeals a judgment of conviction entered after a jury found him guilty of one count of sexual contact with a child, and the circuit court's order denying his motion for postconviction relief. Thill argues that his trial counsel provided ineffective assistance for failing to: (1) ask

follow-up questions of a potential juror who stated that she knew a person with the same name as a defense witness; and (2) object to the prosecutor's questions and comments about Thill's right to remain silent. Thill also argues that the circuit court erred by allowing the victim to testify via closed circuit television without making the requisite findings, in violation of his right to confrontation. Finally, Thill argues that he is entitled to a new trial in the interest of justice. As we explain, we reject Thill's arguments and, therefore, affirm.

BACKGROUND

¶2 The State charged Thill with repeated sexual assault of a child, arising from several incidents between Thill and eight-year-old AMM, whose mother was Thill's former girlfriend. As to one of the incidents, the complaint alleged that Thill touched AMM's crotch when he was driving her from her mother's residence to his residence to play with Thill's children.[1] At trial, the circuit court granted the State's request for an instruction on the lesser-included charge of one count of sexual contact with a child. The jury found Thill guilty of that one count, based on this incident, and not guilty of the charge of repeated sexual assault of a child.

¶3 This appeal concerns three separate aspects of the circuit court proceedings. First, during voir dire, a potential juror stated that she had gone to high school with a person with the same name as a defense witness. The circuit court asked whether the potential juror had been or was at the time of trial "best friends" with that person, and the potential juror answered, "No." Neither Thill's

[1] We refer to this incident as "this" or "the" incident in this opinion.

trial attorney nor the prosecutor asked the potential juror any follow-up questions. The potential juror served as a juror at trial. Shortly after trial, a different juror wrote the circuit court a letter stating that a "younger" juror sitting "across from me knew one of the defendant's character witnesses and she thought something was up with [Thill] from the second [the witness] took the stand because in her words, [the witness] was 'a piece of work.' ... Even I began to question the defendant's innocence when the girl across from me said she knew the witness from seeing her in school."

¶4 Second, the day after Thill was arrested in March 2013, he was interviewed by a detective. Thill was told he was being investigated for the alleged touching of AMM, was informed of and waived his ***Miranda***[2] rights, made certain statements to the detective about the incident, and then invoked his ***Miranda*** rights, at which point the detective terminated the interview. At trial in June 2014, Thill testified about what happened during the incident, and the prosecutor, referring to Thill's testimony, asked, "But when you had the opportunity to tell law enforcement these facts that you hoped would exonerate you, you did not do that?" Thill answered, "No, I did not." During closing argument, the prosecutor, after acknowledging the right of a person under investigation to remain silent, stated, "But if what [Thill] told you is true, wouldn't we want to know that over a year ago and not put ourselves through this process?"

¶5 Third, before trial, the State moved the circuit court to allow AMM to testify outside of the courtroom via closed-circuit television. Thill objected, asserting that the State failed to show that the required statutory criteria were

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

satisfied. The court granted the motion, "based upon the opinions that [the court] received in correspondence from [AMM's] therapists," but then agreed to conduct an in camera review of the therapy records supporting the correspondence from AMM's most recent therapist, and to apprise the parties if it had "concerns that would impact [its] earlier ruling." At trial, the court informed the parties that it had reviewed the therapy records, and neither party further inquired of the court concerning the records.

¶6 Thill filed a postconviction motion alleging that his trial counsel was ineffective for: (1) failing to ask follow-up questions of the potential juror, in order to identify the juror's bias, after the juror stated that she knew a person with the same name as a defense witness, resulting in the seating of a biased juror and the denial of Thill's right to an impartial jury; and (2) failing to object when the State commented on Thill's exercise of his right to remain silent when cross-examining Thill and in closing argument. Thill also sought a new trial in the interest of justice. The circuit court held a ***Machner***[3] hearing and denied Thill's postconviction motion. Thill appeals.

DISCUSSION

I. Ineffective Assistance of Counsel

¶7 Thill argues that his trial counsel was ineffective in two respects. We first set out the legal principles that apply to both claims. We then apply those principles to each claim in turn, explain why we conclude that each claim lacks merit, and address and reject Thill's arguments to the contrary.

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

A. Applicable legal principles

¶8 Under both the Wisconsin and United States Constitutions, in order for a court to find that counsel rendered ineffective assistance, a defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305.

¶9 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***, 466 U.S. at 690. 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.

