COURT OF APPEALS
DECISION
DATED AND FILED

June 1, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP361-CR **Cir. Ct. No. 2012CF324**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL S. THOMPSON-JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: TIMOTHY A. HINKFUSS, Judge. *Affirmed*.

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

¶1 PER CURIAM. At a jury trial Michael Thompson-Jones was convicted of battery, disorderly conduct, and second-degree sexual assault—use or threat of force or violence. He appeals the judgment of conviction and the order denying his motion for post-conviction relief, based primarily on arguments that:

(1) his trial counsel provided ineffective assistance in failing to request a jury instruction for the lesser-included offense of third-degree sexual assault; (2) trial counsel was ineffective in making inadequate use of a written statement that the alleged victim gave police; and (3) the evidence was insufficient to prove that he used or threatened force or violence to have nonconsensual sexual intercourse with the victim. We reject each argument and accordingly affirm.

BACKGROUND

¶2 At the two-day trial, the State built its case around the alleged victim's testimony, and each issue raised on appeal involves the victim's trial testimony. Thompson-Jones did not testify, although the jury heard police testimony about alleged admissions he made. We now summarize aspects of the victim's testimony adequate to provide basic background for the issues raised on appeal, and then provide additional background as pertinent to particular topics in the Discussion section.

¶3 The victim and Thompson-Jones had known each other for 18 to 24 months when he visited her in her condominium on the day in question. Thompson-Jones was "messed up" from drinking, and "all day he … was fighting with me[,] [after] he started drinking." "[H]e gets mean when he drinks." The two argued during the late afternoon about the victim calling a former boyfriend for a ride. Thompson-Jones "didn't want [the victim] to leave."

¶4 After objecting to the victim calling the former boyfriend, Thompson-Jones "punched" her "really hard" in the face at least one time, without her consent, as she sat in a recliner in the living room. She tried to protect herself by putting her hands up. "He hits hard. He's strong." At the time he punched her,

Thompson-Jones said, "I'll kill you." Thompson-Jones started the physical violence between the two that afternoon.

¶5 Thompson-Jones's actions "messed up" the victim's eye (she noticed bruising the next day), her nose was bleeding and swollen, she had marks "all over" her arms, and a partial denture and her glasses were both broken. The victim attempted to defend herself. In unsuccessful attempts to scratch his eyes and his chest, the victim pushed Thompson-Jones and scratched his face.

¶6 The violence "stopped because [Thompson-Jones] wanted to have sex." The victim lay down on the floor in the living room. Thompson-Jones may have been "pacing and talking," although she "wasn't really listening to him. My head hurt so bad." "He was talking about sex and … how … he would feel better, and I said, no, please, no, my head hurts." "I was afraid he would hit me and kill me." When Thompson-Jones told her that he wanted to have sex, "I told him, please, no, my head hurts. My throat was hurting. My stomach hurts. I didn't want to. I told him no. And he yelled," and held up his fist, "and I was afraid again."

¶7 About five minutes later, "or less," the victim left the living room and went to the bedroom, with Thompson-Jones "right behind me." The victim first testified that she "laid down and he took off my clothes and he had sex with me." Subsequently, however, she testified that she took off her own pants and underwear. She took off her pants "[b]ecause he wanted to have sex with me, and I was … afraid of him. I just wanted it to be over with and I was afraid of him."

¶8 While the two were together in the bedroom, the victim "didn't say anything," except that her head hurt. The victim cried "the whole time" while Thompson-Jones had sex with her, which included a form of sexual intercourse.

At one point, she "pushed him away from me. That meant stop." Beyond that, she did not attempt to fight off Thompson-Jones "[b]ecause I didn't want him to hit me again because he [had] just beat me up. I was shaken. I was scared…. I just wanted him to finish and go away." After Thompson-Jones had held up his fist to her in the living room, and after "I told him no, and he wanted to" have sex, "What else was I supposed to do?"

¶9 After Thompson-Jones had sexual intercourse with her, "He wouldn't let me go anywhere. He followed me everywhere," including into the bathroom. Eventually, the two slept in her bed. In the morning, Thompson-Jones observed some of her injuries and asked who had caused them. When she responded that he had, Thompson-Jones replied, "It wasn't me. I wasn't there." While Thompson-Jones was in the bathroom, the victim "escaped," in what she believed was her first chance to do so, grabbing her purse and keys and running out the door without taking time to put on shoes. She went to her sister's residence. Before calling police, the victim told her sister that Thompson-Jones had "beat me up and then raped me."

