State v. Peckham

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James J. Peckham appeals from a judgment entered after a jury found him guilty of one count of first-degree sexual assault of a child, contrary to Wis. Stat. § 948.02(1) (1999-2000).[1] He also appeals from an order denying his post-conviction motion. Peckham claims: (1) the trial court erroneously exercised its discretion in excluding certain evidence; (2) his trial counsel provided ineffective assistance; and (3) the sentence he received was unduly harsh and excessive. Because the trial court did not erroneously exercise its discretion in excluding evidence; because Peckham failed to prove an ineffective-assistance claim; and because the sentencing issue is moot, we affirm.

I. BACKGROUND

¶2. Eight-year-old victim J.

¶1. M.S., stated that on October 28, 2000,[2] Peckham put his hand down J.M.S.'s pants and touched his penis. This occurred while J.M.S. was at Peckham's home, using Peckham's computer. J.M.S. told police that Peckham had touched his penis many times before this incident as well. Peckham was arrested and charged.

¶3. After a jury trial, Peckham was convicted and sentenced to twenty years in prison. Peckham filed a post-conviction motion, which was denied. He now appeals.[3]

II. DISCUSSION

A. Evidentiary Issues.

¶4. Peckham contends that the trial court erroneously excluded evidence which he alleges would show a motive for J.M.S.'s mother fabricating the assault allegation, and evidence showing J.M.S.'s prior sexual history. The trial court excluded the evidence on the basis that the probative value was substantially outweighed by undue prejudice. We affirm the trial court.

¶5. Evidentiary issues are reviewed subject to the erroneous exercise of discretion standard. State v. Jenkins, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992). As long as the trial court considered the proper facts, applied the correct law, and reached a reasonable determination, we will not disturb an evidentiary ruling. Id. Moreover, when a defendant contends the evidentiary ruling prevented him from presenting a defense, the issue presented is one of constitutional fact. State v. Barreau, 2002 WI App 198, ¶44, 257 Wis. 2d 203, 651 N.W.2d 12. A defendant has the constitutional right to defend

himself or herself. See id. at ¶45. That right is not absolute, but rather, limited to the presentation of "relevant evidence [whose probative value is] not substantially outweighed by its [potential] prejudicial effect." State v. Pulizzano, 155 Wis. 2d 633, 646, 456 N.W.2d 325 (1990) (citations omitted).

¶6. Here, Peckham contends the trial court interfered with his right to introduce evidence regarding J.M.S.'s mother's motive to fabricate the allegations. Peckham wanted to convey to the jury that Lisa (the mother) used the sexual assault of her son as a tool to obtain leniency in her own fraud conviction. During Lisa's sentencing, her attorney requested leniency based on the sexual assault. Peckham argued that Lisa fabricated the assault so that she could use the incident to ask for leniency during her sentencing hearing. Peckham's theory was that Lisa convinced her son that the assault occurred by repeatedly questioning him in a suggestive manner.

¶7. The trial court refused to allow the introduction of Lisa's sentencing request because it was highly prejudicial and the prejudice substantially outweighed any probative value. We hold that the trial court did not erroneously exercise its discretion. The trial court excluded only the evidence directly related to Lisa's sentencing in an unrelated criminal case. The trial court allowed Peckham to fully explore his theory with additional evidence, including asking Lisa whether she had ever been convicted of a crime. Peckham was permitted to freely question Lisa as to whether she encouraged her son to make a false allegation of sexual assault. The trial court also permitted the testimony of Peckham's expert that Lisa's questioning of J.M.S. occurred through the use of overly suggestive interview techniques.

¶8. Thus, the trial court admitted evidence to support Peckham's theory that Lisa fabricated the assault, but excluded evidence relating to the specifics of her own criminal conviction sentencing hearing. This was a reasonable decision and we shall not disturb it.

¶9. Further, we reject Peckham's contention that the trial court's ruling prevented him from presenting his defense. As noted, Peckham's right to present a defense is limited. Here, the evidence excluded was of low probative value and highly prejudicial. A defendant does not have a right to present evidence, which falls into that category. Pulizzano, 155 Wis. 2d at 646. Moreover, excluding evidence unconstitutionally violates a defendant's right to present a defense only when its exclusion prevents the defendant from proving a fundamental element of his defense. State v. St. George, 2002 WI 50, ¶52, 252 Wis. 2d 499, 643 N.W.2d 777.

