COURT OF APPEALS
DECISION
DATED AND FILED

December 7, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0484-CR **Cir. Ct. No. 00CF000088**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN J. HAUSCHULTZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kewaunee County: DENNIS J. MLEZIVA, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Kevin Hauschultz appeals a judgment convicting him of five counts of sexually assaulting his step-daughter and one count of intimidating a witness. He also appeals an order denying his postconviction motion in which he alleged ineffective assistance of trial counsel. He argues that: (1) the State failed to present sufficient credible evidence to support the

convictions; (2) his trial counsel was ineffective for failing to seek in-camera review of the child's counseling records and for failing to introduce medical evidence showing lack of injury to her rectal area; (3) the trial court erred by giving the jury a calendar to assist in its deliberations; and (4) this court should grant a new trial in the interest of justice because the case was not fully and fairly tried. We reject these arguments and affirm the judgment and order.

¶2 When reviewing the sufficiency of the evidence to support a conviction, this court must defer to the jury's findings unless the evidence is so lacking in probative value that no reasonable jury could find guilt beyond a reasonable doubt. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). It is the jury's function to decide the credibility of witnesses and reconcile inconsistencies in the testimony. *See* ***State v.Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985). The State presented sufficient evidence to support the convictions. Although the child's testimony revealed inconsistencies and confusion, particularly as to the dates of the offenses, it is not this court's function to weigh the credibility of witnesses. *See* ***State v. Wilson***, 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989). The victim's testimony is not "in conflict with the uniform course of nature or with fully established or conceded facts." Therefore, it is not incredible as a matter of law. *See* ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (Ct. App. 1975).

¶3 The jury believed the victim's testimony that Hauschultz had anal intercourse with her on five occasions and that he intimidated her. Her testimony, which the jury had the right to believe, establishes all of the elements of the offenses for which Hauschultz was convicted. The State also presented some corroborating evidence. The child's mother told police that she witnessed inappropriate sexual activity. Although she later denied that she assisted

Hauschultz by getting the child to the bedroom to facilitate a sexual assault, she did corroborate the child's presence in the bedroom on one of the occasions the child said she was assaulted. In addition, the child's accounts of the assaults and what she did afterward were corroborated by teenage friends. The jury could reasonably find the child's testimony credible as to all of the significant matters.

¶4 To establish ineffective assistance of counsel, Hauschultz must show deficient performance and prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). We need not determine whether counsel performed deficiently because Hauschultz has not established the prejudice prong. ***Id.*** at 697. Hauschultz has not shown prejudice from his counsel's failure to request in-camera inspection of the child's counseling records or to present medical evidence that the victim's rectal area was not injured. To establish prejudice, Hauschultz does not need to show that he would have been acquitted but for counsel's conduct. He must merely show sufficient probability that counsel's failures affected the verdict to undermine this court's confidence in the outcome. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 641-42, 369 N.W.2d 711 (1985). Hauschultz does not meet that burden in this appeal.

¶5 Hauschultz contends that the victim's counseling records should have been examined because they relate to the child's credibility. Hauschultz testified at the postconviction hearing that his wife told him that the therapist told her the child "wasn't acting like other children that were traumatized in situations like this." That information is insufficient to cause the trial court to breach the child's confidentiality. Although the preliminary showing for an in-camera review is not intended to be unduly high, a defendant seeking confidential counseling records must set forth a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a

determination of guilt or innocence. *See* ***State v. Green***, 2002 WI 68, ¶28, 253 Wis. 2d 356, 646 N.W.2d 298. Whether the therapist believed the child is not relevant and is not admissible. *See* ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). The record does not suggest that the child suffered from any physical or mental disorder that might affect her credibility or her ability to observe and truthfully report the events.

¶6 While an expert can testify about the victim's reactive behavior following the assaults, that testimony is ordinarily introduced by the State to disabuse the jury of misconceptions it may have about the significance of that behavior. *See* ***State v. Jensen***, 147 Wis. 2d 240, 250-51, 432 N.W.2d 913 (1988). The danger arises from the jury incorrectly assuming that the child's reactive behavior is inconsistent with assault victims' behavior. *See* ***State v. Robinson***, 146 Wis. 2d 315, 333-35, 431 N.W.2d 165 (1988). Hauschultz has not identified any expert witness who would testify that sexual assaults did not occur based on the victim's failure to respond like other victims. Because Hauschultz's motion did not establish any likelihood that the counseling records would disclose relevant exculpatory evidence, he has not established any prejudice from his trial attorney's failure to request in-camera inspection.

¶7 Hauschultz also failed to establish any prejudice from his counsel's failure to introduce a medical report from an examination two weeks after the last assault that indicated "no scarring around the rectum, no abrasions around the rectum … no obvious tears or bleeding." Hauschultz must establish actual prejudice, not merely the possibility that the evidence might have helped his case. *See* ***Strickland v. Washington***, 466 U.S. 668, 693 (1984). To establish actual prejudice, Hauschultz must present expert evidence that the absence of scarring, abrasions, tears or bleeding would be unexpected for a child who endured

occasional anal intercourse over a period of two years culminating two weeks before the examination. Without expert testimony, the jury would have been required to speculate about the significance of the medical report. Hauschultz has not established that the medical report would have been admissible without expert testimony as to its significance, and he has not identified any medical expert who would testify that the absence of anal injury suggests that the assaults did not take place.

¶8 During deliberations, the jury asked to see calendars for the years in question to allow them to compare the events described to the days of the week. Over Hauschultz's objection, the trial court gave the jury the requested calendars. We conclude that Hauschultz has not established any prejudice from the court's decision to provide the jury with that background information. A calendar is neither incriminatory nor exculpatory and is not inflammatory. It is not likely to have been misused by the jury. Through its collective knowledge, the jury would have been able to reconstruct calendars by a laborious process. The trial court reasonably circumvented the need for this cumbersome procedure by providing the jury with a neutral device that merely allowed it to efficiently review the evidence.

¶9 Finally, Hauschultz has not established a basis for granting a new trial in the interest of justice. His argument merely repeats the issues rejected by this court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2001-02).