COURT OF APPEALS
DECISION
DATED AND FILED

June 27, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1252-CR **Cir. Ct. No. 2014CF2989**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL L. DIXON,

DEFENDANT-APPELLANT.

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

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Michael Lion Dixon appeals from a judgment, entered after a jury trial, convicting him of two counts of second-degree sexual assault of a child for having sexual intercourse with thirteen-year-old S.O. and fourteen-year-old D.D.[1] He asserts various claims of ineffective assistance of defense counsel. We conclude that Dixon is neither entitled to a new trial on that ground, as he has not proved that he was prejudiced by any of the deficiencies of which he complains, nor in the interest of justice. We also conclude the trial court did not err in denying his motion for postconviction relief without a hearing. We affirm the judgment and order.[2]

¶2 Dixon committed the assaults in 2002 and 2011 but was not charged until 2014, when DNA evidence linked him to the crimes. After a three-day trial, the jury found him guilty. He filed a postconviction motion seeking a new trial, which the court denied without a hearing. This appeal followed.

¶3 Dixon contends he is entitled to a new trial because defense counsel was ineffective due to counsel's failure to object to the admission of certain evidence through a surrogate witness denied him his right to confrontation. Sexual Assault Nurse Examiner (SANE) Debra Martinez attended to D.D. at Aurora Sinai Sexual Assault Treatment Center (Aurora Sinai). As Martinez was unavailable at trial due to a family emergency, the written records she generated from her examination of D.D. and the evidence she collected—vaginal swabs and

[1] Dixon was charged with five counts of sexual assault involving four victims between 2002 and 2012. The other two victims were adult women. He went to trial only on the ones involving S.O and D.D. His appeal does not raise any issues in regard to S.O.

[2] The Honorable Timothy G. Dugan presided over the jury trial. The Honorable Jeffrey A. Wagner denied Dixon's postconviction motion seeking a new trial.

D.D.'s semen-stained jeans—were admitted through the testimony of her nurse manager, Gina Kleist. Dixon argues that counsel should have objected to the admission, through Kleist's testimony, of Martinez's statements, the sexual assault record relating to D.D., the chain-of-custody report, and the packaging on the vaginal swabs and her jeans.

¶4 To succeed on a claim of ineffective assistance of counsel, a defendant must show both that counsel's representation was deficient and that this deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.***

¶5 The prejudice prong is satisfied where counsel's error is of such magnitude that there is a reasonable probability that, but for the error, the result of the proceeding would have been different. ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** We may address the tests in either order. ***Id.*** at 697. Thus, if the defendant fails to establish prejudice, we need not address deficient performance. *See* ***id.***

¶6 "The Confrontation Clauses of the United States and Wisconsin Constitutions guarantee criminal defendants the right to confront witnesses against them." ***State v. Hale***, 2005 WI 7, ¶43, 277 Wis. 2d 593, 691 N.W.2d 637; U.S. CONST. amend. VI, WIS. CONST. art. 1, §7. Dixon argues that Martinez's own testimony was necessary to properly authenticate the evidence because only

she possessed the knowledge that it was what it was claimed to be, *see* WIS. STAT. § 909.015(1), whereas Kleist had no personal knowledge about it.[3]

¶7 "The requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." WIS. STAT. § 909.01. The list of examples of ways to authenticate offered in WIS. STAT. § 909.015 is not an exhaustive list. ***State v. Baldwin***, 2010 WI App 162, ¶55, 330 Wis. 2d 500, 794 N.W.2d 769.

¶8 Here, the physical evidence obtained during Martinez's examination of D.D. was authenticated through circumstantial evidence, another recognized means. *See* ***State v. Giacomantonio***, 2016 WI App 62, ¶20, 371 Wis. 2d 452, 885 N.W.2d 394. As Martinez's manager and a certified SANE herself, Kleist was familiar both with Martinez's work and documentation procedures used at Aurora Sinai. She described the standard procedures all of the Aurora Sinai nurses follow

[3] The Confrontation Clause is implicated by the admission of out-of-court statements that are "testimonial," a determination made by applying the primary purpose test. ***State v. Mattox***, 2017 WI 9, ¶32, 373 Wis. 2d 122, 890 N.W.2d 256. Under that test, "the dispositive 'question is whether, in light of all the circumstances, viewed objectively, the "primary purpose" of the [out-of-court statement] was to creat[e] an out-of-court substitute for trial testimony.'" ***Id.*** (alteration in original; citation omitted). When a "statement's primary purpose is something other than to 'creat[e] an out-of-court substitute for trial testimony[,]' its admission does not implicate the Confrontation Clause." ***Id.***, ¶3 (first alteration in original; citation omitted).

The State points out that whether a victim's statements to a SANE is testimonial is not settled law. Where the law is unsettled, counsel does not perform deficiently by failing to challenge it. ***State v. McMahon***, 186 Wis. 2d 68, 84, 519 N.W.2d 621 (Ct. App. 1994). We will save for another day an exploration of whether such statements are testimonial because we conclude that Dixon was not prejudiced by counsel's failure to, or decision not to, object.

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

when conducting sexual assault examinations and when collecting and packaging evidence to maintain the chain of custody. Kleist testified that the evidence bearing D.D.'s name and the date of collection on the packaging were labeled according to those procedures.