¶10. The information proffered here-Lisa seeking leniency in an unrelated criminal sentencing-does not constitute a fundamental element of Peckham's defense. Allowing the jury in Peckham's case to hear the sentencing comments from Lisa's case was not necessary to defend Peckham. Peckham was allowed to introduce his theory that Lisa fabricated the assault, that she suggested to her son that he was assaulted, and that her son felt like Lisa wanted him to make the allegations. Peckham was not denied his right to present a defense.

¶11. The second evidentiary challenge involves the exclusion of proffered evidence that J.M.S. found a dildo in Lisa's room, and that is how he obtained sexual knowledge to make the accusation here. The trial court excluded this evidence again because it was unduly prejudicial and not relevant as to whether or not the incident occurred. We conclude that the trial court's decision does not constitute an erroneous exercise of discretion.

¶12. Peckham contends the dildo discovery, which occurred prior to the alleged assault, provided J.M.S. with the sexual knowledge necessary to make the accusation. However, Peckham made no offer of proof as to what, if any, sexual knowledge he believed J.M.S. derived from the dildo discovery. Moreover, even if there was some evidence to suggest that finding Lisa's dildo gave J.M.S. sexual knowledge (that he did not otherwise have) sufficient to fabricate the occurrence of a sexual assault, any probative value attached to this evidence was substantially outweighed by the prejudice derived from the evidence. There was great potential for the jury to be unfairly influenced against Lisa because of this evidence. Accordingly, the trial court's decision here was reasonable and we will not disturb it.

B. Ineffective Assistance.

¶13. Peckham's next claim is that he received ineffective assistance of trial counsel because his trial counsel advised him not to testify. Specifically, he contends the trial court should not have summarily denied his allegation. We reject his claim.

¶14. A defendant who makes a claim of ineffective assistance is entitled to an evidentiary hearing if he alleges sufficient facts to raise a question of fact. State v. Bentley, 201 Wis. 2d 303, 309, 548 N.W.2d 50 (1996). If a defendant fails to satisfy that standard, or if he asserts purely conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, it is within the trial court's discretion to summarily deny the motion. Id. at 309-10. To establish ineffective assistance, the defendant must allege sufficient facts to establish both that his trial counsel was deficient and that the deficiency prejudiced the outcome of the case. Strickland v. Washington, 466 U.S. 668, 687 (1984). Trial counsel's performance is deficient if it is unreasonable under prevailing professional norms, id. at 687-88, and prejudicial if it raises a reasonable probability that, but for the unprofessional error, the result of the proceeding would have been different, id. at 693.

¶15. Here, Peckham's post-conviction motion fell far short of satisfying the requirements necessary to conduct an evidentiary hearing. Peckham failed to file an affidavit attesting that he wanted to testify and would have testified if trial counsel had not advised against it. He did not allege the specific advice he received from counsel, or provide information as to what his testimony would have been. Even more significantly, he failed to provide any specific facts to suggest that "but for" trial counsel's advice, the outcome of his trial would have been different. Accordingly, the trial court did not erroneously exercise its discretion when it summarily denied Peckham's ineffective-assistance-of-counsel claim.

C. Sentencing.

¶16. Peckham's final argument is that the twenty-year sentence imposed was unduly harsh and excessive. We need not address this issue, however, because Peckham's death makes this issue moot. The State indicated in its response brief that Peckham died on September 15, 2002. Counsel for Peckham concedes this fact by failing to respond to it in his reply brief.

¶17. Based on the law of this state, a deceased defendant's appeal continues, State v. McDonald, 144 Wis. 2d 531, 532, 424 N.W.2d 411 (1988); however, we "act only to determine actual controversies" and will not provide "purely advisory opinions," State v. Witkowski, 163 Wis. 2d 985, 988, 473 N.W.2d 512 (Ct. App. 1991) (citations omitted).

¶18. The first two issues were "actual controversies" because reversal by this court would overturn the judgment of conviction. Any decision regarding the length of sentence is moot, however, because it would have no practical effect. Accordingly, we decline to address it. State v. Blalock, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the narrowest possible grounds).

By the Court. -- Judgment and order affirmed.

This opinion will not be published. See Wis. Stat. Rule 809.23(1)(b)5.

1. All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

2. The information was later amended to reflect that the assaults occurred during the summer of 2000.

3. Peckham died during the briefing of this matter; however, pursuant to State v. McDonald, 144 Wis. 2d 531, 424 N.W.2d 411 (1988), his appeal continues.