COURT OF APPEALS
DECISION
DATED AND FILED

December 21, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2373-CR **Cir. Ct. No. 2013CF972**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHNNY RICHARDSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: WILLIAM E. HANRAHAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Johnny Richardson appeals a judgment of conviction for repeated sexual assault of the same child. He also appeals an order denying his postconviction motion. Richardson claims ineffective assistance of trial counsel on several grounds. We affirm.

Background

¶2 Richardson is married to the victim's biological aunt and, thus, is the victim's uncle by marriage. We note the family relationship only because it has bearing on Richardson's arguments.

¶3 The victim lived with Richardson, her aunt, and some of the victim's siblings. According to the victim, Richardson began sexually assaulting her when she was in fifth or sixth grade. The alleged assaults continued until the victim reported Richardson to a teacher in eighth grade.

¶4 The victim was 15 at the time of trial, and testified. In addition, the jury viewed videotaped interviews of the victim recorded when the victim was 13.

¶5 The defense sought to show that the victim fabricated the allegations against Richardson. Richardson took the stand in his defense and denied engaging in any of the alleged assaults.

¶6 We discuss additional trial evidence below.

Discussion

¶7 Richardson claims ineffective assistance of trial counsel. "Whether a defendant received ineffective assistance of trial counsel is a two-part inquiry under ***Strickland v. Washington***, 466 U.S. 668 (1984)." ***State v. Jenkins***, 2014 WI 59, ¶35, 355 Wis. 2d 180, 848 N.W.2d 786. "A defendant must show *both*

(1) that counsel performed deficiently; *and* (2) that the deficient performance prejudiced the defendant." ***Id.*** (emphasis added).

¶8 To demonstrate deficient performance, the defendant must show that "counsel's representation fell below an objective standard of reasonableness." ***Strickland v. Washington***, 466 U.S. 668, 688 (1984). "[R]egardless of defense counsel's thought process, if counsel's conduct falls within what a reasonably competent defense attorney could have done, then it was not deficient performance." ***State v. Jackson***, 2011 WI App 63, ¶9, 333 Wis. 2d 665, 799 N.W.2d 461.

¶9 To demonstrate prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶10 Richardson argues that trial counsel was ineffective in three ways:

1) by failing to present evidence that during opening statements counsel promised to present;

2) by failing to take advantage of two opportunities to attack the victim's credibility; and

3) by failing to renew a pretrial request to admit evidence that the victim was previously sexually assaulted by a different uncle.

For the reasons explained below, we conclude that Richardson fails to show ineffective assistance.

1. Failure to Present Promised Evidence

¶11 Richardson first argues that trial counsel was ineffective by failing to present certain evidence counsel promised during opening statements that he would present to the jury. Even assuming counsel was deficient in this respect, we conclude for the reasons that follow that Richardson fails to show prejudice.

¶12 We begin by summarizing trial counsel's pertinent conduct. We then explain why Richardson's prejudice argument fails.

¶13 As noted, Richardson's defense was that the victim fabricated the allegations against him. Trial counsel suggested several possible motives to fabricate, including that the victim was trying to get more "love and attention." Counsel began his opening statement with this claim: "[N]ot showing her enough love and attention anymore, that's exactly what [the victim] told her aunt ...." Counsel returned to the "love and attention" theme at the end of his opening statement, and repeated it yet again during closing arguments.

¶14 In addition, during opening statements, counsel asserted, without specifying the particular event, that one of the assaults the victim alleged was similar to a scenario in *Fifty Shades of Grey*, an erotic novel that the jury later heard the victim had been reading around the time that she reported Richardson to her teacher.

¶15 The State does not contest that trial counsel failed to elicit evidence that the victim told her aunt that she was not receiving enough love and attention anymore. It is also undisputed that, although there was evidence that the victim had read at least some of *Fifty Shades of Grey*, Richardson's trial counsel failed to

elicit evidence of any similarity between any alleged assault by Richardson and any event in *Fifty Shades of Grey*.

