COURT OF APPEALS
DECISION
DATED AND FILED

October 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1836-CR **Cir. Ct. No. 2012CF1213**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT J. KINSLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: CHAD G. KERKMAN, Judge. *Affirmed*.

Before Reilly, P.J., Gundrum and Hagedorn, 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. Robert J. Kinsley appeals from a judgment of conviction and an order denying his postconviction motion. He contends that he is

entitled to a new trial due to ineffective assistance of trial counsel and the circuit court's erroneous admission of expert testimony. We disagree and affirm.

¶2 Kinsley was convicted following a jury trial of repeated sexual assault of the same child. The charge stemmed from allegations that he sexually assaulted a fifteen-year-old boy named J.P.C. on three separate occasions. For his actions, the circuit court sentenced Kinsley to six years of initial confinement and four years of extended supervision.

¶3 After sentencing, Kinsley filed a postconviction motion seeking a new trial. He claimed that his trial counsel—John Birdsall and Steven Greenberg—rendered constitutionally ineffective assistance in multiple ways. He also claimed that the circuit court erred when it permitted a forensic interviewer named Julianne McGuire to testify as an expert for the State. Following a hearing on the matter, the circuit court denied the motion. This appeal follows. Additional facts are set forth below.

¶4 On appeal, Kinsley first contends that his trial counsel provided ineffective assistance. Specifically, he complains that counsel: (1) failed to investigate a favorable witness; (2) failed to file a witness list, resulting in the exclusion of certain evidence; (3) failed to present an expert to rebut McGuire's testimony; and (4) failed to timely request a psychological examination of J.P.C. pursuant to ***State v. Maday***, 179 Wis. 2d 346, 507 N.W.2d 365 (Ct. App. 1993).

¶5 To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that such performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To show deficient performance, the defendant must point to specific acts or omissions by counsel that were "outside the wide range of professionally

competent assistance." ***Id.*** at 690. To show prejudice, the defendant must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. ***Id.*** at 694. We need not address both components of the analysis if the defendant fails to make a sufficient showing on either one. ***Id.*** at 697.

¶6 Appellate review of an ineffective assistance of counsel claim is a mixed question of fact and law. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will not disturb the circuit court's findings of fact unless they are clearly erroneous, but the ultimate determination of whether counsel's performance fell below the constitutional minimum is a question of law we review independently. *See* ***id.*** at 634.

¶7 Kinsley's first complaint of ineffective assistance stems from counsel's failure to investigate a witness named Kirsten Berman. Berman is Kinsley's stepsister. J.P.C told police that Berman discovered him alone, naked, and hiding in a bed shortly after the first sexual assault at Kinsley's home. He said that Berman yelled at him to get out. Berman did not testify at trial, as no one followed up with her about J.P.C.'s statement. However, she testified at the postconviction motion hearing and denied that the encounter with J.P.C. had taken place.

¶8 When asked why they had not investigated Berman as a witness, counsel explained that Kinsley had directed them not to do so. Early on in the case, the defense's focus was on other, unrelated criminal allegations. Kinsley was embarrassed about them and did not want Berman contacted at that time. Kinsley reiterated that feeling later on in the case. According to Greenberg, Kinsley "told [him] not to contact [Berman]" because "[s]he didn't want to

come[,] [h]e didn't want her involved[,] [and] [s]he lived in California or Colorado or something…."

¶9 Given Kinsley's directives not to contact Berman or involve her in the case, we cannot fault counsel for failing to investigate her as a witness. ***Strickland*** instructs that "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." ***Strickland***, 466 U.S. at 691. Here, it was reasonable for counsel—and not deficient performance—to respect Kinsley's wishes and not investigate Berman.

¶10 Kinsley's next complaint of ineffective assistance stems from counsel's failure to file a witness list, resulting in the exclusion of certain evidence. Five months before trial, the circuit court issued a scheduling order requiring the parties to file witness lists within twenty days. Kinsley's counsel failed to comply with that order. Consequently, the court sanctioned Kinsley by limiting the testimony of the witnesses he planned to call.

¶11 The witnesses that Kinsley planned to call were Haley Hansen and Patience Spinler. They were slated to testify about J.P.C.'s reputation for untruthfulness. However, because Kinsley's counsel failed to file a witness list, their testimony was limited to rebuttal only. In rebuttal, Hansen and Spinler contradicted certain aspects of J.P.C.'s testimony regarding whether Kinsley had offered or served alcohol to underage people and whether J.P.C. had planned an "ecstasy party" at Kinsley's house. They did not testify about J.P.C.'s reputation for untruthfulness.

¶12 We agree with Kinsley that counsel performed deficiently by failing to file a witness list. However, we are not persuaded that he was prejudiced as a

result. Reputation evidence is, by its nature, of "marginal probative value." 7 DANIEL D. BLINKA WISCONSIN PRACTICE SERIES: WISCONSIN EVIDENCE § 608.1 at 478 (3d ed. 2008). Greenberg conceded as much at the postconviction motion hearing when he observed, "I don't find that calling people to testify that another witness is untruthful is typically very effective." In light of the weakness of the evidence, as well as the fact that Hansen and Spinler were able to dispute the accuracy of J.P.C.'s testimony in other ways, we cannot say that, but for counsel's error, the result of the proceeding would have been different.

¶13 Kinsley's next complaint of ineffective assistance stems from counsel's failure to present an expert to rebut McGuire's testimony. McGuire was the forensic interviewer who spoke to J.P.C. during the investigation. She was allowed to discuss commonalties among child sexual assault victims and offenders based upon her training and experience.