¶10 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." ***Id.*** at 694.

¶11 The defendant bears the burden on both of these elements. ***State v. Roberson***, 2006 WI 80, ¶24, 292 Wis. 2d 280, 717 N.W.2d 111. 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.

¶12 A claim of ineffective assistance of counsel presents a mixed question of law and fact. We will uphold the circuit court's findings of fact unless they are clearly erroneous. ***Thiel***, 264 Wis. 2d 571, ¶21; ***State v. Kimbrough***, 2001 WI App 138, ¶27, 246 Wis. 2d 648, 630 N.W.2d 752. "Findings of fact

include 'the circumstances of the case and the counsel's conduct and strategy.'" ***Thiel***, 264 Wis. 2d 571, ¶21 (quoted source omitted). The determination of counsel's effectiveness is a question of law which we review de novo. ***Kimbrough***, 246 Wis. 2d 648, ¶27.

B. Failure to question a potential juror

¶13 "Prospective jurors are presumed impartial, and the challenger to that presumption bears the burden of proving bias." ***State v. Smith***, 2006 WI 74, ¶19, 291 Wis. 2d 569, 716 N.W.2d 482 (quoted source omitted). There are three types of potential juror bias: statutory, subjective, and objective. ***State v. Faucher***, 227 Wis. 2d 700, 716, 596 N.W.2d 770 (1999). Thill alleges only subjective and objective bias here. Subjective bias "refers to the bias that is revealed by the prospective juror on voir dire: it refers to the prospective juror's state of mind." ***Smith***, 291 Wis. 2d 569, ¶20 (quoted source omitted). Objective bias may be revealed where a juror shows either "an ingrained attitude about the particular subject of the case," or some connection between the bias and the theory of the case, such that a reasonable person in the juror's position could not judge the case in a fair and impartial manner. ***State v. Oswald***, 2000 WI App 2, ¶26, 232 Wis. 2d 62, 606 N.W.2d 207; ***Faucher***, 227 Wis. 2d at 718-19. A defendant is prejudiced if trial counsel's performance resulted in the seating of a biased juror. ***State v. Koller***, 2001 WI App 253, ¶14, 248 Wis. 2d 259, 635 N.W.2d 838.

¶14 We briefly recap the facts. During voir dire, a potential juror stated that she had attended high school with a person with the name of one of Thill's witnesses, but did not know "if [it was] the same person." When asked by the circuit court if they were best friends, the potential juror answered, "No." In a post-trial letter, a different juror stated that an unidentified juror, who knew one of

Thill's character witnesses, made a negative comment about that witness. For ease of discussion, we refer to the potential juror who answered the voir dire question as the potential juror, to the juror who wrote the letter as the letter-writer, and to the juror to whom the letter-writer attributed the negative comment as the commenting juror.[4]

¶15 Thill does not argue that the potential juror's answers in voir dire in and of themselves indicated subjective or objective bias that required follow-up questions to explore bias. Rather, Thill argues only that the post-trial letter revealed that the commenting juror was subjectively and objectively biased. More specifically, Thill argues that, in light of the letter sent to the circuit court after trial stating that another juror knew one of Thill's character witnesses and made a negative comment about that witness, Thill's trial counsel had been ineffective for failing to ask follow-up questions of the potential juror during voir dire to reveal her bias and prevent her from sitting on the jury. There are several problems with Thill's argument, but we address only one, which is that his argument is based on pure speculation.[5]

[4] In briefing on appeal, Thill assumes that the potential juror and the commenting juror are the same person. We acknowledge that the circuit court seemed to make the same assumption, although the court did not expressly so find. Regardless of Thill's failure to present evidence that the potential juror and the commenting juror are the same person, we assume for argument's sake that the two are the same person.

[5] Although Thill argues that it was the post-trial letter that triggered counsel's obligation to ask follow-up questions, he also seems to seek a bright-line rule that whenever a potential juror states that they know a person with the same name as a witness but is not friends with that person, counsel must ask a follow-up question to find out "whether [they] might have a negative opinion." Thill cites no legal support for such a rule, and we decline to consider this aspect of Thill's argument further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to review issues unsupported by references to legal authority or inadequately briefed).