¶10 The court admitted into evidence photographs of injuries that the victim testified she suffered as a result of Thompson-Jones battering her, and allowed these to be published to the jury during her testimony.

DISCUSSION

I. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

¶11 Thompson-Jones argues that his trial counsel provided ineffective assistance in two ways: failing to request a jury instruction for the lesser-included offense of third-degree sexual assault; and failing to adequately impeach the

alleged victim using a written statement that she provided to police. We now summarize the applicable legal standards and then address the two ineffective assistance arguments in turn.

A. Legal Standards

¶12 While a claim of ineffective assistance of counsel can present mixed questions of law and fact, ***Strickland v. Washington***, 466 U.S. 668, 698 (1984), whether counsel's conduct violated a defendant's constitutional right to have effective assistance of counsel is ultimately a legal determination, which this court decides de novo. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

¶13 A defendant claiming ineffective assistance of counsel must show: (1) deficient performance by counsel; and (2) prejudice resulting from that deficient performance. ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. We resolve the first issue raised by Thompson-Jones based on the deficient performance prong, under which a defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms, and show that the attorney made errors so serious as to essentially not function "'as the 'counsel' guaranteed by the Sixth Amendment.'" *See* ***id.*** (quoting ***Strickland***, 466 U.S. at 687). We resolve the second issue raised by Thompson-Jones based on the prejudice prong, under which a defendant must show errors serious enough to render the resulting conviction unreliable. *See* ***id.***

¶14 In light of some arguments made in this appeal, it is significant that in order "[t]o demonstrate deficient performance, the defendant must show that his [or her] counsel's representation 'fell below an *objective standard* of reasonableness' considering all the circumstances." *See* ***State v. Carter***, 2010 WI

40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695 (quoting ***Strickland***, 466 U.S. at 688) (emphasis added).

B. Failure To Request Third-Degree Sexual Assault Instruction

¶15 Thompson-Jones contends that his trial counsel was ineffective for failing to request a jury instruction on the lesser-included offense of third-degree sexual assault. The circuit court rejected this argument in post-conviction proceedings. We now provide additional background information pertinent to this issue, then explain why we reject Thompson-Jones's argument that trial counsel's performance was deficient in that counsel's representation fell below the standards of objective reasonableness in failing to request the instruction.

¶16 As referenced above, the particular form of second-degree sexual assault charged by the State was sexual assault by use or threat of force or violence, as provided in WIS. STAT. § 940.225(2)(a) (2015-16).[1] In a post-conviction motion, Thompson-Jones argued that his trial counsel was ineffective for failing to request an instruction for the lesser-included offense of third-degree sexual assault, contrary to § 940.225(3), which provides in pertinent part, "Whoever has sexual intercourse with a person without the consent of that person is guilty of a Class G felony."

[1] Under WIS. STAT. § 940.225(2)(a), it is a Class C felony to have "sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence."

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

¶17 Thompson-Jones's trial counsel testified to the following at the post-conviction hearing. The "basic theory" of the defense at trial, which trial counsel discussed with Thompson-Jones at the time, was that the victim's injuries resulted either from Thompson-Jones's attempts at self-defense or through accident on his part, and that the subsequent sexual intercourse was consensual. Trial counsel explained that it was part of the defense consent theory that the sexual intercourse occurred, according to the defense, as long as two hours after the physical altercation.

¶18 As to the sexual assault charge, trial counsel further testified that, both before trial and at trial, she discussed with Thompson-Jones the possibility of his entering a plea to, or requesting a jury instruction on, the lesser charge of third-degree sexual assault. This included her explaining to him the differences between the two forms of sexual assault in the maximum penalties and in the elements. Presented with these explanations, Thompson-Jones "consistently rejected" the idea of either a plea to or a jury instruction on third-degree sexual assault. Trial counsel decided not to request the lesser-included offense instruction, and it was not given. Thompson-Jones does not dispute this testimony on appeal, acknowledging that trial counsel adequately consulted with him on this topic and that in those consultations he consistently rejected a plea or instruction on third degree as a potential option.

¶19 There can be no dispute that third-degree sexual assault is a lesser-included offense of second-degree sexual assault. *See* ***State v. Randle***, 2002 WI App 116, ¶20, 252 Wis. 2d 743, 647 N.W.2d 324.

