COURT OF APPEALS
DECISION
DATED AND RELEASED

OCTOBER 31, 1995

No. 95-0109-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LOUIS EDWARD MACK,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Washburn County: FREDERICK A. HENDERSON, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Louis Mack appeals a judgment convicting him of sexually assaulting A.H., a four-year-old boy. He also appeals an order denying his postconviction motion. He argues that: (1) the State failed to present sufficient evidence to support the conviction; (2) he did not knowingly and voluntarily relinquish his right to testify; (3) he was denied effective assistance of counsel; (4) the court erroneously admitted other crimes evidence, expert

opinion on the truthfulness of the victim and hearsay; and (5) the prosecutor's closing argument improperly stressed the prosecutor's beliefs, pressured the jury, misrepresented the evidence, and referred to facts not of record. We reject these arguments and affirm the judgment and order.

The State presented sufficient evidence to support the conviction. The victim testified that Mack "sucked my weeney [sic]." The prosecution presented evidence that Mack babysat for A.H. and Mack's sons for several hours on the day in question. A witness testified that she saw Mack playing with A.H. and one of Mack's sons. Both boys were naked at the time. Three days after the incident, A.H. told his father that Mack's five-year-old son wanted to "play boy sex." When his father asked A.H. whether the other child had touched his penis, A.H. responded that he had not, but that Louis Mack had touched it. On the same day, A.H. reported to his mother that Mack had taught him sex play. He told his grandmother that Louis tried to put a ball up his butt and threatened to cut off his fingers if he told anyone. Later that night, he demonstrated the sexual contact he had with Mack using anatomically correct dolls. The State also presented evidence by three expert witnesses that A.H. shared common traits and behavior with sexual assault victims. In addition, the State presented "other crimes" testimony that Mack had sexual contact with his five-year-old niece in 1980. This evidence, viewed most favorably to the State and conviction, has sufficient probative value to support the verdict. *See* ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990).

On cross-examination, A.H. answered "yes" when asked if another man sexually assaulted him, threatened to cut off his fingers if he told anyone and told him to tell everybody that Mack did it. *Citing* ***Thomas v. State***, 92 Wis.2d 372, 284 N.W.2d 917 (1979), Mack argues that A.H.'s testimony was so unreliable that it should not sustain a conviction unless corroborated by other evidence. In ***Thomas***, the victim had the mental capacity of a six-year-old and testified that she did not remember having intercourse and that her mother told her what to say. This testimony, on its face, bore evidence of unreliability. Here, the victim testified that the incidents occurred. When the defense attorney described his testimony as a "story," the victim interjected "it ain't no story." The allegedly inconsistent statements regarding the perpetrator's identity were in response to a series of leading questions that only required the child to say "yes." The jury might well have concluded that the child was confused by the questions or attempting to be agreeable because he found

testifying uncomfortable and wished to be dismissed or that the child was assaulted by more than one person. It is the function of the jury, not this court, to resolve inconsistencies in the testimony and resolve credibility questions. ***Poellinger***, 153 Wis.2d at 503, 451 N.W.2d at 757.

Next, the record supports the trial court's finding that Mack made the decision not to testify. His trial counsel testified at the postconviction hearing that he advised Mack against testifying after Mack indicated that he suffered from a mental disorder, was taking medication and was upset. This confirmed counsel's analysis that Mack would not make a good witness because he readily lost his temper and was argumentative. Trial counsel testified that he tried to convey to Mack that it was his choice and he thinks Mack understood that it was his choice. When the defense attorney stated in open court that the defense would present no witnesses, Mack did not indicate any desire to testify. The trial court is not required to inquire into a defendant's waiver of his right to testify unless the defendant indicates some disagreement with counsel over that decision. ***State v. Wilson***, 179 Wis.2d 660, 673, 508 N.W.2d 44, 49 (Ct. App. 1993). On the basis of trial counsel's postconviction testimony and the reasonableness of the joint decision not to testify, the trial court reasonably found that Mack made the decision not to testify on the sound advice of his attorney.

Mack argues that his trial counsel was ineffective for failing to properly advise him about his right to testify, for failing to call several witnesses and for conceding some sexual contact in his closing argument. To establish ineffective assistance of counsel, Mack must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Mack must prove that his counsel's representation fell below an objective standard of reasonableness. ***Id***. at 688. Judicial scrutiny is highly deferential and there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. ***Id***. at 689. Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. ***Id***. at 690. To establish prejudice, it is not enough for Mack to show that the errors had some conceivable effect on the outcome of the proceeding. ***Id***. at 693. Rather, he must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Id***. at 694. If this

court finds either that counsel's performance is not deficient or that there was no prejudice, this court need not address the other component. ***Id***. at 697.

