COURT OF APPEALS DECISION DATED AND FILED

November 14, 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. 2016AP481-CR

Cir. Ct. No. 2014CF226

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY MURRAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

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

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Anthony Murray appeals from a judgment of conviction, entered upon a jury's verdict, for two counts of repeated sexual assault of the same child contrary to WIS. STAT. § 948.025(1)(d) (2015-16)[1], and one count of first-degree child sexual assault, intercourse with a person under twelve, contrary to WIS. STAT. § 940.02(1)(b). Murray also appeals from an order denying his motion for postconviction relief on grounds of ineffective assistance of counsel.

¶2 On appeal, Murray argues that the judgment of conviction should be vacated and the case dismissed because the evidence was insufficient to support his conviction on both counts of repeated sexual assault of the same child. Murray also reiterates his argument in his postconviction motion that he is entitled to a new trial, or at least a ***Machner***[2] hearing, because his trial counsel was ineffective for failing to object to certain out-of-court statements of the victim on grounds that they were inadmissible hearsay. We reject Murray's arguments and affirm.

BACKGROUND

¶3 These charges stemmed from numerous allegations of sexual assault of Murray's stepdaughter "Violet."[3] On December 31, 2013, Violet, then eleven, was in the care of a family friend, Sherita Highshaw, while her mother, "Maxine," was out of town. Highshaw had noticed that Violet was acting out, and asked her

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

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

[3] We use pseudonyms for the victim and her mother in this opinion to protect their identities, pursuant to WIS. STAT. RULE 809.86.

if something was wrong. Violet initially denied that anything was wrong; however, later in the conversation, Highshaw asked if someone had touched her, she responded in the affirmative and stated that a boy named Kendall had touched her. Highshaw suggested that Violet might feel more comfortable writing a letter describing the incident rather than talking about it. Violet then wrote a letter regarding the incident with Kendall; after discussing that letter, Highshaw asked Violet if anyone else had touched her. Violet then wrote two letters that described being sexually assaulted by Murray. She also verbally discussed details of the assaults with Highshaw over the next day and a half.

¶4 Violet's description of the assaults included "penis contact to external genitalia, penis contact penetrating the vagina, finger contact to the external genitalia, finger contact penetrating the vagina … external contact to the anus, [and] penetrating contact to the anus." Violet stated that the assaults occurred on many occasions in several different rooms of the two houses in which Murray had lived with her family.

¶5 For example, in her first letter written to Highshaw, Violet stated that Murray had "raped" her on "Vine." This refers to a residence located at 1922 North 24th Place in Milwaukee, which is near Vine Street. Violet and her family had moved into this home in June 2012. Violet's family then moved to 4547 North 24th Place, Milwaukee, in April 2013. Murray lived with them at this location from June 2013 to November 2013. Violet describes being sexually assaulted by Murray at this residence in November 2013 in her second letter.

¶6 After discussing the sexual abuse with Violet, Highshaw told Maxine about the sexual assaults. Highshaw also reported the assaults to the police and took Violet to the Aurora Sinai Sexual Assault Treatment Center for a

sexual assault examination that same day, December 31, 2013. Violet was examined by Deborah Martinez, a sexual assault nurse examiner (SANE), who prepared a report explaining her examination of Violet. The report also included an account of the assaults as told to her by Violet, noting that Violet had said that the assaults had been occurring since she was ten years old, with the last contact on the day after Christmas.

¶7 The trial took place in June 2014. Highshaw testified about how she discovered that Violet was being sexually abused and described the letters Violet had written. Maxine testified that upon her return home from Chicago on January 1, 2014, Violet told her about the abuse. She stated that Violet had explained that the abuse had started with Murray "trying to see her body," and that Violet then told Maxine "basically everything he [did] to her." Maxine also testified as to the time frames in which they lived in each of the residences described above.

¶8 Testimony regarding the sexual assault examination of Violet was provided by Chriss Hildebrand, a different SANE nurse, because Nurse Martinez was no longer employed at the Aurora Sinai Sexual Assault Treatment Center at the time of trial. Violet also testified during the course of the trial, describing in detail the many assaults that she had endured and the different types of sexual contact and intercourse Murray had engaged in with her, explaining how the assaults had occurred at different times and in different rooms of each of the homes in which Murray had lived with her family.

¶9 Murray was convicted by a jury of all three counts. He subsequently filed a postconviction motion for a ***Machner*** hearing, which the trial court denied without a hearing. This appeal follows.