¶20 The State raised some contrary suggestions at oral argument, but in its appellate briefing the State does not seriously dispute that Thompson-Jones's

trial counsel could reasonably have made the decision to request a third-degree sexual assault instruction, that the court would likely have granted the request, and that, if given the option, the jury could have returned a verdict of third-degree sexual assault instead of second-degree sexual assault based on the evidence presented. In other words, the State in its briefing does not contest that there were reasonable grounds based on the evidence for both an acquittal on second degree and a conviction on third degree (*i.e.*, jury would not find that Thompson-Jones used or threated force or violence to obtain sex, but would also find that the victim did not consent to sex). *See* ***State v. Miller***, 2009 WI App 111, ¶48, 320 Wis. 2d 724, 772 N.W.2d 188 ("A criminal defendant is entitled to a lesser-included offense instruction if requested when reasonable grounds exist in the evidence both for acquittal on the greater offense and conviction on the lesser offense."). In any case, we see no reasonable argument to the contrary, based on the portions of the record brought to our attention by counsel and the arguments presented on appeal.

¶21 We now turn to the dispositive point on the lesser-included offense issue. We agree with the following argument by the State, suggested in its brief and more fully developed at oral argument: Thompson-Jones fails to demonstrate that there was not a reasonable evidentiary basis for the defense to pursue an "all or nothing" trial strategy, aiming for a complete acquittal based on jury findings both that Thompson-Jones did not use or threaten force or violence to have sexual intercourse and that the victim consented to sexual intercourse.

¶22 We repeatedly pressed appellate counsel for Thompson-Jones at oral argument to explain the basis for an argument that trial counsel did not act within reasonable professional norms in pursuing an all-or-nothing defense. However, counsel's only responses amounted to arguments that there was an evidentiary

basis for the lesser-included offense instruction. This was not responsive to the question, and amounted to an effective concession that Thompson-Jones cannot show deficient performance under the objective standard.

¶23 Moreover, such an argument does not appear to be supported by the record. As stated above, the defense pursued the theory at trial that Thompson-Jones had merely defended himself from physical aggression by the victim, and then, (according to the defense) as long as two hours later, the two had consensual sex before spending the night in the same bed. We see a number of facts and dynamics in the case that supported an argument that the jury should reject both the use-or-threat-of-force-or-violence inferences of the evidence and also the lack-of-consent inferences. In sum, given the evidence, Thompson-Jones fails to persuade us that an all-or-nothing strategy was not an objectively reasonable choice.

¶24 This completes our analysis on this ineffective assistance issue under the correct legal standards. We now explain why much of what Thompson-Jones argues in his briefing and at oral argument (and, for that matter, the bulk of the State's briefing in response) lands far wide of the target. In sum, the arguments ignore the objective standard and instead focus on what turns out to have been beside-the-point post-conviction testimony by trial counsel about *why* she decided not to request the third-degree instruction. We now explain briefly the context for these beside-the-point arguments.

¶25 In the post-conviction proceedings, Thompson-Jones's trial counsel testified that she did not request the lesser-included offense instruction "as a result" of Thompson-Jones informing her that he did not want her to do so. She testified that, "[h]ad it been solely a strategic decision," she "may have gone ahead

and [requested the instruction] …, but at the time I believed that I had to defer" to Thompson-Jones's preference. She did not consider this to be "a solely strategic decision" for her to make alone.

¶26 The parties argue the point, but we need not parse what trial counsel meant to convey in her testimony about what she understood on the legal question of whether the final decision was exclusively up to her, or instead partially up to her, after conferring with Thompson-Jones. Nor do we need to address the arguments that Thompson-Jones now attempts to make based on his interpretation of counsel's testimony on this topic, which involve case law addressing the question of whether trial counsel is obligated to consult with the client about whether to ask for a lesser-included offense instruction. As referenced above, there is no dispute here that Thompson-Jones's trial counsel consulted adequately with him on this topic.

¶27 One way of summarizing the problem is that Thompson-Jones argues from the false premise that his trial counsel necessarily performed deficiently if she misunderstood her proper role as the decision maker in deciding whether to request a lesser-included offense instruction. But the question of whether her performance was deficient is not the abstract one of whether she misunderstood the law on this topic. To repeat, the question is whether, based on all circumstances, her performance was deficient, considered under the objective standard.

¶28 Doubtless, in any case trial counsel *can* perform deficiently as a result of misunderstanding a pertinent legal principle, just as counsel can perform deficiently as a result of misunderstanding pertinent allegations or established facts. However, we have explained above why, on the facts here, we reject the

only argument that we understand Thompson-Jones to present, albeit without providing any support, under the objective standard, which does not depend on how his trial counsel understood her role at the pertinent time. Put differently, assuming without deciding that trial counsel misunderstood her decision-making role on this issue, Thompson-Jones fails to provide any support for an argument that it was deficient performance under the objective standard for her to fail to request the third-degree instruction.

