Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-324

AUGUST TERM, 2004

In re Anthony Kenyon	}	APPEALED FROM:
	}	Chittenden Superior Court
	}	DOCKET NO. 1719-00 Cncv
	}	Trial Judge: Matthew I. Katz

In the above-entitled cause, the Clerk will enter:

Defendant in this post-conviction relief proceeding appeals from a summary judgment in favor of the State. Defendant contends the court erred in: (1) rejecting his claim that trial counsel rendered ineffective assistance by failing to seek dismissal of an aggravated sexual assault charge based on the theory that defendant had engaged in merely one continuous assault rather than repeated nonconsensual sexual acts; and (2) failing to address defendant= s claim that counsel was deficient in entirely failing to subject the State= s case to meaningful adversarial testing. We affirm.

In November 1999, defendant was charged with sexually assaulting a thirteen year old girl by inserting his penis into her vagina. The State subsequently amended the information to a charge of aggravated sexual assault through "repeated nonconsensual sexual acts as part of the same occurrence@ under 13 V.S.A. ' 3253(a)(9). The information alleged "contact between the finger of [defendant] and the [victim's] vagina," and "contact between the penis of [defendant] and the [victim's] vagina.@ The affidavit of probable cause in support of the information recounted the victim's statement to the investigating officer, in which she stated that defendant, for whom she was babysitting, had returned home drunk, sat on the couch next to her, forcibly removed her sweatpants and underwear, and put his finger in her vagina for about five minutes. He then inserted his penis in her vagina and engaged in sexual intercourse for about half an hour, despite the victim's unsuccessful attempts to push him off. The affidavit further recounted that the victim had suffered substantial bleeding from her vagina while being transported by the police to the hospital, that a search of defendant= s home had revealed a blood stained couch cushion, and that the search of a dumpster next to defendant= s house disclosed a garbage bag containing the victim's blood stained underwear and sweatpants.

In May 2000, defendant, while represented by counsel, and pursuant to a plea bargain, pled guilty as charged. He received a sentence of ten to thirty years in accord with the recommended sentence of the plea bargain. In December, defendant filed a pro se petition for post-conviction relief. In October 2002, after several extensions, defendant= s appointed counsel filed an amended petition, alleging that trial counsel had rendered ineffective assistance and had failed to subject the prosecution= s case to meaningful adversarial testing. The assertions were based principally on defendant= s claim that counsel was deficient in failing to seek dismissal of the charge because the evidence established merely one continuous sexual assault rather than A repeated nonconsensual sexual acts@ as charged. The parties filed cross-motions for summary judgment. In June 2003, the court issued a written decision, concluding that the evidence amply supported the charge, and that any error in failing to file a motion to dismiss was therefore non-prejudicial. Accordingly, the court granted the State= s motion and dismissed the petition. This appeal followed.

A defendant claiming ineffective assistance of counsel must show that trial counsel= s performance fell below an objective standard of reasonableness and that defendant was prejudiced as a result. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); In re Cohen, 161 Vt. 432, 434 (1994). To demonstrate prejudice, A defendant must show that there

is a reasonable probability that, but for counsel= s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.@ Strickland, 466 U.S. at 694; accord Cohen, 161 Vt. at 435.

On appeal, defendant renews his claim that he was denied effective assistance by counsel= s failure to seek dismissal of the aggravated sexual assault charge, alleging that he committed a single sexual assault rather than A repeated nonconsensual sexual acts@ under 13 V.S.A. ' 3253(a)(9). In State v. Fuller, 168 Vt. 396, 400 (1998), we set forth several factors to consider in determining whether an incident of sexual assault consists of one continuous assault or separate acts, including A the elapsed time between successive parts of the defendant= s conduct; whether the defendant= s conduct occurred in more than one geographic location; whether an intervening event occurred between successive parts of the defendant= s conduct; whether there was sufficient time for reflection between assaultive acts for the defendant to again commit himself.@ Relying on these factors, defendant asserts that there was but one sexual assault because little time elapsed between the digital penetration and the subsequent intercourse; the acts occurred in one location; there were no intervening events; and there was no time for defendant to reflect on his behavior and recommit to another assault.

The argument is unpersuasive. Although not specifically mentioned in Fuller, an important factor in determining whether the defendant has formed a separate intent B a factor cited in both cases on which Fuller relied B is the A nature,@ Harrell v. State, 277 N.W.2d 462, 473 (Wis. Ct. App. 1979), or the A similarity of the acts performed.@ People v. Smith, 616 N.E.2d 737, 742 (Ill. App. Ct. 1993). Thus, in Smith, the court noted that defendant had committed A separate acts of sexual penetration of the victim= s vagina and anus.@ 616 N.E.2d at 742. In Harrell, the court explained that A differing and separate means or acts of abuse or gratification@ may demonstrate that the defendant formed separate intents to A to gratify himself or abuse his victim.@ 277 N.W.2d at 473. And in a more recent case closely on point, a Wisconsin court explained that A [w]hen a perpetrator moves from having mouth-to-vagina contact to having penis-to-vagina intercourse, he necessarily engages in a new volitional act warranting a separate charge, conviction, and punishment. . . . These acts are plainly different in nature and involve a new volitional departure, regardless of how much time separates the two.@ State v. Koller, 2001 WI App. 253, & & 59-60, 635 N.W.2d 838 (Wis. Ct. App. 2001); see also State v. Griffin, 713 P.2d 283, 287 (Ariz. 1986) (separate convictions and sentences upheld for sexual assaults committed by engaging in forcible oral sexual contact, vaginal, and oral intercourse despite the fact that the A acts were committed within a relatively short time span@).

The record here shows that defendant forcibly removed the victim= s sweatpants and underwear and digitally penetrated her vagina for about five minutes, and then engaged in sexual intercourse with the victim for almost half an hour, despite the victim's efforts to push him off. Although one act closely followed the other, the substantially different nature of the acts plainly demonstrate a separate intent to recommit to a second assault. Accordingly, we discern no merit to the claim that defendant engaged in merely one sexual assault. It follows that any error in counsel= s failure to seek dismissal on this ground was harmless, and resulted in no prejudice to defendant.

Defendant further contends the trial court erred in failing to address his claim that prejudice should be presumed when counsel A entirely fails to subject the prosecution= s case to meaningful adversarial testing.@ United States v. Cronic, 466 U.S. 648, 659 (1984). Although the claim was raised in defendant= s petition, it was based on counsel= s failure to file a motion to dismiss the charge of A repeated nonconsensual sexual acts,@ a failure which, as explained above, resulted in no prejudice to defendant. Accordingly, we discern no basis to disturb the judgment.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice