COURT OF APPEALS
DECISION
DATED AND FILED

July 24, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP687-CR **Cir. Ct. No. 2003CF2074**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GORDON E. SUSSMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: JAMES L. MARTIN, Judge. *Affirmed.*

Before Dykman, Vergeront and Bridge, JJ.

¶1 PER CURIAM. Gordon Sussman appeals a judgment convicting him of two counts of repeated sexual assault of the same child and sixteen counts of possession of child pornography. He also appeals an order denying his motion for postconviction relief. He argues: (1) that he received ineffective assistance of

counsel; and (2) that we should reverse because the credibility of the victim's sexual abuse accusations was improperly bolstered with hearsay lay witness opinion testimony. We affirm.

¶2 Sussman first argues that he received ineffective assistance of counsel. There is a two-part test for determining whether counsel's actions constituted ineffective assistance. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "The first test requires the defendant to show that his counsel's performance was deficient." ***Id.*** The defendant must also show that his counsel's deficient performance prejudiced the defense. ***Id.*** We will uphold the trial court's findings of fact, "the underlying findings of what happened," unless they are clearly erroneous. ***Id.*** (citation omitted). "The ultimate determination of whether counsel's performance was deficient and prejudicial to the defense are questions of law which this court reviews independently." ***Id.*** at 128.

¶3 Sussman first argues that his attorney should have attempted to impeach the victim with a statement the victim made to his therapist several years before the charges were brought. Sussman contends that his attorney should have sought admission of a note written by the victim's therapist in which the therapist stated that the victim had firmly denied any inappropriate contact with Sussman. Sussman contends that this evidence was crucial to proving that the victim was not credible.

¶4 We do not address whether counsel's performance was deficient because we conclude that, even assuming deficient performance, Sussman cannot show prejudice. Although the note was not introduced as evidence, Sussman's attorney brought the contents of the note to the jury's attention through questioning when Sussman's attorney asked the victim at trial whether he had

denied sexual contact with Sussman to his therapist. The victim testified that he could not remember whether he had denied sexual contact with Sussman to his therapist but, if he had, his denial would have been a lie. Sussman's attorney brought this to the jury's attention again during closing argument, pointing out that the victim had specifically denied engaging in sexual contact with Sussman to his therapist. Additional proof that the victim had made this assertion to his therapist via the therapist's note would have added little to the information received by the jury through the victim's testimony. Moreover, the note would have been insignificant in impeaching the victim's credibility because other substantial evidence was introduced at trial in an attempt to impeach the victim's credibility. For example, Sussman's counsel elicited testimony from the victim's mother's friend that the victim had said the victim was lying about the sexual contact with Sussman. We cannot conclude that the result of the proceeding would have been different had the note been introduced. We therefore reject Sussman's claim of ineffective assistance of counsel.

¶5 Sussman next argues that his attorney was ineffective for failing to file a pre-trial motion under WIS. STAT. § 971.31(11) (2005-06),[1] to introduce testimony that the victim had falsely accused his father of sexual abuse in the past. The circuit court would not allow Sussman to introduce evidence at trial of past false reports of sexual abuse as permitted by WIS. STAT. § 972.11(2)(b)3. because Sussman had not brought the required pre-trial motion.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶6 We again conclude that Sussman cannot show prejudice. In a well-explained and thorough decision denying the postconviction motion, the circuit court explained that it would not have granted a pre-trial motion to allow the evidence had it been brought. The court explained that the evidence did not meet the first and third elements of the three-part test outlined in ***State v. DeSantis***, 155 Wis. 2d 774, 785, 456 N.W.2d 600 (1990).

