COURT OF APPEALS
DECISION
DATED AND FILED

July 3, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1905-CR **Cir. Ct. No. 2005CF774**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT A. MORIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed*.

Before Higginbotham, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Robert Morin appeals from a judgment convicting him of first-degree sexual assault of a child. He also appeals from the order denying him postconviction relief. He contends that the trial court allowed

inadmissible expert testimony at his trial, and that he received ineffective assistance from his trial counsel. We affirm.

¶2 The State charged Morin with sexually assaulting D.M.B., DOB 9/8/00, and her brother M.G.B., DOB 9/26/99, between August 2004 and May 2005, while he lived with the children and their mother. The children did not testify at trial but their videotaped statements were played for the jury. The State also introduced testimony from the mother, aunt and grandmother of the children that in late June 2005, after the children were found engaging in inappropriate sexual activity, they heard D.M.B. say that she had genital to genital contact with Morin. On the same occasion the mother and grandmother also heard M.G.B.'s statement that Morin showed him a movie with sexual activity in it. Additionally, the children's aunt testified that she had seen Morin harshly and inappropriately discipline the children. Counsel did not object to any of this testimony.

¶3 Police Officer Mark Yehle testified, also without objection, that Morin had agreed to an interview during the investigation but before his arrest, but failed to appear for or reschedule it. Tammy Hanson, a social worker, appeared as an expert in child abuse investigations, and testified that less than two percent of child sexual assault allegations are false; she had personally experienced only one or two false reports of sexual abuse in her career; children under seven are not sophisticated enough to tell a good lie; and children of that age could not give details of a sexual assault if it had not occurred. The trial court denied Morin's motion to exclude this testimony while Hanson testified on direct, and also denied his motion for a mistrial based on it. On cross-examination, Hanson asserted that the social services department where she was employed had substantiated only a small proportion of the child abuse allegations it had investigated, but had substantiated the children's allegations against Morin.

¶4 At the conclusion of the trial, the jury found Morin guilty of sexually assaulting M.G.B., and acquitted him of the sexual assault on D.M.B. In postconviction proceedings the trial court denied his claim of ineffective assistance from counsel. On appeal, Morin contends that Hanson gave inadmissible opinion testimony on the credibility of the child witnesses. He also contends that counsel provided ineffective representation by failing to: (1) cross-examine M.G.B. at trial; (2) object to inadmissible hearsay from witnesses recounting the children's statements to them; (3) object to prejudicial other acts evidence concerning Morin's discipline of the children; and (4) object to Officer Yehle's testimony that Morin failed to appear for an interview.

HANSON'S TESTIMONY

¶5 No witness may testify that another competent witness is telling the truth. ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). Arguably, Hanson gave inadmissible testimony under this rule when she testified that only two percent of sexual assault allegations are false, she has rarely seen false allegations in her own experience, and the allegations in this case were substantiated by her department. A reasonable jury could have interpreted that testimony as statements vouching for the truth of the children's accounts of Morin's assaults on them. However, "[a]n error is harmless if the beneficiary of the error proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" ***State v. Hale***, 2005 WI 7, ¶60, 277 Wis. 2d 593, 691 N.W.2d 637 (quoting ***Chapman v. California***, 386 U.S. 18, 24 (1967)). Here, Hanson's testimony about the credibility of child witnesses applied to both D.M.B. and M.G.B, yet the jury only believed M.G.B.'s account. Had Hanson's testimony influenced the jury, it would have convicted Morin of assaults on both victims.

INEFFECTIVE ASSISTANCE OF COUNSEL

¶6 A defendant claiming ineffective assistance of counsel must establish that: (1) the lawyer was deficient; and (2) the defendant was prejudiced as a result. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must point to specific acts or omissions of the lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, "[t]he 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." ***Id.*** at 694. If a reviewing court determines that a defendant has failed to satisfy either prong of the ***Strickland*** test, it need not consider the other one. ***Id.*** at 697. Whether an attorney's performance was deficient and, if so, prejudicial, are questions of law that we review de novo. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶7 Counsel reasonably chose not to cross-examine the alleged victims. The children were five and six years old, respectively, at the time of trial. In the postconviction proceeding, counsel explained that he made a strategic decision not to cross-examine the children because "if we had a couple of cute kids parading in front of the jury … the jury might become attached to them." Counsel further explained: "And frankly, I didn't think they had done all that good a job on their videos … and all they had was that video." Counsel's assessment was borne out, at least in part, by Morin's acquittal on one count. His decision was one a reasonable attorney might have made in the exercise of professionally competent assistance.

¶8 Morin has failed to show deficient performance on the issue of hearsay testimony from the children's mother, aunt and grandmother. D.M.B. and M.G.B. made their statements about Morin's sexual activity with them several weeks, at the very least, after it occurred. In Morin's view, that means the statements were not excited utterances or present sense impressions, and counsel should have objected because there were no other applicable hearsay exceptions under which the statements were admissible. However, "[a] broad and liberal interpretation is given to what constitutes an excited utterance when applied to young children." ***State v. Padilla***, 110 Wis. 2d 414, 419, 329 N.W.2d 263 (Ct. App. 1982). Proximity to the event in question is not the controlling factor. ***Id.*** at 420-21. The statements were admissible under the Padilla rule, and counsel had no basis to object to their admissibility.[1]

¶9 Additionally, the far more damaging and directly inculpatory of the statements was given by D.M.B., who described a sexual assault, while M.G.B. only alleged that Morin showed him videotapes. Nevertheless, the jury acquitted Morin of assaulting D.M.B., and we could not reasonably conclude, therefore, that admitting her statement was prejudicial. As for Morin's contention that the statements were inadmissible under ***Crawford v. Washington***, 541 U.S. 36 (2004), his argument is undeveloped and conclusory and we decline to address it for that reason. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (this court will not address issues on appeal that are inadequately briefed).

[1] When the children's aunt and grandmother testified, counsel did, in fact, object on hearsay grounds, although the jury had already heard the same testimony from the children's mother.

¶10 Morin does not show prejudice from counsel's failure to object to testimony that Morin inappropriately disciplined the children. It is unreasonable to believe that the jury factored Morin's harsh discipline of both children into the guilty verdict on one charge, while apparently discounting it when acquitting him on the other. Additionally, as Morin himself notes, the evidence of harsh discipline had no probative value on the sexual assault charges, and we conclude that no reasonable jury would have considered it probative.

¶11 Morin also failed to show prejudice from Officer Yehle's testimony concerning Morin's failure to appear for an interview during the investigation. Comments on a defendant's pre-arrest silence are inadmissible. *See* ***State v. Fencl***, 109 Wis. 2d 224, 236, 325 N.W.2d 703 (1982). Arguably, Officer Yehle's testimony fell under this prohibition. Again, however, Morin fails to make the case that the testimony influenced the jury, given its acquittal on the D.M.B. charge. It is not reasonable to conclude that the testimony influenced the jury in only one of the two cases.

¶12 Morin also asks for a new trial in the interest of justice, given the cumulative effect of counsel's omissions. We deny the request because, as we have noted, even the omissions that were arguably deficient performance were not prejudicial, and that remains true even when considering them together rather than separately.

By the Court.—Judgment and order affirmed.

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