¶16 One way to prove prejudice from the seating of a biased juror as a result of trial counsel's failure to ask that juror follow-up questions to reveal that bias, is to call "suspect jurors" as witnesses at the postconviction hearing in order to ask them the follow-up questions that the defendant argues trial counsel ought to have asked at voir dire. ***Koller***, 248 Wis. 2d 259, ¶15. At the postconviction motion hearing here, Thill did not present the potential juror, the letter-writing juror (at the least, to identify the commenting juror), or the commenting juror. Accordingly, we have no information about whether the potential juror or the commenting juror, whether the same person or not, was biased. On a claim for ineffective assistance of counsel, the burden is on the defendant to show both deficient performance and prejudice. ***State v. Sanchez***, 201 Wis. 2d 219, 232, 548 N.W.2d 69 (1996). Without this evidence, Thill's claim is purely speculative. ***State v. Leighton***, 2000 WI App 156, ¶¶38-39, 237 Wis. 2d 709, 616 N.W.2d 126.

¶17 At the postconviction motion hearing here, Thill presented only his trial witness whose name was mentioned by the potential juror. That witness testified that she knew the potential juror from high school, had not realized that she did until the verdict was read, never told Thill or his counsel, and did not know why that person would call her "a piece of work." However, the *witness's testimony* does not provide this court with a foundation to conclude that the *juror* was biased in her ability to be impartial toward Thill. *See* ***State v. Funk***, 2011 WI 62, ¶¶41-43, 57, 335 Wis. 2d 369, 799 N.W.2d 421 (where the defendant in a sexual assault case did not call a juror at a postconviction hearing to ask why she did not respond to a question that may have led to the eventual disclosure that she had been a victim of sexual assault, the defendant had failed to make "a record at the post-conviction hearing of why" she had not done so, and absent such a record,

there was no "foundation on which to conclude that a reasonable person in [the juror's] position" would be biased against the defendant).

¶18 In sum, we conclude that Thill failed to meet his burden to show that his trial counsel was ineffective for failing to ask the potential juror follow-up questions.

C. Failure to object to questions and comments about Thill's right to remain silent

¶19 Thill argues that his counsel deficiently failed to object to the prosecutor's comments on Thill's pretrial silence. We assume, without deciding, that the prosecutor's comments were improper and that the failure to object to the comments was deficient performance. However, we conclude that Thill has not demonstrated prejudice.

¶20 A defendant has a constitutional right to remain silent, and the State may not comment on a defendant's choice to remain silent before or at trial. U.S. CONST. amend. V; WIS. CONST. art. I § 8; ***Miranda***, 384 U.S. at 467-68; ***Nielsen***, 247 Wis. 2d 466, ¶30. More specifically, it is a violation of due process to use a defendant's silence after receiving ***Miranda*** warnings for impeachment purposes. ***Doyle v Ohio***, 426 U.S. 610, 618-19 (1976). However, when a defendant voluntarily speaks after receiving ***Miranda*** warnings, the State may impeach a defendant's trial testimony with the defendant's prior inconsistent statements. ***Anderson v. Charles***, 447 U.S. 404, 408 (1980) ("Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving ***Miranda*** warnings has not been induced to remain silent.").

¶21 We briefly recap the relevant facts. At trial, the prosecutor commented twice about what Thill did not say to law enforcement after his arrest. First, on cross-examination, the prosecutor and Thill had the following exchange:

> Q: Now, Mr. Thill, you've been present throughout the trial and you've been able to hear all the evidence that's been presented to the jury so far, correct?
>
> A. Yes.
>
> Q. Isn't it true that the first time you've told this account is today?
>
> A. No, I've had discussions with [trial counsel] before.
>
> Q. ... But when you had the opportunity to tell law enforcement these facts that you hoped would exonerate you, you did not do that?
>
> A. No, I did not.

Second, in his closing argument, the prosecutor stated:

> Now, folks that are under investigation are absolutely entitled to remain silent. I must have said that to 150 clients when I was a defense attorney, you shut your mouth, I'll tell you when you can speak, and God help the ones who didn't listen to me. But if what [Thill] told you is true, wouldn't we want to know that over a year ago and not put ourselves through this process?

¶22 Approximately one year before trial, Thill made certain statements to a detective after receiving and waiving his ***Miranda*** rights, until he invoked his ***Miranda*** rights and the detective ended the interview. The State on appeal does not point to any of the statements Thill made during that interview as being inconsistent with Thill's testimony at trial. Nor does the State argue that Thill "open[ed] the door" for impeachment by testifying about his interactions with the detective or other law enforcement officials after he was arrested. ***Nielsen***, 247 Wis. 2d 466, ¶31. Nor, most significantly, does the State refute Thill's argument

that the prosecutor's questions and comments improperly asked the jury "'to make a direct inference of guilt from [Thill's] post-arrest silence,'" and allowed Thill's silence "to be used to impeach his explanation subsequently offered at trial." Accordingly, we take the State to concede that the prosecutor's questions and comments were objectionable.

