

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 7, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2007AP2962-CR

Cir. Ct. No. 2005CF422

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WESLEY L. MCKINNEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Wood County: JON M. COUNSELL, Judge. *Affirmed.*

Before Higginbotham, P.J., Lundsten and Bridge, JJ.

¶1 PER CURIAM. Wesley McKinney appeals a judgment convicting him of repeated sexual assaults of the same child and an order denying postconviction relief. He contends that he was convicted of an offense that did not

exist when he committed it. He also contends that he received ineffective assistance from trial counsel. We affirm.

¶2 The State charged McKinney with violating WIS. STAT. § 948.025(1)(b) (2003-04),¹ repeated sexual assaults of the same child, between June 2001 and September 2001. Section 948.025(1)(b) provided that sexually assaulting the same child three or more times was a class C felony if fewer than three of the assaults were first-degree sexual assaults (committed while the child was less than thirteen). However, § 948.025(1)(b), did not exist at the time McKinney committed the offense. Its predecessor, WIS. STAT. § 948.025(1) (1999-2000), provided that committing three or more sexual assaults of the same child was a class B felony when the child was less than sixteen. Here, the victim was fifteen when the assaults occurred.

¶3 At trial the victim testified to daily or almost daily sexual encounters with McKinney between late June 2001 and the end of August 2001, all occurring in his room at a boarding house in Marshfield. A friend of hers, Tonya Kummers, testified that she saw them beginning to have sex in McKinney's room, and on occasion heard them having sex from the room of her boyfriend, Dionsius Johnson, next door. The victim's mother testified that she saw letters that McKinney subsequently sent her daughter from prison, and that they contained "sexual content." She did not describe the "sexual content" in any detail.

¶4 McKinney testified that he never had sexual contact with the victim. He also presented evidence that he left Marshfield on or about July 19, 2001,

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

relocated in Medford, and for the rest of the summer only returned to Marshfield occasionally to visit his mother and never returned to the boarding house. In the course of presenting that defense the jury heard that: he was on probation in the summer of 2001; the Department of Corrections had placed him at the boarding house and was paying for his room; he was on electronic monitoring; his probation agent put a probation hold on him on July 18, 2001; he escaped from the officers sent to the boarding house to arrest him later that day; and he then absconded, and remained at large until his arrest on September 4, 2001. The purpose of giving the jury this information was to establish that McKinney had considerable motivation to stay away from the boarding house during a period when the victim said she saw him there almost every day. The jury also heard that he had eight prior convictions, adjusted poorly to probation, and was sent to prison after his September arrest. McKinney presented two alibi witnesses, the person he lived with, Michael Lehmann, and his Medford girlfriend, Crystal Stockheimer, to prove that he remained in Medford after he absconded.

¶5 After his conviction, McKinney filed a postconviction motion alleging several instances of ineffective assistance from trial counsel. After hearing testimony from counsel and other witnesses, the trial court denied the motion, resulting in this appeal.

DEFECT IN THE CHARGE

¶6 McKinney contends that the circuit court lacked subject matter jurisdiction, and his conviction is therefore void, because the complaint and information charged him with a crime that did not exist when he committed it. *See State v. Briggs*, 218 Wis. 2d 61, 68, 579 N.W.2d 783 (Ct. App. 1998) (circuit court has no subject matter jurisdiction over a nonexistent crime). However, the

crime McKinney committed did exist in Wisconsin in 2001. The only difference between the charged statute, WIS. STAT. § 948.025(1)(b), and the statute then in effect, WIS. STAT. § 948.025(1) (1999-2000), was the numbering of the statute, and a reduction in McKinney's maximum sentence exposure. Because the victim was older than twelve, the elements of the crime remained the same. Consequently, if there was a charging error, it was harmless. *See State v. Wachsmuth*, 166 Wis. 2d 1014, 1027, 480 N.W.2d 842 (Ct. App. 1992) (where both offenses contain identical elements, a charging error is harmless). Additionally, McKinney benefitted from the error by his reduced exposure. The charging error resulted in a sentence imposed for a class C felony, with a maximum penalty of forty years in prison, when the court should have sentenced him for a class B felony, with a sixty-year maximum. His argument is therefore without merit.

TRIAL COUNSEL'S PERFORMANCE

¶7 To demonstrate ineffective assistance of counsel the defendant must demonstrate that: (1) defense counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment; and (2) this deficient performance prejudiced the defense so seriously as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶8 The test for deficient performance is whether counsel had a reasonable basis for the challenged acts or omissions. *See State v. Rock*, 92 Wis. 2d 554, 560, 285 N.W.2d 739 (1979). Deficient performance and prejudice both present mixed questions of fact and law. *State v. Jeannie M.P.*, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We uphold the circuit court's

factual findings unless clearly erroneous. *State v. Thiel*, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. Whether counsel's performance is deficient or prejudicial is a question of law we review de novo. *Jeannie M.P.*, 286 Wis. 2d 721, ¶6.

