COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 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. 2016AP964-CR

Cir. Ct. No. 2012CF1941

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JIMI K. WELLMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, 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. Jimi K. Wellman appeals from a judgment of conviction on one count of second-degree sexual assault and one count of incest. *See* WIS. STAT. §§ 948.02(2), 948.06(1) (2011-12)[1]. He also appeals from an order denying his motion for postconviction relief, which followed our previous decision to remand this case for a ***Machner*** hearing.[2] *See* ***State v. Wellman***, No. 2014AP1920-CR, unpublished op. and order (WI App July 7, 2015). Wellman makes two arguments on appeal: (1) his trial counsel denied him the right to testify at trial by incorrectly advising him regarding what he would be allowed to say to support a defense that he did not remember what happened the night of the assault; and (2) the trial court erred when it denied his pretrial request for a new attorney. We affirm.

I. BACKGROUND

¶2 Some of the underlying facts relevant to this appeal were set forth in our prior decision:

> Wellman was charged with one count of second-degree sexual assault of a child under sixteen and one count of incest for allegedly having sexual intercourse with his fourteen-year-old cousin. The cousin was at Wellman's home, and they were seated on his bed, in his bedroom, playing video games. They both fell asleep on the bed. When the cousin woke up, her pants and underwear were around her knees and her vaginal area was wet. Wellman's DNA, extracted from sperm, was found on her underwear and on her vaginal and cervical swabs. At trial, a nurse testified that penetration was necessary for there to be sperm on the cervix. Wellman denied any sexual contact with his cousin. He said he was asleep all night and awoke

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

[2] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

with his pants and underwear on and a wet stain on both. He said he thought he might have had a wet dream.

At a final pre-trial, Wellman told the trial court that he wanted to raise an affirmative defense of sexsomnia.[3] The trial court ruled he could not present such a defense because it was not recognized in Wisconsin and because there was no foundation for it. Wellman also asked for a new attorney because he did not appreciate some of the things trial counsel allegedly said to him. The trial court rejected this motion in part because of the proximity to the trial date and in part because it did not believe Wellman's account of counsel's behavior.

According to Wellman's postconviction motion, after the trial court excluded the sexsomnia defense, trial counsel told Wellman that he could not give any testimony regarding whether he was sleeping at the time of the alleged assault. Thus, Wellman was constrained to agree to waive his right to testify. The jury convicted him on both counts, and the trial court sentenced Wellman to a total sentence of fourteen years' initial confinement and six years' extended supervision.

Wellman filed a postconviction motion seeking a new trial. He alleged that trial counsel deprived him of his right to testify "and was prejudicially ineffective with respect to trial matters." Wellman asserts that trial counsel told him that "not only could he not testify about sexsomnia, but he could not testify about having any sleep sexual contact whatsoever." This exclusion thus prevented Wellman from giving relevant testimony "as to the element of intent" and "about the facts and the events that had allegedly occurred." Specifically, Wellman wanted to testify that he had taken muscle relaxants before bed, that he slept the entire night, and that he has no memory of what happened because he was asleep. Because the victim slept through the assault and had no memory of events herself, Wellman believed his testimony had the potential to yield a different result because, he asserts, any sexual intercourse "must be conscious and affirmative before an inference can be drawn that there was an intent for sexual gratification or arousal."

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[3] Sexsomnia is "a disorder similar to sleepwalking." *See* ***New Mexico v. Colter***, No. 31,108, mem. op. (N.M. Ct. App. Aug. 15, 2011) (non-precedential).

Wellman, No. 2014AP1920-CR, unpublished op. and order at 2-3 (footnote numbering altered; footnote text is as it appears in the original). The trial court denied the postconviction motion without a hearing.

¶3 Wellman appealed, raising claims that trial counsel improperly advised him, thereby depriving him of the right to testify, and that the trial court erred in denying his request for a new attorney a month before trial. ***Id.***, No. 2014AP1920-CR, unpublished op. and order at 1. We concluded that the postconviction motion alleged sufficient facts to warrant a hearing regarding whether counsel improperly told him that all sleep-related testimony was excluded. ***Id.***, No. 2014AP1920-CR, unpublished op. and order at 5. Because we remanded for a hearing on this basis, we did not reach Wellman's second issue, i.e., whether the trial court erred in denying his request for a new attorney. ***Id.***, No. 2014AP1920-CR, unpublished op. and order at 7 n.6.