C. Failure To Adequately Impeach Victim

¶29 Thompson-Jones argues that his trial counsel provided ineffective assistance in "fail[ing] to have any witness testify to how different the victim's initial [statement to police] was from her testimony" at trial on the following topic: the passage of time between the alleged beating and the alleged sexual assault. We first explain additional pertinent background, and then explain why we conclude that Thompson-Jones fails to show prejudice as necessary to establish ineffective assistance.

¶30 As referenced above, the victim testified at trial that five or fewer minutes passed between the beating and the sexual intercourse. Thompson-Jones focuses on isolated portions of a 3½-page handwritten statement that the victim gave to police, in which the victim made statements that included the following on the topic of timing:

> [At a]round 5:00 - 5:30 p.m. on 03-12-12, [Thompson-Jones] was drinking. I wanted to leave so I called [male name used] to pick me up. He is an ex-boyfriend, now friend [phone number given]. [Thompson-Jones] was right there when I called [first name]. [Thompson-Jones] started beating me, hitting me in the face.

After describing the alleged beating for several paragraphs, the statement included the following additional reference to timing:

> After [Thompson-Jones] beat me we [laid] down in front of the TV and I wanted to go to sleep. I went to the bedroom around 7:00 pm. That's when [Thompson-Jones] wanted to have sex to release his tension but I told him no. (emphasis in original statement)

¶31 In cross examining the victim at trial, defense counsel posed an extended line of questioning that focused on the time gap, using the victim's written statement. This cross examination line included the idea that the victim and Thompson-Jones both laid down in front of the television for an extended period after the physical altercation and before the victim went into the bedroom. The victim did not deny giving the statement to police. In essence she testified on cross examination that she and Thompson-Jones did lay down in front of the television, but not for long, but that she could not recall details about timing.

¶32 During closing argument, defense counsel described an alleged time gap problem and inconsistencies in the victim's statements and testimony, arguing in part:

> [The victim] said initially that she laid down by the TV [after the alleged beating] all by herself. And [Thompson-Jones] was pacing. That was her original testimony. [Thompson-Jones] was pacing because that pacing sounds really aggressive ….
>
> And then I show her her statement, and I say, "Doesn't it say we laid down?" She says, "Oop[s], well, I don't really remember that, but I guess if we laid down, we laid down in front of the TV." I asked, "What were you watching?" She said, "I don't know if I was watching TV." I was like, okay.
>
> … [A]nd you noticed in the pictures that the pillows and blankets are still on the floor. And they had an argument, whatever it … was, it ended, we do know this, police weren't called at the time of the argument. You

> know that. And they laid down in front of the TV. At one point she says they were only down for five minutes, and at another point she admits that in her statement she said [that] the fight happened between 5 and 5:30 and that they had sex together at 7. So whether they were there for 5 minutes or 30 minutes, I don't think [that is] germane.

¶33 Even if we were to assume that trial counsel's performance was deficient in not making more extensive use of the alleged victim's written statement, Thompson-Jones fails to persuade us that any additional or different use of, or references to, the written statement by his trial counsel would have made a positive difference for the defense. First, as summarized above, defense counsel made sustained and focused use of the written statement, during the course of which the victim did not deny telling the police that the alleged beating, or at least events leading up to the beating, began at around 5 or 5:30 p.m. and that Thompson-Jones went into the bedroom at about 7 p.m. We have trouble seeing how prejudice could have arisen from the failure to make greater use of the statement under these circumstances.

¶34 Second, we note that the written statement contains many incriminating references that match the victim's trial testimony, as well as a number of references that are potentially prejudicial to Thompson-Jones. The latter include the victim's statements that Thompson-Jones "is ordered to take these crazy pills but he doesn't take them," and that he "has tried to choke [*i.e.*, strangle] me many times [and] tried to choke me" on the evening in question. Therefore, further emphasizing the statement carried concrete risks of greater, not less, prejudice to Thompson-Jones.

¶35 Third, the content of the statement regarding the time gap issue is not as potentially probative as Thompson-Jones contends, which is another reason that greater use of the statement would not have made a difference. Although

Thompson-Jones and the State both seem to assume otherwise, the written statement is not precise in purporting to establish when the alleged beating occurred. One reasonable reading is that the beating occurred sometime around 5:00 or 5:30 p.m., but another possible reading is that this was the time when Thompson-Jones first started showing elevated signs of inebriation or aggression, and that the alleged beating occurred sometime later.