¶9 McKinney presents the following claims of ineffective performance by counsel, alleging that he: (1) failed to notice the charging error; (2) failed to file a timely notice of alibi; (3) failed to adequately question the prospective jurors during voir dire; (4) pursued an ineffective strategy that caused the jury to hear highly prejudicial information about McKinney; (5) failed to adequately question or cross-examine several witnesses; (6) failed to locate and present an important alibi witness; (7) called three defense witnesses who provided damaging testimony; (8) did not object to the jury seeing prejudicial exhibits during deliberations; (9) did not object to testimony from the victim's mother; and (10) failed to adequately consult with McKinney concerning a plea bargain. We address each argument in turn.

¶10 Claim (1). Failed to notice the charging error. As we have previously concluded the error was harmless. Counsel's omission was therefore without prejudice.

¶11 Claim (2). Failed to file a timely notice of alibi. The untimely notice did not prejudice McKinney because, as he concedes, he was permitted to present his alibi defense at trial.

¶12 Claim (3). Failed to adequately question the prospective jurors. Four prospective jurors reported previous connections to sexual assault cases, but all stated that they could decide this case on the evidence. Two of those prospective jurors subsequently served on the jury that found McKinney guilty.

He contends that counsel should have undertaken a full voir dire of these individuals rather than accepting their assertions of non-bias. However, McKinney can only speculate that the jurors' prior experiences biased them. A meritorious claim that counsel performed ineffectively during jury selection requires proof that the result was a biased jury. See *State v. Traylor*, 170 Wis. 2d 393, 399-400, 489 N.W.2d 626 (Ct. App. 1992). Here, McKinney offers no such proof.

¶13 McKinney also contends that counsel should have fully questioned a prospective juror further about the fact that her brother-in-law was a Marshfield police officer. She did not serve on the jury selected for the trial, and McKinney only speculates that counsel would have uncovered information justifying a strike for cause, that would have allowed him to use a peremptory strike on another juror. Furthermore, he only speculates that the result of not having one extra strike was a biased jury. As noted, proof of bias, not speculation, was required.

¶14 Claim (4). Counsel pursued an ineffective strategy. During the trial, counsel brought out a number of unfavorable facts about McKinney, including his criminal record, status as a probationer, poor performance on probation, absconding from supervision, and subsequent capture and imprisonment. Counsel gave two reasons for doing so. First, counsel thought that being upfront about things the jury would find out anyway would enhance McKinney's credibility when he testified. Second, counsel viewed much of the information as helpful to the defense because it demonstrated McKinney's strong motivation to stay away from Marshfield and the boarding house, thus supporting his claim that the victim was lying or mistaken about his frequent presence there, with her, after July 18. We measure counsel's performance by an objective standard of reasonableness as measured against prevailing professional norms. *Strickland*, 466 U.S. at 688. A

reasonable attorney in the same circumstances might have adopted the same strategy as counsel did here, for the same reasons.

¶15 Claim (5). Failure to adequately question or cross-examine witnesses. McKinney asserts that a hole in the post July 18 alibi defense was counsel's failure to counter the possibility that he returned from Medford to Marshfield every day or almost every day to continue his sexual relationship with the victim. In McKinney's view, counsel should have established more precisely the times the victim said their sexual contacts occurred, and then shown through questioning of his two alibi witnesses that McKinney was in Medford at those precise times. However, a reasonable attorney could have determined that "closing the hole" in this manner would have been unnecessary, because the testimony from Lehmann and Stockheimer, if believed, sufficiently demonstrated the implausibility of daily trips back to Marshfield. Both testified to daily contact with McKinney, throughout the day, and Lehmann stated with certainty that he would have known if and when McKinney travelled to Marshfield. In any event, McKinney cannot reasonably claim prejudice because the prosecutor never contended that McKinney frequently returned to Marshfield from Medford to meet the victim. In fact, in closing arguments the prosecutor told the jury it should not even consider the question because there was sufficient evidence of sexual contacts before July 19 to find McKinney guilty.

¶16 McKinney also contends that counsel did not adequately cross-examine Kummer about seeing McKinney and the victim "beginning to have sex." He contends that counsel should have asked her what she meant by that term, and pinned her down as to when she saw this. However, a reasonable counsel might have decided to avoid those questions because Kummer might have answered them in a way highly prejudicial to McKinney. Kummer did not testify at the

postconviction hearing and it is only speculation that further cross-examination of her would have benefitted McKinney.