¶16 We have difficulty understanding Richardson's main prejudice argument. On the one hand, Richardson appears to argue that a defense attorney's failure to present promised evidence should be deemed per se prejudicial. On the other hand, Richardson qualifies this argument by suggesting that a per se rule would be limited to situations in which the promised evidence was "important," a qualification that seems to argue against a per se rule. Regardless, we reject Richardson's argument for a per se rule. The case law Richardson cites does not support such a rule. Rather, that case law reflects a fact-based application of ***Strickland***'s familiar standard. *See* ***State v. Coleman***, 2015 WI App 38, ¶¶21, 28-32, 362 Wis. 2d 447, 865 N.W.2d 190 (citing the ***Strickland*** standard, and concluding that counsel was ineffective when counsel told the jury that counsel makes the decision whether the defendant will testify and counsel broke a promise to the jury that the defendant would testify); ***Anderson v. Butler***, 858 F.2d 16, 16-19 (1st Cir. 1988) (citing ***Strickland***, and concluding that counsel's broken promise to produce important evidence underlying the defense theory was prejudicial "as [a] matter of law," meaning that remand for further postconviction proceedings was unnecessary); *see also* ***United States v. McGill***, 11 F.3d 223, 227 (1st Cir. 1993) (citing ***Anderson*** for the proposition that counsel's failure to produce a promised witness "may under some circumstances be deemed ineffective assistance"); ***Turner v. Williams***, 35 F.3d 872, 903-04 (4th Cir. 1994) (agreeing with ***McGill*** that broken promises by defense counsel are assessed based on the particular circumstances).

¶17 Richardson goes on to argue in his reply brief that, even under the ***Strickland*** standard, there was prejudice. We could ignore this belated argument.

See ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998). We choose, however, to address it and put it to rest.

¶18 Richardson's argument, as we understand it, is very general. He does not address the strength of the State's evidence or address in any detail why the broken promises might undercut the State's case. Rather, Richardson simply contends that trial counsel's broken promises were likely to have shaken the jury's faith in counsel and in what Richardson apparently asks us to assume was otherwise a tenable defense. Richardson also argues, as we understand it, that the missing evidence would have been strong evidence for the defense. Neither argument is persuasive.

¶19 We acknowledge the danger that arises when trial counsel fails to deliver on promised evidence. In ***Coleman***, this court stated: "Defense counsel is seen by the jury as an agent for the defendant. If counsel says something will happen that does not, without explanation, counsel necessarily damages both his own, and potentially his client's, credibility." ***Coleman***, 362 Wis. 2d 447, ¶30.

¶20 But we do not examine counsel's broken promises in a vacuum. Rather, we consider how significant those promises were in the context of the overall defense strategy and all of the evidence at trial. *See* ***State v. Maday***, 2017 WI 28, ¶58, 374 Wis. 2d 164, 892 N.W.2d 611 ("When determining if counsel's deficiency undermines confidence in the outcome of the trial and amounts to prejudice, 'a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.'" (quoting ***Strickland***, 466 U.S. at 695)); ***Jenkins***, 355 Wis. 2d 180, ¶50 ("Our prejudice analysis is necessarily fact-dependent. Whether counsel's deficient performance satisfies the prejudice prong of ***Strickland*** depends upon the totality of the circumstances at trial.").

¶21 Here, as we now explain, the main problem with Richardson's defense was *not* trial counsel's failure to deliver the promised evidence. It was instead that, with or without that evidence, the prosecution's case against Richardson was strong and the defense had no plausible explanation for some of the most damaging evidence. In the subsections that follow, we discuss this evidence and Richardson's defense.

a. Victim's Detailed Descriptions of Multiple Incidents Over Time

¶22 In her testimony and the videotaped interviews, the victim provided detailed descriptions of many incidents of assault spanning two or three years. The incidents included:

- a time in the bathroom when Richardson was helping the victim apply a face cream, rubbed the victim's vagina over her clothes, and made her rub his penis over his clothes, then stopped when he could hear the garage door opening;

- multiple times when Richardson surreptitiously slid his foot under the victim's vagina while the victim was sitting on the floor watching television;