¶4 Wellman and his trial counsel testified at the ***Machner*** hearing. Trial counsel relayed pretrial discussions the two had. He said that Wellman wanted to testify that he took muscle relaxants and fell asleep on the night of the assault. Trial counsel told Wellman that it was his decision to testify, but "strongly" advised him not to do it. Additionally, trial counsel told Wellman that he could not testify about any "sleep contact" with the victim. According to trial counsel, Wellman gave him "multiple, multiple stories" to explain the crimes. One related to sexsomnia, one was that Wellman had a wet dream while he slept next to the victim, and another was that the victim initiated sex while Wellman was asleep.

¶5 At the hearing, Wellman explained that he wanted to testify at trial that he took muscle relaxants, fell asleep, and that "I don't recall anything

happening that night, so whatever had happened had to have been while I was asleep." Wellman continued: "The idea was to tell them that anything that had happened that night had to have been while I was asleep because I don't recall it. Had I recalled it, none of this would have went as far as it did."

¶6 According to Wellman, trial counsel told him that "essentially" all he would have been able to testify to was that he fell asleep and did not remember anything that happened. Wellman confirmed that trial counsel told him that he could not testify about any "sleep contact," which Wellman understood to mean "[t]hat I was sleeping so that whatever contact happened that night had to have happened while I was asleep."

¶7 Wellman also explained the effect trial counsel's advice had on his decision to testify. He said that he was "not just going to get on the stand and say I don't remember, I don't remember, I don't remember. I mean if I can't testify to all the facts, then I don't want to testify." Wellman admitted, though, that he could not testify about what he suspected had happened. He also acknowledged that trial counsel told him that it was his right to testify and he knew that it was his decision to make.

¶8 The trial court concluded that trial counsel was not ineffective. It was "confident" trial counsel told Wellman "you could theoretically testify that I took sleeping pills and I passed out. End of story." The trial court concluded that testimony about what Wellman believed had happened would be speculative and without basis or foundation. Wellman, the trial court noted, "wanted to testify about what he thought … happened throughout the night. His belief or his supposition or his imagination as to what happened is far different than knowing

what happened." The trial court stated that it did not believe Wellman's testimony.

¶9 Wellman appeals. Additional background information related to the issues raised on appeal is set forth below.

II. DISCUSSION

A. *Ineffective Assistance of Counsel*

¶10 Wellman argues that his trial counsel provided ineffective assistance when he denied Wellman his fundamental right to testify. Specifically, he claims trial counsel misadvised him about what he could say if he testified and that the wrong advice is what made him decide not to testify. According to Wellman, trial counsel told him he could not testify that on the night of the assaults, he took muscle relaxers, fell asleep, and did not remember what happened afterward. Wellman submits that this testimony would have supported an argument that he did not affirmatively have intercourse with the victim.

¶11 An ineffective assistance of counsel claim presents a mixed question of fact and law. *See **State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). This court will not disturb a trial court's findings of fact unless they are clearly erroneous, but we review the trial court's legal conclusions as to deficiency and prejudice for errors of law. *See **id.*** at 127-28.

¶12 To establish ineffective assistance of counsel, a defendant must prove that the representation was (1) deficient and (2) prejudicial. *See **Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient representation, a defendant must highlight specific acts or omissions that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. An attorney's strategic

decisions "are virtually invulnerable to second-guessing." ***State v. Westmoreland***, 2008 WI App 15, ¶20, 307 Wis. 2d 429, 744 N.W.2d 919. There is a "'strong presumption' that [counsel's] conduct 'falls within the wide range of reasonable professional assistance.'" ***State v. Domke***, 2011 WI 95, ¶36, 337 Wis. 2d 268, 805 N.W.2d 364 (citations and one set of quotation marks omitted; bracket in original).

¶13 To prove prejudice, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient performance, the results of the proceeding would have been different. *See* ***Strickland***, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶14 It is important, at the outset, to restate the key language from our prior decision:

> Here, we conclude that the postconviction motion alleges sufficient facts to warrant a hearing. Wellman does not challenge the trial court's exclusion of the "sexsomnia" defense. Thus, he could not have testified that he believed he had a disorder that caused him to unknowingly or involuntarily engage in sexual intercourse while he slept. However, the exclusion of sexsomnia-related testimony should not have prohibited the testimony that Wellman's postconviction motion alleges he hoped to give: that he had taken muscle relaxants before bed, that he slept all night, and that he did not remember anything that happened because he was asleep all night. *If trial counsel did, in fact, tell Wellman that all sleep-related testimony was excluded, then counsel was deficient in his advice. What counsel actually told Wellman, however, is a question of fact that is presently undetermined.*

See ***Wellman***, No. 2014AP1920-CR, unpublished op. and order at 5 (emphasis added).