¶17 Claim (6). Failed to present Dionsius Johnson as a witness. As noted, Johnson was McKinney's next room neighbor in the Marshfield boarding house where the sexual contact occurred. He testified at the postconviction hearing that he was very close to both McKinney and the victim and never saw her enter McKinney's room alone. He also testified that one could not hear noises coming from McKinney's room, such as Kummer testified to hearing. He added that he never heard McKinney having sex. He testified that Kummer was untruthful, as was the victim.

¶18 In McKinney's view, counsel's failure to call Johnson as a witness was an unreasonable decision. In our view, a reasonable attorney could have chosen not to call Johnson because his testimony harmed McKinney in one important aspect. Notes were found in McKinney's room after he absconded with phone numbers of the victim, Kummer, and one other female. The note with Kummer's number also stated "I know you think I am hot." The defense offered the theory that Johnson wrote the notes when he came to McKinney's room to use the phone, as he supposedly did frequently because he did not have his own phone. Johnson would have testified, however, that he could not recall using McKinney's phone. Additionally, the fact that he did not hear noises from McKinney's room was not particularly exculpatory and did not necessarily impeach Kummer, because Johnson was hard of hearing, and frequently watched television with the set turned up loud.

¶19 Claim (7). Counsel called witnesses who gave damaging testimony. Counsel called a probation agent and two police officers as witnesses. McKinney

contends that their testimony prejudiced McKinney because they described his failed probation and subsequent attempts to evade arrest. In doing so, they offered testimony that supported the defense theory that McKinney had compelling reasons to avoid the boarding house after July 18. We have already determined that bringing out information about McKinney's problems on probation was a reasonable defense strategy, and using these witnesses in support of it was also reasonable.

¶20 Claim (8). Counsel did not object to the jury's viewing prejudicial exhibits. The exhibits in question were a letter to McKinney from Stockheimer in which she refers to sexual encounters with him and expresses her love for him, and his revocation report prepared by the Department of Corrections. According to McKinney, granting the jury's request to see these exhibits gave undue emphasis to evidence that damaged Stockheimer's credibility, and painted McKinney in a bad light as a repeat probation violator. A reasonable attorney might not have objected to either exhibit. The letter from Stockheimer emphasized the seriousness of their affair, thus making it less likely that he was travelling to Marshfield to have sex with a child at the same time. The probation report contained no reference to any sexual misconduct, and provided support for the main defense claim that McKinney would have reason not to return to the boarding house. Arguably, viewing the exhibits helped rather than prejudiced McKinney. Additionally, even if the exhibits benefitted the State rather than McKinney, he has not demonstrated prejudice from the jury examining them because there is nothing to indicate that the court would have granted a motion to deny the jury's request.

¶21 Claim (9). Counsel failed to object to testimony from the victim's mother. The mother testified to letters McKinney wrote to the victim from prison

that contained sexual content. McKinney contends that counsel should have objected on the grounds of relevance, because the letters were sent three years after the assaults took place. Nevertheless, the letters remained highly relevant to whether McKinney and the victim had a prior sexual relationship. Counsel had no basis to object and cannot be faulted for failing to make a pointless objection.

¶22 In the alternative, McKinney contends that counsel should have cross examined the witness to elicit more detail about the letters. McKinney can only speculate that the answers counsel received to further questions would have helped him rather than harmed him. He cannot fault counsel for reasonably choosing to avoid risk of the latter.

¶23 Claim (10). Counsel failed to adequately consult with McKinney. Counsel indicated that at some point he discussed a possible plea bargain with the prosecutor. McKinney contends that counsel performed ineffectively because he failed to tell McKinney about the potential offer. Even if counsel neglected his duty, McKinney has not met his burden of demonstrating prejudice. There is no evidence of what the prosecutor was willing to offer, or whether the prosecutor ever made a formal offer, or whether McKinney would have accepted any offer. The only testimony on the latter question was counsel's unrefuted recollection that McKinney wanted to go to trial "from day one."

¶24 Finally, as an alternative to his other claims, McKinney asks this court to order a new trial in the interest of justice. He contends that the cumulative effect of counsel's errors prevented a full and fair trial of the real controversy. Because we conclude that in all cases either counsel performed effectively, or McKinney failed to demonstrate prejudice where counsel did not, we deny his request for a new trial. The issue of his guilt or innocence was fully tried.

By the Court.—Judgment and order affirmed.

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