- a time in the car when Richardson pulled into a parking lot and, while touching her vaginal area, asked her, "Do you want me to put it in?," to which the victim responded no and started to cry;

- a time when, while the victim was home from school for a doctor's appointment and her aunt was at work, Richardson took off the victim's pants and underwear, put on a condom, and engaged in penis to vagina intercourse with her on the bed in a bedroom;

- a time when the victim was alone with Richardson in the basement and he put his penis in her vagina, then stopped and pulled up his pants when they heard the victim's brother at the top of the stairs;

- another time in the basement when Richardson indicated to the victim's aunt upstairs that he intended to look for something, came downstairs, engaged in penis to vagina intercourse with the victim for about three

minutes, and, when he was done, yelled up to the victim's aunt, "found it"; and

- yet another time in the basement when Richardson pulled down the victim's pants and underwear, took off his glasses, lifted one of her legs so that she was positioned, according to the victim, "like a dog peeing on a fire hydrant," put his tongue in her vagina, and asked her, "Did you like that?"

¶23 Regardless of trial counsel's failure to deliver on the promised "love and attention" evidence, the defense had no good explanation for why the victim would fabricate so many detailed allegations over such a long period of time. Further, those allegations included details that were not likely to be fabricated. One especially noteworthy example is the detail that Richardson took off his glasses before putting his tongue in her vagina. It is unlikely that any victim, particularly a victim as young as 13, would think to include that type of detail if the incident had not actually occurred.

¶24 Importantly for purposes of our analysis here, Richardson did not present postconviction evidence that the glasses detail or any of the other more striking or unusual details in the victim's account matched any scene in *Fifty Shades of Grey*. Thus, Richardson gives us no reason to think that trial counsel's broken promise to present similarity evidence as to *Fifty Shades of Grey* was significant.

¶25 We note that trial counsel *was* able to take advantage of undisputed evidence that the victim had been reading *Fifty Shades of Grey* and that the victim's aunt reacted negatively when she found out. In particular, defense counsel used this evidence as part of a broader defense strategy to show that the victim's aunt ran a strict household and that the victim might have fabricated allegations against Richardson as a reaction to her aunt's strict approach or in

hopes that she would be allowed to go live somewhere else. While this argument was a stretch, it was no more of a stretch than the defense's proffered "love and attention" motive.

b. iPhone Evidence

¶26 In the videotaped interviews, the victim explained how Richardson would use his iPhone in several ways related to the alleged sexual assaults. Specifically, according to the victim, Richardson would use the phone to show the victim pictures of his penis, to exchange "notes" with the victim relating to the assaults, and to show the victim pornographic videos and ask her which ones she liked.

¶27 The police recovered evidence from Richardson's iPhone that corroborated the victim's videotaped statements. This evidence included photos of Richardson's penis, including one photo on which Richardson had drawn a smiley face.

¶28 When asked about the photo with the smiley face, Richardson claimed that he was going to send the photo to the victim's aunt. The victim's aunt testified that she was unaware that Richardson had photos of his penis on his phone and that Richardson had never shown her the pictures.

¶29 Police also recovered from Richardson's iPhone fragments of "Notes" messages with sexual-sounding themes. The fragments included:

- "Yes because we would get in trouble I didn't tell";
- "when you started touching me when was doing y";
- "I was going to lick you today oh I really think we should stop ….";

- "Why do you always got to be the victim it's more like I am."

¶30 The victim testified that she remembered some of these fragments as parts of messages that Richardson exchanged with her on his phone. Richardson admitted that he used the Notes application on his phone, but claimed not to know how the sexual-sounding messages might have come to be there.

¶31 The iPhone evidence was incriminating to say the least. Regardless of trial counsel's broken promises regarding "love and attention" evidence and *Fifty Shades of Grey*, the defense had no good explanation for what was found on Richardson's iPhone. To believe Richardson's defense, the jury would have needed to believe the implausible claim that Richardson's iPhone fortuitously contained the sexual material described—including a photograph of Richardson's penis with a smiley face—and that the victim detected this material on the phone and realized she could use it as a way to corroborate fabricated assault allegations against Richardson. To state the obvious, any reasonable jury would have found this explanation far-fetched.

c. Victim's Friends' Testimony

¶32 Two of the victim's friends testified. As we now explain, their testimony, like the iPhone evidence, strongly corroborated the victim's allegations against Richardson.