¶23 We will assume, without deciding, that trial counsel's failure to object constituted deficient performance. However, as we explain, Thill fails to show that he was prejudiced by his trial counsel's failure to object.

¶24 The prosecutor's questions and comments were isolated, made at the start of a lengthy and wide-ranging cross-examination of Thill and in the midst of a lengthy closing argument, at a trial that lasted three days, during which the parties called nineteen witnesses and presented forty-five exhibits. The State's evidence included AMM's forensic interview statements, her statements during her physical examination, her trial testimony, and testimony by her mother and grandmother. Thill presented evidence challenging AMM's credibility, supporting his defense that AMM's mother was motivated to frame him after he ended their relationship, and showing his good character. The jury acquitted Thill of repeated acts of sexual assault and found him guilty of one act of sexual contact committed on the date of the incident described earlier in this opinion. In reaching that verdict, the jury would have been focused on the credibility of AMM, her mother, and her grandmother; on the physical evidence related to the other incidents charged; and also on Thill's credibility as to all the incidents charged. Thill fails to show that there is a reasonable probability that, but for his trial counsel's failure to object to the prosecutor's brief and isolated questions about Thill's failure to tell the detective his full account of one of the incidents, the verdict would have been different.

¶25 This case is not like ***Odell v. State***, 90 Wis. 2d 149, 151-54, 279 N.W.2d 706 (1979), *on reconsideration of* ***Odell v. State***, 87 Wis. 2d 294, 274 N.W.2d 670 (1979), which involved one incident of theft and where the questioning was persistent, emphatic, and expressly accusatory as to that one incident. We are confident that the brief and isolated questions and comments here did not affect the jury's verdict, and, therefore, that Thill suffered no prejudice from his trial counsel's failure to object.

II. Testimony Via Closed Circuit Television

¶26 Under both the Wisconsin and the United States Constitutions, defendants in criminal cases have the right to confront the witnesses against them. ***Maryland v. Craig***, 497 U.S. 836, 848-50 (1990); ***State v. Vogelsberg***, 2006 WI App 228, ¶4, 297 Wis. 2d 519, 724 N.W.2d 649. A court may limit this right where "necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." ***Craig***, 497 U.S. at 850.

¶27 In ***Craig***, the Supreme Court held that a child could testify via closed circuit television if the circuit court makes an individualized determination that: (1) the procedure is necessary to protect the child's welfare; (2) the child would otherwise be traumatized by the presence of the defendant; and (3) the emotional distress suffered by the child in the presence of the defendant is "more than 'mere nervousness or excitement or some reluctance to testify.'" ***Id.*** at 855-56 (quoted source omitted).

¶28 Consistent with the ***Craig*** requirements, WIS. STAT. § 972.11(2m)(a)1. (2015-16)[6] authorizes a circuit court to take the testimony of a child under twelve years old via closed circuit television if "the court finds all of the following:"

> a. That the presence of the defendant during the taking of the child's testimony will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.
>
> b. That taking the testimony of the child in a room other than the courtroom and simultaneously televising the testimony in the courtroom by means of closed-circuit audiovisual equipment is necessary to minimize the trauma to the child of testifying in the courtroom setting and to provide a setting more amenable to securing the child witness's uninhibited, truthful testimony.

¶29 "Whether an action by the circuit court violated a criminal defendant's right to confront an adverse witness is a question of constitutional fact." ***Vogelsberg***, 297 Wis. 2d 519, ¶3. This court will uphold the circuit court's factual findings unless they are clearly erroneous, but will independently determine whether those facts meet the constitutional standard. ***Id.***

¶30 We briefly recap the relevant facts. The State filed a pretrial motion to allow AMM to testify via closed circuit television. Thill filed an objection, identifying the statutory requirements and asserting that the State failed to show that those requirements were satisfied. At a pretrial hearing, the circuit court asked the State if it was "prepared to support the allegation that [AMM] would suffer severe emotional distress to the extent that the child could not reasonably

[6] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

communicate?" The prosecutor responded relying on treatment records that the State had only recently received and had provided to defense counsel the morning of the hearing. The court deferred ruling on the motion to give Thill and the court an opportunity to review the records, stating: "I want to see that report. I will then compare the opinions and findings of the psychiatrist or psychologist with the requirements of the statute and give both of you additional opportunity to argue concerning the motion after we're all fully advised."

