**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**November 27, 2012**

**Diane M. Fremgen**
**Clerk of Court of Appeals**

**NOTICE**

**This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.**

**A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.**

**Appeal No. 2012AP174-CR** **Cir. Ct. No. 2009CF254**

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

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**RONALD S. DEPAOLI,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment and an order of the circuit court for Shawano County: THOMAS GROVER and WILLIAM F. KUSSEL, JR., Judges.[1] *Affirmed*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

[1] The Honorable Thomas Grover presided over trial and entered the judgment of conviction. The Honorable William F. Kussell, Jr., entered the order denying the defendant's postconviction motion.

¶1 PER CURIAM. Ronald Depaoli appeals a judgment convicting him of repeated sexual assault of the same child, his stepdaughter. He also appeals an order denying his postconviction motion in which he alleged ineffective assistance of trial counsel. Depaoli contends his trial counsel was ineffective in three respects: (1) counsel failed to object to the court instructing the jury that the State did not have to prove the precise dates of the sexual assaults, an instruction that Depaoli contends is inconsistent with another instruction; (2) counsel failed to object to the victim's mother's testimony that she believed her daughter; and (3) counsel failed to object to an expert witness's testimony that Depaoli characterizes as vouching for the victim's credibility. We reject these arguments and affirm the judgment and order.

## BACKGROUND

¶2 The jury found that Depaoli committed at least three sexual assaults against the same child between October 1, 2007 and September 30, 2009. That time period is framed by the family's move to a new house where the assaults occurred and the date the victim reported the crimes. The victim testified that Depaoli had intercourse with her at least ten times during that period, and she provided details regarding five assaults. She testified that the last assault occurred approximately one month before she reported the assaults, but provided no specific dates for any of the assaults.

¶3 The victim's brother testified that he observed two incidents. In one incident, the boy "saw [his] dad get on top of [his] sister" underneath the blanket. In another incident, the boy walked into his sister's bedroom and saw Depaoli get up and close his robe over his boxer shorts. The victim asked her brother not to tell their mother for fear that it would lead to a divorce.

¶4 The victim's mother testified that she confronted Depaoli at their home after she learned of the victim's allegations. She begged Depaoli to say the accusations were not true, but he did not deny them. Instead, he told her to remember that he "blacked out," and he did not want to go to jail. He said he was going to kill himself. Depaoli then ran to the garage where he grabbed a steak knife from a grill and stabbed himself in the neck. At the close of the prosecutor's direct examination of the victim's mother, the following exchanges occurred:

> Q. Now you had said earlier that you didn't believe [the victim] when this first occurred; is that right, when you first found out about it?
>
> A. I had a hard time, yes.
>
> Q. And now since you've learned of everything else that has went on here as far as the investigation, what is your opinion now?
>
> A. I believe her.
>
> Q. Is there any reason why you didn't believe her in the beginning?
>
> A. I didn't want to believe her because I just didn't want to believe this was happening.

On cross-examination, defense counsel asked the victim's mother whether the victim ever lied to her. She responded, "Yeah, I'm sure she has."

> Q. Not big stuff but little stuff?
>
> A. All of the above.
>
> Q. Is that one of the reasons why you might not have believed her initially?
>
> A. Probably.

¶5 The State also called Maryann Clesceri, a licensed clinical social worker, to testify as an expert witness about delayed reporting. Clesceri reviewed

the videotape of the victim with a forensic interviewer, and testified without objection:

> When I have had something occur multiple times to exactly remember it, especially a trauma incident, something that you clearly know is something that you don't want happening to you, and to – and to see the type of coping mechanism that she was using, not wanting to remember, trying to block the memories, you know, or disassociation, it would clearly lead one to believe that this was a young girl who wanted to not have to remember the pain that she was experiencing and as a result was blocking or suppressing those memories as a way to deal with it.

## DISCUSSION

¶6 A defendant claiming ineffective assistance of counsel must show both deficient performance and prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. ***Id.*** at 688. Judicial scrutiny is highly deferential and the court must attempt to eliminate the distorting effects of hindsight. ***Id.*** at 689. The defendant must overcome the presumption that, under the circumstances, the challenged action might be considered a sound trial strategy. ***Id.*** Strategic decisions made after thorough investigation of the law and facts are virtually unchallengeable. ***Id.*** at 690. To establish prejudice, a defendant must establish a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one that undermines our confidence in the outcome. ***Id.*** at 694. Because the defendant must show both deficient performance and prejudice, this court is not required to review both prongs if there is an insufficient showing as to one of them. ***Id.*** at 697.

¶7 Depaoli has not established any prejudice from his counsel's failure to object to the jury instructions. He contends the instruction WIS JI—CRIMINAL 2107, which told the jury the State must prove the sexual assaults occurred within the dates specified in the information, is inconsistent with WIS JI—CRIMINAL 255, which tells the jury the State does not have to prove the precise date of the offenses. Citing ***State v. Dodson***, 219 Wis. 2d 65, 69, 580 N.W.2d 181 (1998), Depaoli contends the instructions were internally inconsistent and contradictory and would have confused the jury. In ***Dodson***, the supreme court ruled that the court's *modified* instruction was inconsistent with other instructions and the confusion undermined the court's confidence in the verdict. In this case, however, the dates that framed the charge coincide with the family's move to a new house and the date the crimes were reported, not the date of any alleged assault. Except for the last assault which occurred approximately one month before the crimes were reported, the victim did not specify when any of the assaults occurred. On the facts of this case, there is no reasonable probability that the jury would have been confused by the instructions. Therefore, counsel's failure to object to the instructions does not undermine our confidence in the verdict.

¶8 Depaoli next argues that his counsel was ineffective for failing to object to the victim's mother's testimony that she believed her daughter. Depaoli correctly notes that no witness should be permitted to express an opinion that another mentally and physically competent witness is telling the truth. *See* ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). However, at the postconviction hearing, Depaoli's trial counsel testified to a reasonable strategic decision for failing to object. Counsel wanted to explore the mother's initial skepticism about her daughter's allegation. Counsel succeeded in getting the mother to acknowledge that the victim lied about big things, and that was one of

the reasons the mother initially doubted the accusations. Counsel's reasonable strategic decision to open the door to this line of inquiry is virtually unchallengeable on appeal and should not be second-guessed. *See* ***Strickland***, 466 U.S. at 689-90.

¶9 Finally, Depaoli has not established deficient performance or prejudice from his counsel's failure to raise a ***Haseltine*** objection to Clesceri's testimony. Clesceri testified that she thought the videotape suggested the victim's lack of memory was the result of disassociation or wanting to block the memories, consistent with the behavior of other assault victims. This testimony did not vouch for the victim's credibility. Comparable testimony was held to be admissible in ***State v. Hernandez***, 192 Wis. 2d 251, 254-55, 531 N.W.2d 348 (Ct. App. 1995), *overruled on other grounds by* ***State v. Eugenio***, 219 Wis. 2d 391, 404, 597 N.W.2d 642 (1998). In ***Hernandez***, this court held that specific expert testimony that sexual assault can cause a child to have a faulty memory of the incident is admissible as long as the expert is not allowed to convey to the jury his or her own beliefs as to the veracity of the victim. Clesceri's testimony suggests that her observations of the victim on the videotape were consistent with the effects of assault that she had seen in other child victims.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).