¶33 The victim testified that she told her friends about Richardson's assaults early on, but asked them not to tell anyone. She explained that, in eighth grade, her friends persuaded her to tell her teacher. The victim testified that she was reluctant to report Richardson because she liked living with her aunt and wanted to continue to live with her aunt. She thought that if she reported

Richardson she would be removed from her home and taken away from her family.

¶34 Consistent with this testimony, both friends testified that the victim began telling them about sexual assaults by Richardson as early as the sixth or seventh grade. Both friends also testified that the victim was reluctant to talk about the assaults because she was afraid that reporting the assaults would lead to removal from her aunt's home or the breakup of her family.

¶35 The victim's friends' testimony was all but impossible for the defense to explain away. As the prosecution persuasively argued to the jury, it was highly implausible to think that the victim came up with and executed a long-term plan to falsely accuse Richardson that started in sixth grade, with the planting of false allegations with her friends, and culminated two years later, when the victim finally reported the allegations to an adult. Further, the victim's friends' testimony corroborated the victim's professed reason for her reluctance to report Richardson, and thus ran directly contrary to the defense's proffered motives for the victim to fabricate.

¶36 To sum up so far, we are confident that, regardless of defense counsel's failure to deliver the promised "love and attention" evidence and *Fifty Shades of Grey* similarity evidence, the jury would have found Richardson guilty.

2. Failure to Take Advantage of Opportunities to Attack the Victim's Credibility

¶37 Richardson's second ineffective assistance claim involves the assertion that trial counsel deficiently failed to take advantage of two opportunities to attack the victim's credibility. As to each, we conclude that Richardson fails to show deficient performance or prejudice or both.

¶38 The first alleged missed opportunity relates to something the victim allegedly told her aunt about condoms after the victim had come forward to accuse Richardson of sexual assaults. For purposes of this discussion, we will assume that Richardson is correct that trial counsel received discovery indicating the following: the victim's aunt, Richardson's wife, told police that the victim told the aunt that Richardson took the victim to a store to buy condoms and that, after the aunt told the victim there would be a store video to show this, the victim changed her story, telling her aunt that the condoms came from a drawer in the bathroom in their house. At the postconviction hearing, the aunt, who testified as a defense witness at trial, related the above account of her interaction with the victim.

¶39 Richardson argues on appeal that his trial counsel performed deficiently by failing to question the victim about the alleged condom conversation with her aunt. Although Richardson never clearly argues the point, we will assume that he also means to argue that counsel performed deficiently by failing to introduce evidence of the aunt's claim. Regardless of Richardson's precise argument, we are confident that any deficient performance in this regard did not affect the verdict.

¶40 Richardson, at best, merely asserts in conclusory terms that questions and testimony about the condom topic would have altered the jury's view of the victim's credibility. Richardson does not, for example, give us reason to think that the victim, if asked, would have testified that she changed her story or that she otherwise lied to her aunt about buying condoms with Richardson.

¶41 The only apparent source of such testimony was the victim's aunt, a defense witness. But asking the victim's aunt about this topic presented its own

problems because the victim's aunt testified that she and the victim never discussed the alleged assaults. Thus, raising this topic with the aunt would have undercut the aunt's testimony, leaving Richardson as the main defense witness.

¶42 In addition, there are other reasons to think that the jury would have taken a skeptical view of the victim's aunt's claim about the alleged condom-buying incident. One of the more contentious exchanges at trial occurred when the prosecution cross-examined the victim's aunt. The aunt initially implied that the assaults could not have occurred because she knew what went on in her home and she kept tabs on what Richardson was doing. However, the aunt eventually admitted that Richardson regularly had opportunities to be alone with the victim, including on days that he took the victim to doctor appointments while the aunt was at work. The victim's aunt agreed that it was "not quite true" when she previously testified that Richardson had no opportunities to be alone with the victim. Thus, the aunt's credibility was suspect, and any allegation she made against the victim would have been viewed by the jury with suspicion. The aunt was not a neutral party; she had plainly sided with her husband.