DISCUSSION

1. Sufficiency of the Evidence

¶10 Murray first argues that the evidence presented at trial was insufficient to establish his guilt for any of the charged offenses. The issue of the sufficiency of the evidence is a question of law that we review *de novo*. *See* ***State v. Smith***, 2012 WI 91, ¶24, 342 Wis. 2d 710, 817 N.W.2d 410. In making our determination, "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.'" ***Id.*** (quoting ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)). Accordingly, we will "uphold the conviction if there is any reasonable hypothesis that supports it." ***Smith***, 342 Wis. 2d 710, ¶24.

a. Counts I and II

¶11 The State charged Murray with two counts of repeated sexual assault of the same child, contrary to WIS. STAT. § 948.025(1)(d). To obtain a conviction under this statute, the State must prove that a defendant committed at least three separate acts of sexual assault against the same child within a specified time period. ***State v. Johnson***, 2001 WI 52, ¶15, 243 Wis. 2d 365, 627 N.W.2d 455. Exact dates upon which the assaults occurred are not required. ***State v. Hurley***, 2015 WI 35, ¶10 n.6, 361 Wis. 2d 529, 861 N.W.2d 174.

¶12 Here, the victim's age is not in dispute. Therefore, the elements of the statute at issue are whether the sexual assaults occurred, and whether they occurred within the specified time frame.

¶13 Count I pertains to the abuse that occurred between September 1, 2012, and April 1, 2013, at the residence located at 1922 North 24th Place. Violet referred to this house as "Vine" or the "old house." Violet testified that at this location Murray engaged in various types of sexual intercourse and sexual contact with her "more than once," and that the assaults occurred in several different rooms: the basement, her mother's room, the living room, and her room. Violet also had told Nurse Martinez that Murray began sexually assaulting her when she was ten years old; she turned ten in September 2012. Thus, the evidence establishes that there were at least three assaults of Violet that occurred during the specified time frame that they lived in the Vine residence.

¶14 Count II alleges sexual abuse that occurred between April 2, 2013 and December 25, 2013, at the home located at 4547 North 24th Place. In Violet's testimony, she refers to this as the house on "24th Place" or "24th Street." At this address, Violet testified that Murray again engaged in various types of sexual contact and intercourse with her, assaulting her at different times in her mother's room, the living room, and her room. Again, the evidence establishes that there were at least three assaults that occurred during the specified time frame when they lived at the 24th Place residence.

¶15 In short, Violet's testimony about the sexual abuse, which was consistent with the information she had provided to Highshaw and Nurse Martinez, along with Maxine's testimony about where the family was living during these times, are sufficient to prove the elements of WIS. STAT. § 948.025(1)(d) that were at issue for Counts I and II: that Violet was the victim of, at minimum, three sexual assaults by Murray that occurred during each of the specified time frames.

b. Count III

¶16 Murray was also charged with one count of first-degree sexual assault of a child under the age of twelve, contrary to WIS. STAT. § 948.02(1)(b). This charge stems from the assault that allegedly occurred on December 26, 2013, distinguishing it from the assaults alleged in Counts I and II.

¶17 As stated above, the specified time frame for Count II ended on December 25, 2013. Murray's primary challenge regarding Count III is that the evidence did not clearly put it outside the timeline for Counts I and II, implying that the jury might have found him guilty of Count III based on an assault that occurred during the time frame specified for Count II.[4]

¶18 In her police interview and during the trial, Violet specifically discussed an assault that occurred the day after Christmas in December 2013. She explained that Murray had come over to the house on Christmas and sexually assaulted her the next morning. Violet stated that her mother walked in and asked what was going on, to which Violet replied that they were not doing anything.

¶19 Maxine's testimony corroborated this story. She explained that Murray had moved out of the house about a month before Christmas, but that he had come over for a holiday family gathering. Maxine testified that Murray had

[4] The State points out that Murray's argument could be construed as asserting a violation of WIS. STAT. § 948.025(3), which precludes a defendant from being charged for the same violation in two different time frames, as well as potentially raising issues of jury unanimity. However, Murray did not advance this argument with the trial court, nor does he develop the argument on appeal. We therefore decline to broach these issues. *See* ***Northbrook Wis.*, *LLC v. City of Niagara***, 2014 WI App 22, ¶20, 352 Wis. 2d 657, 843 N.W.2d 851 ("[a]rguments raised for the first time on appeal are generally deemed forfeited"); ***State v. Ledger***, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993) ("[o]n appeal, issues raised but not briefed or argued are deemed abandoned").

come over on Christmas evening and had stayed over, sleeping in the bedroom while she and the children slept in the living room. She stated that the next morning she had found Violet in bed with Murray. When she asked what was going on, Violet told her nothing.

¶20 The evidence relating to the time frame of this assault is more exact because it occurred just prior to Violet's revealing to Highshaw that she was being sexually abused. In other words, Violet could pin down the exact date and location that this assault took place. Thus, there is sufficient evidence, with the testimony of both Violet and Maxine, to prove that this assault occurred outside of the time frames specified for Counts I and II. Therefore, Murray's argument fails.

c. Corroboration of the Testimony

¶21 Murray further argues that the evidence was insufficient to support his convictions because it relied on the uncorroborated testimony of Violet, and that corroboration is required by ***Thomas v. State***, 92 Wis. 2d 372, 284 N.W. 2d 917 (1979).