¶14 In her testimony, McGuire noted, among other things, that: (1) child sexual assault victims often know their assailants; (2) assailants often include family members or trusted family friends; (3) some child sexual assault victims delay disclosure of their victimization; (4) child sexual assault victims often experience ambivalence or reluctance to disclose their victimization; (5) child sexual assaults often occur while others are present in the home; and (6) child sexual assault victims often forget parts of what happened to them. Each of these characteristics was present in J.P.C.'s case.

¶15 Kinsley suggests that McGuire's testimony bolstered J.P.C.'s credibility and therefore required an expert to rebut it. However, the failure to present a competing expert is not automatically prejudicial. *See* ***Harrington v. Richter***, 562 U.S. 86, 111 (2011) ("***Strickland*** does not enact Newton's third law

for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense."). Moreover, counsel did effectively challenge McGuire's testimony in cross-examination. There, she was forced to concede a number of points, including that: (1) her employer routinely partnered with law enforcement; (2) her graduate degree in social work was a general degree and she was not an expert in child abuse; (3) common behaviors in child sexual assault victims can differ according to age; (4) she did not know whether J.P.C.'s allegations were true; (5) some children falsely accuse adults of sexual assault because they are "mad at the adult;" and (6) she had no specific recollection of the case."[1] On this record, we cannot say that, but for counsel's failure to present an expert to rebut McGuire's testimony, the result of the proceeding would have been different.

¶16 Kinsley's last complaint of ineffective assistance stems from counsel's failure to timely request a psychological examination of J.P.C. pursuant to ***Maday***, 179 Wis. 2d 346. Kinsley believes that he was entitled to such an examination and would have received one had counsel not first raised the matter on the morning of trial.[2]

¶17 A criminal defendant being prosecuted for sexual assault may be entitled to a court-ordered psychological examination of the victim. ***Id.*** at 349. The potential right to such an examination is triggered "[w]hen the state manifests

[1] At one point during cross-examination, Greenberg asked McGuire how old she thought J.P.C. was when she interviewed him. She replied, "I believe like 12 or 13. Something like that." J.P.C. was, in fact, seventeen at the time of the interview. Greenberg reminded the jury of that mistaken answer during his closing argument.

[2] Counsel's request for a psychological examination of J.P.C. was denied, in part, because it was untimely.

an intent during its case-in-chief to present testimony of one or more experts, who have personally examined a victim of an alleged sexual assault, and will testify that the victim's behavior is consistent with the behaviors of other victims of sexual assault." ***Id.*** at 359-60.

¶18 As our supreme court has explained, "The core rationale in ***Maday*** was one of basic fairness. If one side is to introduce testimony by a psychological expert who has examined the victim, the other side must also be able to request such an opportunity in order to level the playing field." ***State v. Rizzo***, 2002 WI 20, ¶26, 250 Wis. 2d 407, 640 N.W.2d 93. The court noted that the key fact in ***Maday*** was that "psychological experts had personally interviewed and examined the complainant." ***Rizzo***, 250 Wis. 2d 407, ¶26.

¶19 Reviewing McGuire's testimony, we are not persuaded that she was the type of expert contemplated in ***Maday***. After all, she claimed no expertise in psychology and performed no examination of J.P.C. She simply interviewed him. The fact that she also discussed commonalties among child sexual assault victims and offenders is insufficient to trigger Kinsley's potential right to a court-ordered psychological examination of J.P.C. Because Kinsley was not entitled to such an examination, counsel's failure to make a timely request for one cannot constitute deficient performance. *See* ***State v. Wheat***, 2002 WI App 153, ¶30, 256 Wis. 2d 270, 647 N.W.2d 441 (defense counsel not ineffective for failing to bring meritless motion).

¶20 Finally, Kinsley asserts that the above allegations, when considered together, establish cumulative prejudice. *See* ***State v. Thiel***, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 305 ("[P]rejudice should be assessed based on the cumulative effect of counsel's deficiencies."). We disagree. We have already

determined that counsel did not perform deficiently by failing to investigate a favorable witness or failing to timely request a psychological examination of J.P.C. Accordingly, we need not consider those alleged errors in our cumulative prejudice analysis. *See* ***id.***, ¶61 ("[E]ach alleged error [by trial counsel] must be deficient in law—that is, each act or omission must fall below an objective standard of reasonableness—in order to be included in the calculus for [cumulative] prejudice."). The remaining allegations, when considered together, do not undermine our confidence in the outcome of the proceeding.

¶21 Kinsley next contends that the circuit court erred when it permitted McGuire to testify as an expert for the State. He accuses the court of abandoning its gatekeeping role by not first determining whether McGuire's testimony met the standard for expert witnesses under ***Daubert v. Merrell Dow Pharms. Inc.***, 509 U.S. 579 (1993).

¶22 The problem with this argument is that it was not properly preserved for appellate review. Kinsley appeared to realize this fact in his postconviction motion where he wrote, "counsel also should have timely made a request for a ***Daubert*** hearing pursuant to [WIS. STAT. §] 907.02, but failed to do so."[3] Because counsel did not make a specific and timely request for a ***Daubert*** hearing, we deem the argument forfeited. *See* ***State v. Ndina***, 2009 WI 21, ¶¶29-30, 315 Wis. 2d 653, 761 N.W.2d 612 (the failure to raise an argument in the circuit court forfeits the argument on appeal). The circuit court was under no obligation to conduct a ***Daubert*** analysis of McGuire's testimony on its own. *See* ***State v.***

[3] Kinsley did not renew this claim of ineffective assistance in his appellant's brief. Accordingly, we do not address it.

Cameron, 2016 WI App 54, ¶¶12-13, 370 Wis. 2d 661, 885 N.W.2d 611 (the circuit court is not required to conduct a sua sponte ***Daubert*** hearing).

¶23 For these reasons, we affirm the judgment and order.[4]

By the Court.—Judgment and order affirmed.

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

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