¶36 Fourth, Thompson-Jones fails to persuade us that establishing a gap of only minutes between the alleged beating and the sexual intercourse was critical to the State's case. We agree with Thompson-Jones's general starting point, namely that, given the victim's testimony, the wider the time gap, the better for the defense on the sexual assault charge. It is also true that, once the victim committed herself to five or fewer minutes in trial testimony, evidence of a considerably wider gap could have had at least some impeachment value. At the same time, however, the victim's testimony about Thompson-Jones using or threatening force or violence, and about her expressions of lack of consent to sex, were not inherently inconsistent with a time gap of up to two hours. Even if she was inaccurate to a greater or smaller degree regarding timing, the core question for the jury was whether she accurately related descriptions of use of violence, threats of violence, and her lack of consent, during some period of time on the evening in question.

¶37 Thompson-Jones asserts that the fact that the jury, while deliberating, requested a transcript of cross examination of the victim and also requested exhibits that included the victim's written statement to police, demonstrates that the jury was "interested in this very issue," meaning that the jury was interested in the time-gap issue. However, he fails to support this assertion.

Both the cross examination and the written statement covered many issues other than the time-gap issue.

¶38 For these reasons, we conclude that this inadequate-impeachment argument fails under the prejudice prong of the test for ineffective assistance of counsel.

II. SUFFICIENCY OF THE EVIDENCE—SEXUAL ASSAULT

¶39 Thompson-Jones argues that there was insufficient evidence to support the sexual assault conviction because there was no evidence that Thompson-Jones made an "actual threat" to the victim that compelled her to submit to sexual intercourse. In support of this argument, Thompson-Jones states that, by the victim's own account, his actions immediately before sexual intercourse consisted of begging for sex, and not directly using or threatening force or violence. We reject this argument for the following reasons.

¶40 As our supreme court has explained:

> The question of whether the evidence was sufficient to sustain a verdict of guilt in a criminal prosecution is a question of law, subject to our de novo review. When conducting such a review, we consider the evidence in the light most favorable to the State and reverse the conviction only where the evidence "is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." Therefore, this court will uphold the conviction if there is any reasonable hypothesis that supports it.

State v. Smith, 2012 WI 91, ¶24, 342 Wis. 2d 710, 817 N.W.2d 410 (quoted sources omitted).

¶41 Applying these standards, we reject Thompson-Jones's specific argument because this court has rejected the argument that jurors may not

reasonably infer that a defendant's use of threats or violence, made at a significantly earlier time than a charged sexual assault, "lingered" in the mind of the victim and "caused the victim to submit out of fear." *See* ***State v. Speese***, 191 Wis. 2d 205, 212-14, 528 N.W.2d 63 (Ct. App. 1995), reversed on other grounds by 199 Wis. 2d 597, 545 N.W.2d 510 (1996); ***State v. Jaworski***, 135 Wis. 2d 235, 239-40, 400 N.W.2d 29 (Ct. App. 1986). Thompson-Jones attempts to distinguish ***Speese*** and ***Jaworski*** on the ground that here there is no evidence that he ever "threatened force or violence if [the victim] did not have sex with [him]." However, in our view the State accurately summarizes one reasonable interpretation of the victim's testimony as follows, and it is sufficient: Thompson-Jones only stopped hitting the victim and telling her that he was going to kill her "when he told her that he wanted to have sex. When she said no to sex, he yelled at her and raised his fist."

¶42 Thompson-Jones asserts in his reply brief that, in making this argument, the State "cherry picks facts that are favorable to it." But we see no meaningful distinction between what Thompson-Jones apparently means by cherry picking and the proper application of the "any reasonable hypothesis" standard quoted above.

¶43 What is more, in addition to hearing testimony from the victim that included an alleged threat of death on the evening in question and seeing photographic evidence, the jury heard police testimony about potentially significant post-arrest admissions by Thompson-Jones. These included statements by Thompson-Jones that "women don't know how to shut the hell up until they get

what they deserve," and that Thompson-Jones had been planning to turn himself in to authorities due to an outstanding warrant before his arrest in this case, but that he "wanted to get some pussy first."[2]

¶44 For these reasons, we affirm the judgment of conviction and the order denying the motion for post-conviction relief.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16). This opinion may not be cited except as provided under RULE 809.23(3).

[2] Thompson-Jones briefly makes the additional argument that this court should grant a new trial in the interest of justice under WIS. STAT. § 752.35, but offers in support only contentions that we have rejected for reasons already explained.