¶22 In ***Thomas***, the defendant challenged the sufficiency of the evidence upon which his conviction for sexual assault of a child was based, claiming that the finding of guilt relied primarily on the testimony of the victim, which was unreliable. ***Id.*** at 380. The victim, who was eighteen at the time of the trial, had the mental capacity of a six year old. ***Id.*** at 375.

¶23 Our supreme court upheld the conviction. ***Id.*** at 392. It noted that the standard of review for a trial court's determination of the weight and credibility of a witness's testimony allows for overturning that decision '"... only when the evidence that the trier of fact has relied upon is inherently or patently

incredible.'" ***Id.*** at 382 (citation omitted). The supreme court found that her testimony was not "patently incredible," in part because the victim's testimony was corroborated by other evidence. ***Id.***

¶24 Here, the State counters that ***Thomas*** is distinguishable because Violet is not mentally deficient. Rather, she is an eleven-year-old girl who was testifying about traumatic experiences that she had endured; any inconsistencies in her testimony were part of the credibility analysis performed by the finder of fact, in this case the jury. *See* ***Gauthier v. State***, 28 Wis. 2d 412, 417, 137 N.W.2d 101 (1965). Therefore, the State argues that Violet's testimony did not require corroboration because it was not patently incredible.

¶25 We agree. In ***Gauthier***, our supreme court held that:

> An act of intercourse seldom takes place before the eyes of witnesses. Hence, it is rare that there is any corroboration in the usual sense. Our courts have long accepted the testimony (if believed) of the complainant as sufficient to sustain a conviction of rape or sexual intercourse with a child.

Id. at 418.

¶26 In other words, testimony of sexual assault victims, although generally not corroborated, is to be weighed in terms of credibility by the fact finder. Here, the jury believed Violet to be credible; other than pointing out some inconsistencies in Violet's testimony, Murray fails to demonstrate that her testimony was patently incredible. *See* ***Thomas***, 92 Wis. 2d at 382.

¶27 In sum, we find that the evidence in this case is sufficient to support Murray's conviction on all three counts, and thus affirm the judgment of conviction.

2. Ineffective assistance of counsel

¶28 Murray next argues that his trial counsel was ineffective for failing to object to out-of-court statements made by Violet, along with the testimony of Highshaw, Maxine, and Nurse Hildebrand, which were all based on those out-of-court statements, on grounds that they were inadmissible hearsay.

¶29 To prove ineffective assistance of counsel, a defendant must show that his trial counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "Wisconsin applies the two-part test described in ***Strickland*** for evaluating claims of ineffective assistance of counsel." ***State v. Roberson***, 2006 WI 80, ¶28, 292 Wis. 2d 280, 717 N.W.2d 111.

¶30 "To prove constitutional deficiency, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness." ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. "To prove constitutional prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** (citations and internal quotation marks omitted). If a defendant fails to satisfy one component of the analysis, a court need not address the other. ***Strickland***, 466 U.S at 697.

¶31 An evidentiary hearing preserving the testimony of trial counsel is "a prerequisite to a claim of ineffective representation on appeal." ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). A motion for a ***Machner*** hearing may, at the discretion of the trial court, be denied "'if the motion fails to allege sufficient facts to raise a question of fact, presents only conclusory

allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief.'" ***Roberson***, 292 Wis. 2d 280, ¶43 (citation and emphasis omitted).

¶32 "We review the [trial] court's discretionary decision to grant or deny a hearing under the erroneous exercise of discretion standard." ***State v. Romero-Georgana***, 2014 WI 83, ¶30, 360 Wis. 2d 522, 849 N.W.2d 668. However, we review *de novo* '"the legal questions of whether deficient performance has been established and whether it led to prejudice rising to a level undermining the reliability of the proceeding.'" ***Roberson***, 292 Wis. 2d 280, ¶24 (citation omitted). With regard to Murray's specific argument that the trial court admitted inadmissible hearsay, we review a trial court's discretionary decision to admit a hearsay statement under the erroneous exercise of discretion standard. *See* ***State v. Joyner***, 2002 WI App 250, ¶16, 258 Wis. 2d 249, 653 N.W.2d 290.

a. Residual Hearsay Exception Analysis

¶33 The State argues that all of the statements were admissible under the residual hearsay exception, as set forth in WIS. STAT. § 908.03(24). "The residual hearsay exception is designed as a catch-all exception that allows hearsay statements that may not comport with established exceptions, but which still demonstrate sufficient indicia of reliability to be admitted." ***State v. Huntington***, 216 Wis. 2d 671, 687, 575 N.W.2d 268 (1998). In fact, our supreme court has recognized that utilizing the residual hearsay exception in child sexual abuse cases is particularly appropriate because "there is a compelling need for admission of hearsay arising from young sexual assault victims' inability or refusal to verbally express themselves in court when the child and the perpetrator are sole witnesses to the crime." ***State v. Sorenson***, 143 Wis. 2d 226, 243, 421 N.W.2d 77 (1988).