¶15 We now know—post-***Machner*** hearing—that trial counsel did not, in fact, tell Wellman that *all* sleep-related testimony was excluded. The following exchange during the hearing makes that clear:

> **BY [WELLMAN'S POSTCONVICTION COUNSEL]:**
>
> Q But then [Wellman] would have testified that he slept the entire night after having taken muscle relaxants. If he's asleep, he can't really testify to what's happening, but did he want to tell you that I fell asleep because I had taken muscle relaxants and that's what happened; did he want to testify to that?
>
> [Wellman's trial counsel:] He—he did say that several times.
>
> Q That's what he wanted to testify to. What was your reaction when he said I want to testify that I took muscle relaxants, and I slept the entire night?
>
> [Wellman's trial counsel:] I told him it's his call. I thought it was a very foolish thing to do, but it's his call, it's his decision, not mine, but I said—we had talked a lot. I don't know the exact words, but I remember telling him he's going to look like a "fool" and, excuse me for saying, I think I used the word you're going to look like an "ass" in front of the jury, and that's nothing like I was saying you can't do it, but I was saying you would look very foolish in in front a jury with either of these two ideas.
>
> Q So you basically—
>
> [Wellman's trial counsel:] I'm sorry.
>
> Q —so you basically discouraged him from testifying then, correct?
>
> [Wellman's trial counsel:] Discouraged? I told him "strongly" I thought it was a very foolish thing to do.

Counsel additionally acknowledged that he told Wellman not to testify about any sleep contact.

¶16 The trial court is the ultimate arbiter of the credibility of trial counsel and all other witnesses at a ***Machner*** hearing, and in this case, the trial court believed trial counsel's testimony as to what transpired. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶29, 246 Wis. 2d 648, 630 N.W.2d 752. The record supports the trial court's findings.

¶17 Trial counsel advised Wellman that it would be foolish to testify, which is not the same as telling him that *all* sleep-related testimony would be excluded. Trial counsel told Wellman it was Wellman's decision as to whether he wanted to testify that he took muscle relaxants and slept all night. As to sleep contact, trial counsel advised him not to testify to that. This advice was not wrong—sexual-contact testimony would have been wholly speculative given that Wellman could not remember what happened.[4] *See* WIS. STAT. § 906.02 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").

¶18 Again, at the ***Machner*** hearing, Wellman explained that he wanted to testify at trial that he took muscle relaxants, fell asleep, and that "I don't recall anything happening that night, so whatever had happened had to have been while I was asleep." The testimony that whatever happened had to have occurred while Wellman was asleep is problematic. And if he could not testify to that, Wellman made clear at the ***Machner*** hearing that he was "not just going to get on the stand

[4] Contrary to Wellman's assertions, our prior decision in no way prevented the trial court from finding Wellman's proposed testimony about what he thought happened while he was sleeping was speculative. The crux of our prior decision was whether Wellman's trial counsel was deficient in the advice that he gave to Wellman. *See* ***State v. Wellman***, No. 2014AP1920-CR, unpublished op. and order at 5 (WI App July 7, 2015). As set forth above, trial counsel did not deficiently advise Wellman nor did he erroneously cause Wellman to waive his right to testify.

and say I don't remember, I don't remember, I don't remember. I mean if I can't testify to all the facts, then I don't want to testify."[5]

¶19 Because we agree with the trial court that trial counsel's performance was not deficient, we need not consider whether Wellman was prejudiced. *See* ***State v. Shata***, 2015 WI 74, ¶67, 364 Wis. 2d 63, 868 N.W.2d 93 ("Correct advice is not deficient."); *see also* ***Strickland***, 466 U.S. at 697 (A court need not consider both prongs "if the defendant makes an insufficient showing on one.").