Mack has not established deficient performance or prejudice arising out of the decision not to testify. The trial court's finding that Mack made that decision based on his trial counsel's sound advice precludes relief on that basis.

Trial counsel reasonably decided not to call Mack's son as a witness. Although his son may have provided evidence to contradict A.H., counsel determined that his testimony was marginally relevant and presented some danger. The child would have testified that another person molested A.H. Because the child was uncertain of the day it happened, this testimony would not exonerate Mack because it was possible that A.H. was molested twice by different people. Mack's attorney interviewed the child and believed that he was too easily led and appeared to be too well-rehearsed. There was also a risk that the child would corroborate A.H.'s testimony if he was appropriately led. The decision not to call the child as a witness constitutes a reasonable strategy that cannot be second-guessed by this court.

Mack also faults his attorney for failing to call witnesses to impeach Mack's sister who testified that Mack had molested her daughter in 1980. Mack's sister testified that she was a witch who could have out-of-body experiences where she could haunt other people and could foresee the future. Mack's trial counsel reasonably chose to let that testimony speak for itself without calling witnesses to challenge her veracity. Mack notes that one of the witnesses would have contradicted testimony regarding the number of hours Mack babysat on the day in question. The crime described in the complaint would take so little time that reducing the number of hours would have little effect. In addition, one of the proposed witnesses would have corroborated the testimony that Mack was playing with the naked boys during the day.

Counsel did not concede sexual contact in his closing argument. Rather, he noted the inconsistencies in A.H.'s story as it was related to different individuals. We do not interpret his argument as a concession that Mack had sexual contact with A.H. and we believe that no reasonable juror would have construed the argument in that manner.

Mack next argues that the trial court erroneously admitted "other bad acts" testimony that Mack had sexual contact with a young relative twelve years earlier when he was seventeen years old and the child was approximately five. He argues that motive was not an issue because he was charged with sexual intercourse, not sexual contact with A.H., that the crimes were dissimilar and that the prejudicial effect outweighs the probative value of this testimony. Other bad acts testimony is more readily admitted in cases involving sexual assaults of children because it is frequently necessary to corroborate the victim's testimony against charges of fantasy, unreliability or vindictiveness. *See* ***State v. Mink***, 146 Wis.2d 1, 14, 429 N.W.2d 99, 104 (Ct. App. 1988). Nonetheless, the trial court should admit other bad acts testimony only if it concludes that the testimony is admissible under § 904.04(2), STATS., and that its probative value is not substantially outweighed by its prejudicial effect. *See* ***State v. Plymesser***, 172 Wis.2d 583, 592, 493 N.W.2d 367, 371 (1992).

Here, the other crimes testimony was not introduced to show Mack's propensity, but rather to show plan and opportunity. The two crimes, although separated by substantial time, both involved sexual behavior with very young relatives with whom he had a relationship of trust when the children were placed in his care. Even though Mack concedes that sexual contact occurred but denies that he was the perpetrator, the State was nonetheless required to prove all of the elements of the crime charged beyond a reasonable doubt. ***Plymesser***, 172 Wis.2d at 594-95, 493 N.W.2d at 372. Here, the evidence was appropriately used to rebut the defense suggestion that A.H. misidentified his assailant, was fanaticizing, or confused or unreliable.

The prejudicial effect of the other crime evidence did not substantially outweigh its probative value. It is not likely that the jury would convict on the basis of a twelve-year-old assault of a similar nature. The other crime was not presented in such a way as to arouse the jury's passion or suggest that Mack should be punished for that offense even if he is innocent of the present offense. The danger of unfair prejudice is greatly diminished by the court's cautionary instruction on the use to be made of that evidence. *See* ***State v. Clark***, 179 Wis.2d 484, 497, 507 N.W.2d 172, 177 (Ct. App. 1993).

Mack next argues that the court improperly allowed expert witnesses to testify on the truthfulness of the victim. Mack contends that since he conceded that the child had been sexually assaulted, the expert's statements

that the child's behavior was consistent with that of a sexual assault victim was irrelevant. To the same extent, Mack's concession that A.H. was assaulted reduces the probative value of this testimony, it also reduces its prejudicial effect. We do not agree that the jury would misconstrue the testimony as a statement that the experts believed the victim was telling the truth. Rather, the experts appropriately limited their testimony to a comparison of A.H.'s attitudes and behavior to those of a sexual assault victim. *See* ***State v. Jensen***, 147 Wis.2d 240, 249-52, 232 N.W.2d 913, 917-18 (1988). The testimony was relevant because it informed the jury that commonly held expectations of how a victim reacts to sexual assaults may not be true. ***Id***. The experts were not asked whether they believed the victim's allegations and their testimony cannot reasonably be construed as a statement of their belief in the victim.