¶9 The State's case against Dixon in regard to D.D. depended on DNA recovered from the vaginal swabs and jeans procured during the SANE examination. He thus contends that Martinez's testimony was critical to establish the first link in the chain of custody because she obtained the physical evidence taken from D.D., created the written "Chain of Custody of Evidence Report For Sexual Assault Evidence," and packaged the evidence admitted as exhibits at trial. An objection, he argues, would have prevented admission of the evidence and a foundation from being laid for the subsequent testimony of the State Crime Lab analyst regarding her analysis of D.D.'s DNA extracted from the evidence in those exhibits. The analyst testified that, to a reasonable degree of scientific certainty, the DNA on the vaginal swabs and on D.D.'s jeans matched Dixon's profile.[4]

¶10 "The degree of proof necessary to establish a chain of custody is a matter within the trial court's discretion." ***B.A.C. v. T.L.G.***, 135 Wis. 2d 280, 290, 400 N.W.2d 48 (Ct. App. 1986). The proof must be sufficient "to render it improbable that the original item has been exchanged, contaminated or tampered with." ***Id.*** "A perfect chain of custody is not required." ***State v. McCoy***, 2007 WI App 15, ¶9, 298 Wis. 2d 523, 728 N.W.2d 54 (2006). Alleged gaps in the chain go to the weight of the evidence, not its admissibility. ***Id.***

[4] The analyst testified that the DNA recovered from sperm on the jeans matched Dixon's DNA at every genetic location tested and that the chance of finding another person with Dixon's DNA profile was one in 241 quintillion.

¶11 We see no prejudice. A Milwaukee Police Department Sensitive Crimes Division detective testified that he obtained items of evidence from Aurora Sinai and followed specific protocols to document the chain of custody from picking up the evidence through taking it to the Crime Lab. He identified two exhibits: an inventory documenting twelve items he retrieved from Aurora Sinai that were collected from D.D., and the receipt he received when he took the items inventoried as being associated with D.D. to the Crime Lab.

¶12 The Crime Lab analyst who examined the vaginal swabs and jeans recovered from D.D. testified that when the Crime Lab tests evidence brought to the lab by an outside agency, there is a standard protocol that every analyst follows "every step of the way from receiving evidence through the testing process." She also testified that the vaginal swabs and the jeans were in separate envelopes, each with a patient label of D.D. and a particular laboratory bar code.

¶13 We are satisfied that the proof was sufficient to "render it improbable that the original item has been exchanged, contaminated or tampered with." ***B.A.C.***, 135 Wis. 2d at 290. Dixon was not prejudiced by the lack of an objection to the chain of custody.

¶14 Taking another tack, Dixon asserts that Martinez's absence prejudiced his defense because he had no chance to cross-examine her about the narrative portions of her report—what she observed and recorded about D.D.'s description of the sexual assault—or with respect to any "biases, exaggerations, or inaccuracies" in her reports, or inconsistencies between what D.D. told her then and later testified to at trial.

¶15 We are left to guess at what "biases, exaggerations, or inaccuracies" required cross-examination. As to "inconsistencies," Dixon asserts that D.D.

testified at trial that he "choked her and that she had trouble breathing," in contrast to the sexual assault record indicating that she told Martinez no strangulation was involved. While the sexual assault record does show that the "No" box is checked after "Strangulation," Martinez wrote in the narrative section of the report that D.D. said her assailant was "holding my neck."

¶16 We think Dixon nitpicks about semantics. D.D. was just fourteen at the time of the assault. The trial was held several years later. Whether she said he "choked" or "strangled" or "held her neck" is immaterial when the only two elements to be proved were that Dixon had sexual intercourse with her when she was less than sixteen years old. Cross-examination of Martinez on the precise descriptor would have changed nothing. Further, defense counsel impeached D.D.'s credibility when she admitted on cross-examination that she lied to police, telling them her assailant had grabbed her and pulled her inside his car, when in fact she willingly had accepted his offer to give her a ride home. Dixon has not proved prejudice from not having the opportunity to cross-examine Martinez.

¶17 Dixon next complains that his right to confrontation was violated when defense counsel failed to move for a mistrial due to remarks the prosecutor made during opening statements. The remarks referred to DNA evidence that matched Dixon to evidentiary samples taken from S.E., one of the adult victims, and to statements S.E. had made to police. S.E. was on the State's witness list. Dixon contends that, despite having "credible information" that she was not going to appear, the prosecutor nonetheless described for the jury evidence strongly implicating Dixon in S.E.'s assault.

¶18 While S.E., who lived in Pennsylvania, did not show up for trial, the record does not exactly bear out Dixon's contention that the prosecutor's

comments were "calculated." Even so, Dixon was not prejudiced. The prosecutor described the sexual assaults of S.O. and D.D. and how police were able to identify Dixon as the assailant through a DNA match, which related to the sexual assault of S.E. The comments about the S.E.-related evidence were not vital to the prosecution of the sexual assaults of S.O. and D.D., and the State ultimately introduced no evidence concerning S.E. The only further mention of her came when the trial court instructed the jury not to consider any opening-statement comments about her because no evidence relating to the counts involving her had been presented. We presume the jury follows the instructions it is given. ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989).

¶19 Dixon asserts that the trial court erred in denying his postconviction motion without a hearing. We review de novo whether his motion on its face alleged sufficient material facts that, if true, would entitle the defendant to relief. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). As we conclude that the record conclusively demonstrates that Dixon is not entitled to relief, it was within the trial court's discretion to deny a hearing. *See* ***id.*** at 310.

¶20 Finally, incorporating all of his foregoing arguments, Dixon seeks a new trial in the interest of justice. We may exercise our discretion to order a new trial "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." WIS. STAT. § 752.35. Having seen no error on the grounds he raised, we decline to do so.

By the Court.—Judgment and order affirmed.

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