¶31 At a subsequent pretrial hearing, the circuit court granted the State's motion to allow AMM to testify via closed circuit television, basing its decision "upon the opinions that [the court] received in correspondence from [AMM's] therapists."[7] The court stated that it would also review AMM's therapy records referred to in the correspondence, and apprise the parties if anything in those records would affect its ruling. No such communication from the court followed.

¶32 Pursuant to the circuit court's pretrial ruling, AMM testified from a different room via closed circuit television; Thill's trial counsel and the prosecutor were in the room with AMM; Thill, the judge, and the jury remained in the courtroom and watched as AMM testified on direct and cross examination via closed circuit television.

¶33 Thill argues that the circuit court failed to make the required statutory findings and that the therapist's letters and therapy records relied on by the court do not establish that the statutory requirements were satisfied. We disagree.

[7] Although the transcript reads "therapists," the record contains correspondence from one therapist only.

¶34 "[I]f a circuit court fails to make a finding that exists in the record, an appellate court can assume that the circuit court determined the fact in a manner that supports the circuit court's ultimate decision." ***State v. Martwick***, 2000 WI 5, ¶31, 231 Wis. 2d 801, 604 N.W.2d 552 (citing ***Sohns v. Jensen***, 11 Wis. 2d 449, 453, 105 N.W.2d 818 (1960)). The appellate court is entrusted to make that assumption "only when evidence exists in the record to support the 'assumed fact.'" ***Id.***, ¶74 (Abrahamson, C.J., dissenting).[8] The record contains the facts that support the circuit court's decision here.

¶35 As noted, the circuit court relied on correspondence from AMM's therapist, who is a sexual abuse counselor at Gundersen Behavioral Health, and the therapist's treatment records. Those documents contain a diagnosis of AMM's condition, a description of her symptoms, and an explanation of how Thill's presence during AMM's testimony would affect her condition and her ability to communicate.[9] The therapist's observations and opinions contained in these documents support the findings that testifying in Thill's presence would cause AMM to suffer serious emotional distress such that she could not reasonably communicate, and that testifying via closed circuit television is necessary to minimize that trauma and provide a setting more amenable to securing her truthful testimony. *See* WIS. STAT. § 972.11(2m)(a)1. Because those findings are not clearly erroneous, we conclude that the circuit court properly allowed the State to present AMM's testimony via closed circuit television.

[8] The State in its response brief cites this ruling in ***Martwick*** to support the circuit court's decision, and Thill in his reply brief does not argue that ***Martwick*** may not apply here. Rather, Thill argues only that the record does not support the required statutory findings.

[9] Consistent with our order granting the parties permission to access these documents which are sealed in the record, we do not quote any confidential portions of these documents.

III. New Trial in Interest of Justice

¶36 WISCONSIN STAT. § 752.35 permits this court to order a new trial "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried[.]" Thill asks that we order a new trial, arguing that the real controversy was not tried here because the jury heard improper evidence and he was denied an impartial jury due to his trial counsel's ineffective assistance, and because he was denied the right to confront his accuser.

¶37 Thill's first two grounds fail because they simply reiterate his ineffective assistance of counsel argument. Where a defendant argues under WIS. STAT. § 752.35 that he is entitled to a new trial because his trial counsel's deficiencies prevented the real controversy from being fully tried, the appropriate analytical framework is provided by ***Strickland***. ***State v. Mayo***, 2007 WI 78, ¶60, 301 Wis. 2d 642, 734 N.W.2d 115. We have already conducted the ***Strickland*** analysis and concluded that Thill's trial counsel did not provide ineffective assistance.

¶38 Thill's third ground is a reiteration of his argument that the circuit court improperly allowed AMM to testify via closed circuit television. We have already reviewed that ruling by the circuit court and concluded that it was not improper.

¶39 Therefore, Thill fails to show that there is a basis for a new trial in the interest of justice.

CONCLUSION

¶40 For the reasons stated, we affirm the judgment of conviction and the order denying postconviction relief.

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 except as provided under RULE 809.23(3).