¶34 The court in ***Huntington*** explained that there are five factors which the trial court must consider when applying the residual exception to a child's out-of-court statements: (1) the attributes of the child, including age, ability to communicate, comprehension of questions, and understanding of the difference between the truth and falsehood; (2) the relationship between the child and the person to whom the statement was made; (3) the circumstances under which the statement was made, including the time frame between when the assault occurred and when the statement was made, as well as other contextual clues that could assist in determining the statement's trustworthiness; (4) the content of the statement, including any indication of false information; and (5) any corroborating evidence, such as physical evidence of an assault, statements made by the victim to others, and opportunity or motive of the defendant. ***Id.***, 216 Wis. 2d at 687-88.

¶35 The facts in ***Huntington*** closely parallel those of this case, and thus the facts here can be similarly applied to these factors. First, like the victim in ***Huntington***, Violet was eleven years old at the time of trial. She was able to effectively respond to questions during her testimony, and demonstrated that she knew the difference between the truth and a lie. Second, she made her initial disclosure regarding the abuse to Highshaw, with whom she had a close relationship. She also told her mother, the police detective, and the SANE nurse who examined her, all trustworthy adults.

¶36 With regard to the time frame between Violet's statements and the assaults, the third factor, she disclosed the assaults to Highshaw five days after she had last been assaulted by Murray, a shorter time frame than the two-week lapse between the assault and the victim's statement in ***Huntington***. *See* ***id.*** at 678. Considering the fourth factor, Violet was very consistent regarding the content of

all of the statements that she made relating to the type of sexual contact and intercourse that Murray engaged in with her.

¶37 With regard to the fifth factor, there is admittedly a lack of physical evidence of the assaults. Violet was not examined by the sexual assault nurse until five days after the last assault, so it was unlikely that any relevant DNA evidence could be recovered after that amount of time. In the same vein, any DNA found on the bedding that was tested would not be conclusive proof of the assaults because it was known that Violet and Murray had both slept in the same bed, so it would not be unusual to find DNA evidence for both.

¶38 However, there is corroborating evidence of the assaults, particularly from Maxine, who walked into the bedroom during the final assault. Additionally, Murray had ample opportunity to commit the assaults while he was living in the house with Violet and her mother. Furthermore, there is no evidence that Violet may have fabricated the allegations; in fact, she testified that she "felt kind of sad" after she disclosed that Murray had been abusing her because she was "really close to him" and she "really loved him."

b. ***Strickland*** *Analysis*

¶39 Based on the application of the ***Huntington*** factors, the trial court did not erroneously exercise its discretion in admitting Violet's out-of-court statements under the residual hearsay exception. Therefore, Murray's trial counsel was not deficient for failing to object to this evidence, because "[a]n attorney does not perform deficiently by failing to make a losing argument." ***State v. Jacobsen***, 2014 WI App 13, ¶49, 352 Wis. 2d 409, 842 N.W.2d 365. Furthermore, because Murray failed to satisfy the deficiency prong of the ***Strickland*** analysis, we need not address the prong relating to prejudice. *See* ***Strickland***, 466 U.S at 697.

¶40 Still, we will briefly address the State's assertion that even if the statements were inadmissible hearsay, their admission did not prejudice Murray's defense. The State points to the trial court's reasoning in its decision and order denying Murray's postconviction motion to support its position. The trial court stated that Violet was a credible witness and that there was "no need for the jury to rely on her prior statements" because those same statements were made by Violet in court during her testimony.

¶41 Indeed, Murray fails to explain how he was prejudiced by the admission of Violet's out-of-court statements, other than making a conclusory statement that the evidence "significantly bolstered the State's case." Thus, Murray has not met his burden of demonstrating that there was a reasonable probability that the outcome of his trial would have been different had his trial counsel objected to this evidence to satisfy the prejudice prong of the ***Strickland*** test. *See* ***Love***, 284 Wis. 2d 111, ¶30. Therefore, because Murray has failed to prove either prong of the ***Strickland*** test, we affirm the trial court's denial of Murray's postconviction motion requesting a new trial or a ***Machner*** hearing on grounds of ineffective assistance of counsel.

¶42 In sum, we affirm the judgment of conviction on all three counts against Murray, as well as the trial court's order denying Murray's motion for postconviction relief.

By the Court.—Judgment and order affirmed.

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