Mack next argues that the court improperly exercised its discretion when it allowed the hearsay testimony of the victim's parents, grandmother, aunt, and teacher. The trial court properly allowed the statements made three days after the sexual assault as excited utterances. A broad and liberal interpretation governs the excited utterance exception to the hearsay rule when it is applied to young children because children tend to repress stressful incidents, frequently report the incident only to the mother, and are less likely than adults to consciously fabricate the incident over a period of time. *See* ***State v. Moats***, 156 Wis.2d 74, 97, 457 N.W.2d 299, 309 (1990).

The statement made to A.H.'s preschool teacher six months after the incident is admissible under § 908.24, STATS., the residual exception. Hearsay testimony is admissible if there are substantial guarantees of trustworthiness similar to the other hearsay exceptions. *See* ***Mitchell v. State***, 84 Wis.2d 325, 332, 267 N.W.2d 349, 352 (1978). In ***State v. Sorenson***, 143 Wis.2d 226, 245-46, 421 N.W.2d 77, 84-85 (1988), the court developed five factors that should be considered when determining the admissibility of a young sexual assault victim's out-of-court statements: (1) the attributes of the child; (2) the person to whom the statement was made, focusing on the person's relationship with the child and any motivation of the recipient to fabricate or distort its contents; (3) the circumstances under which the statement was made; (4) any sign of deceit or falsity; and (5) corroborating evidence. Here, the victim's preschool teacher made a balloon with a sad face on it. A.H. took the balloon and starting talking about how Mack bit his "hot dog" and stuck something in his butt which made him feel sad. This statement was entirely spontaneous, made to a trusted teacher in whom it was reasonable for the child to confide

and who had no motivation to fabricate or distort the contents. It displays no sign of deceit or falsity and is consistent with A.H.'s prior statements. This spontaneous statement is similar to an excited utterance or a present sense impression and is admissible under the residual hearsay exception.

Finally, Mack argues that the prosecutor's closing argument constituted plain error because it expressed the prosecutor's personal opinion of Mack's guilt, improperly pressured the jury, misrepresented the evidence, and used facts not of record. The record does not support these arguments. The prosecutor commented on the evidence, detailed the evidence and argued from it that the evidence convinced the prosecutor and should convince the jury. This type of comment on the evidence was approved in ***State v. Hoffman***, 106 Wis.2d 85, 219, 316 N.W.2d 143, 161 (Ct. App. 1982).

The test to be applied when a prosecutor is charged with misconduct for remarks made in an argument to the jury is whether those remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ***State v. Wolff***, 171 Wis.2d 161, 167, 491 N.W.2d 498, 501 (Ct. App. 1992). The prosecutor's closing argument did not unfairly summarize the evidence and reasonable inferences that could be drawn from the evidence. The only objectionable statement made by the prosecutor was that the victim's testimony convinced him. This statement merely informed the jury of what they should have already surmised, that the prosecutor accepted the victim's testimony. The comment did not convey the impression that evidence not presented to the jury but known to the prosecutor supports the charge. *See* ***United States v. Young*** 470 U.S. 1, 18-19 (1985). The prosecutor's exhortation for the jury to do its duty did not improperly pressure the jury.

The prosecutor's statements that the victim was agreeable with anything the defense attorney suggested appropriately urged the jury to draw an inference from the evidence it saw and did not suggest that the jury should arrive at a verdict by considering factors other than the evidence. ***State v. Neuser***, 191 Wis.2d 331, 336, 528 N.W.2d 49, 51 (Ct. App. 1995). The prosecutor's statement that the victim was scared and anxious to get off the stand also represents the prosecutor's comment on what the jury might have seen in the courtroom. His comment regarding the other crime evidence, that it was not reported because a family might want to keep it a secret, does not imply inside information. Rather, it appeals to the jury's common sense and

ordinary experiences of life. *See* ***DeKeuster v. Green Bay & W.R. Co.***, 246 Wis. 476, 479, 59 N.W.2d 452, 454 (1953). None of these comments improperly suggest that the prosecutor has additional information not presented to the jury.

By the Court.—Judgment and order affirmed.

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