> First, the Court is unpersuaded that defendant has shown a past allegation of sexual assault by the complaining witness. Admissible evidence under Wis. Stat. § 972.11(2)(b)3. is specifically limited to "[e]vidence of prior untruthful allegations of sexual assault made by the complaining witness." This language indicates that the purported allegations must bear at least some resemblance to a relevant definition of sexual assault and not merely be allegations with some sexual aspect. The language of the statute is particularly relevant in this case where defendant has provided material which could support a finding that the complaining witness alleged that his father made contact with his intimate parts. There has, however, been no material submitted which would support a finding that the complaining witness claimed his father had touched him for the purpose of sexual gratification or sexual degradation. There is no indication that the complaining witness alleged that the father was aroused by the contact, that the complaining witness was intentionally humiliated by the contact or that the complaining witness depicted the contact as assaultive. To infer that the complaining witness' allegations were allegations of sexual assault in this instance would, in the Court's opinion, either be entirely speculative and/or render a significant portion [of] the language of [the statute] surplusage.
>
> Second, the Court is convinced that the purported evidence would not have been admitted because its probative value is significantly, indeed grossly, outweighed by its prejudicial effect. The alleged false accusation by the complaining witness against his father was of a rather ambiguous nature, was temporally remote from the allegations against the defendant, especially considering the youth of the complaining witness, and contained vastly different surrounding circumstances. Thus, the probative value of the evidence would have been quite low. The potential for improper use and confusion by the jury,

> however, would have been unacceptably high. Extensive testimony regarding this alleged report of sexual abuse would likely have focused undue attention on the complaining witness' behavior in a situation quite unlike the one actually being tried.

Because the motion to allow the evidence would not have been successful for the reasons explained by the trial court, counsel's failure to bring the motion did not prejudice Sussman. We therefore reject the argument that Sussman received ineffective assistance of counsel.

¶7 Sussman next contends that we should reverse his conviction because the credibility of the victim's sexual abuse accusations was improperly bolstered with testimony informing the jurors that a number of unnamed lay witnesses had opined that he behaved like a sexual abuse victim. He points to the following exchange:

> Prosecutor: And do you recall what happened to cause you to say hey, this happened?
>
> Victim: My mom had had a lot of people tell her, friends, therapist, that I was showing signs of being –
>
> Defense Counsel: I object to the hearsay. I ask it be stricken.
>
> The Court: Sustained, stricken.
>
> Prosecutor: I'm explaining, I'm asking the question as to why he disclosed, Your Honor. I think he's entitled to say why he disclosed.
>
> The Court: Then it's not offered for the truth.
>
> Prosecutor: That's correct.
>
> The Court: You may answer it.
>
> Prosecutor: Continue.
>
> Victim: My mom had heard from friends and [a] therapist that I was showing signs of being sexually abused and that she needs to really ask me heart to heart. And we were in

> Culvers and her friend and her asked me and sat me down and I had told her.

¶8 Sussman contends that this testimony should have been excluded for two reasons: (1) the testimony was double hearsay; and (2) non-expert opinions comparing the behavior of complainants in sexual abuse cases to the behavior of sexual abuse victims in general are inadmissible. As for the first reason, the circuit court properly exercised its discretion in denying Sussman's hearsay objection to the testimony because the testimony was not offered for the truth of the matter asserted, but was instead offered to explain why the victim disclosed the assault when he did.

¶9 As for the second reason, Sussman's attorney did not object at trial to the testimony as improper lay opinion testimony. Although it is well-established that a defendant waives the right to appellate review of an error by failing to object, Sussman contends that we should review the issue under the "plain error" doctrine, under which we may review a waived objection if the waived error resulted in the denial of a fundamental constitutional right or substantially impaired the right to a fair trial. ***State v. Stank***, 2005 WI App 236, ¶35, 288 Wis. 2d 414, 708 N.W.2d 43. To apply, however, "the error must be so fundamental that a new trial or other relief must be granted, and the error must be obvious and substantial, or grave." ***State v. Street,*** 202 Wis. 2d 533, 552, 551 N.W.2d 830 (Ct. App. 1996). Regardless of whether the testimony was improperly allowed, the admission of the testimony did not deny Sussman a fundamental constitutional right or substantially impair his right to a fair trial. When considered in light of all of the evidence admitted at this lengthy trial, the evidence was simply not that significant. For the same reason, we see no need to

exercise our discretionary authority to reverse Sussman's conviction under WIS. STAT. § 752.35.

By the Court.—Judgment and order affirmed.

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