[5] Without legal support, Wellman argues in his reply brief that his proposed testimony to the effect that anything that happened must have happened while he was asleep is not speculation but rather "a reasonable, logical, and legal[] inference." Wellman's assertion that he could testify to such an inference is undeveloped. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered."). We note in passing that opinion testimony from a lay witness is limited to opinions or inferences that are "[r]ationally based" on the witness's perception, "[h]elpful to a clear understanding of the witness's testimony or the determination of a fact in issue," and "[n]ot based on scientific, technical, or other specialized knowledge." WIS. STAT. § 907.01.

As set forth in our previous decision, the jury could have drawn reasonable inferences from the evidence that Wellman was asleep and unconscious all night:

> Based on the motion, if Wellman testified and a jury believed that he was asleep and, thus, unconscious all night, the jury could reasonably infer that he had not taken any affirmative action to engage his cousin in sexual intercourse, particularly given that she had no recollection of the assault, either. The likely result of such an inference would be a not-guilty verdict. Thus, Wellman's postconviction motion adequately alleged the potential prejudice that resulted if trial counsel deficiently advised him and erroneously caused Wellman to waive the right to testify.

Wellman, No. 2014AP1920-CR, unpublished op. and order at 6. However, as clarified at the ***Machner*** hearing, Wellman did not simply want to testify that he was asleep and unconscious all night. He sought to offer testimony beyond this.

B. *Pretrial Request for a New Attorney*

¶20 Next, Wellman argues that the trial court erred when it denied his pretrial request for a new attorney. One month before trial, during an off-the-record proceeding, trial counsel advised the trial court that Wellman wanted a new attorney. The parties discussed the request at a final pretrial conference four days later. Trial counsel informed the trial court that he and Wellman were not "in agreement" concerning the sexsomnia defense. Additionally, Wellman told that court that he and trial counsel did not "see eye-to-eye on other things":

> THE COURT: Like what?
>
> THE DEFENDANT: The language that he used towards me in the courtroom on Friday. I was not pleased with that. He said I looked like a selfish brat. And if I get my—how did he put it? I'm going to—I'm going to—I'm going to look like a little punk up there, a little selfish punk, a spoiled brat. Like, he's not supposed to talk to me that way. He's supposed to defend me.

(Bolding omitted.) The trial court stopped Wellman and said the case was a year old and it would remain on the calendar for trial. The trial court added that Wellman was free to retain new counsel on his own if counsel would be ready to try the case in a month.

¶21 Wellman faults the trial court for what he believes was an incomplete inquiry and points out that he never sought a trial adjournment.

¶22 Whether to permit substitution of counsel was within the trial court's discretion. ***State v. Jones***, 2010 WI 72, ¶23, 326 Wis. 2d 380, 797 N.W.2d 378. Wellman had the burden to show good cause to substitute counsel. *See* ***State v. Lomax***, 146 Wis. 2d 356, 360, 432 N.W.2d 89 (1988). We consider the following in evaluating whether the trial court properly exercised its discretion in addressing a request for new counsel: (1) the adequacy of the trial court's inquiry into the

defendant's request, (2) the timeliness of the defendant's request, and (3) "whether the alleged conflict between the defendant and the attorney was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case." *See* ***id.*** at 359. These factors are considered separately, not balanced against each other. ***Jones***, 326 Wis. 2d 380, ¶30.

¶23 First, "[m]ere disagreement over trial strategy does not constitute good cause to require the court to permit an appointed attorney to withdraw." ***State v. Wanta***, 224 Wis. 2d 679, 703, 592 N.W.2d 645 (Ct. App. 1999). Second, insofar as Wellman was displeased that trial counsel said he would look like a selfish punk and a brat on the stand, this is not enough to show that the conflict between the two "was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case." *See* ***Lomax***, 146 Wis. 2d at 359.

¶24 Wellman challenges the adequacy of the trial court's inquiry and argues that a retrospective hearing is required. We disagree. The trial court's inquiry is not required to "satisfy a particular formula." ***State v. Kazee***, 146 Wis. 2d 366, 372, 432 N.W.2d 93 (1988). Once "the reasons for the defendant's request are made known, or are apparent, the court may exercise its discretion without further inquiry." ***Id.***; *see* ***Lomax***, 146 Wis. 2d at 362 (Upon a defendant's request for new counsel, a meaningful inquiry "may not take more than minutes.").

¶25 We conclude that the trial court's inquiry was adequate to inform the court of the basis for Wellman's request and the nature of his complaints and to permit an informed exercise of discretion concerning the substitution of counsel.

By the Court.—Judgment and order affirmed.

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