¶43 Further, even if the jury had heard and believed testimony that the victim lied to her aunt about buying condoms with Richardson, we disagree with Richardson that there is a reasonable probability of a different outcome. Given all of the other evidence against Richardson, it is far more likely that the jury would have continued to believe that the victim's assault allegations were credible.

¶44 We turn to the second alleged missed opportunity to attack the victim's credibility. Richardson points to the victim's videotaped interviews where the victim alleged that the first time Richardson assaulted her was a time in fifth grade when Richardson was helping the victim apply face cream. According

to Richardson, the victim did not have face cream for a face condition until she was older. Richardson argues, apparently, that trial counsel's failure to explore this face cream topic was another missed opportunity to undermine the victim's credibility. Assuming for argument's sake that Richardson's trial counsel could have persuaded the jury that the victim did not have a condition requiring face cream until she was older, we nonetheless conclude that the omission by counsel was neither deficient performance nor prejudicial within the meaning of ***Strickland***.

¶45 We instead agree with the State that pursuing the face cream topic had a downside and little potential upside for the defense. It risked coming off to the jury as nitpicking and, most likely, would have had no effect on the victim's credibility. At most, it might have shown that the victim, by the time she was first interviewed about the assaults in eighth grade, misremembered an extraneous detail from two to three years earlier or had understandably lost track of the relative timing of some of the many incidents.

3. Failure to Renew Argument to Admit Prior Sexual Assault Evidence

¶46 Richardson's third ineffective assistance claim relates to information indicating that the victim had been sexually assaulted by a different relative. Prior to trial, the defense moved to allow evidence that the victim was sexually assaulted by a different uncle in Michigan before coming to live with Richardson. The circuit court excluded the evidence under the Rape Shield Law. The court rejected Richardson's argument that one or more exceptions to that law applied.[1]

[1] Judge Maryann Sumi made the pretrial ruling excluding the prior sexual assault evidence. Judge William E. Hanrahan presided over subsequent proceedings.

¶47 Richardson argues that trial counsel was ineffective when, during the course of trial, counsel failed to renew his request that the prior sexual assault evidence be admitted. We conclude that Richardson fails to show both deficient performance and prejudice.

¶48 We need not discuss the legal standards for the exceptions to the Rape Shield Law because, as we now explain, Richardson's argument depends on a false factual premise.

¶49 Specifically, Richardson's argument starts from the factual proposition that the victim's friends' testimony was ambiguous as to whether the victim was talking about her Michigan uncle when the victim first started telling her friends about sexual assault in sixth grade. We agree with the State, however, that there was no such ambiguity in the victim's friends' testimony.

¶50 First, both friends testified that, although the victim initially did not specify that Richardson was the "uncle" in question, the victim eventually made clear that the assaults were being perpetrated by the uncle with whom she was living, namely, Richardson. And, there was nothing in the victim's friends' testimony to support an inference that the victim might have been talking about more than one uncle.

¶51 Second, as already noted, both friends testified that the victim told them she was afraid to tell anyone about the assaults *because she was afraid that she would be removed from her home and separated from her family*. This testimony from the friends made no sense if the victim was describing assaults by her Michigan uncle.

¶52 Finally, the friends' testimony made clear that the victim was telling them about *ongoing* assaults. One of the friends explained how they would use a code name to refer to the victim's uncle, and that she would ask the victim, "'So, what's going on with you and [code name]?' And [the victim] would tell me, and sometimes she doesn't even want to talk about it."[2]

Conclusion

¶53 For the reasons stated, we affirm the judgment of conviction against Richardson 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. (2015-16).

[2] For the same reasons, we reject Richardson's argument that the circuit court erred in excluding evidence that the victim was previously assaulted by her uncle in Michigan. Richardson's argument on this topic adds nothing to his ineffective assistance argument. Both arguments are based on the false premise that the victim's friends' testimony was ambiguous as to whether the victim was referring to Richardson.