COURT OF APPEALS
DECISION
DATED AND FILED

September 25, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-1709-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

STEVEN H.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: JOHN ULLSVIK, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

DEININGER, J. Steven H. appeals a judgment convicting him of twelve counts of sexual assault of a child, in violation of § 940.225(1)(d), STATS.,

1985-86.[1] He also appeals the denial of his motion for postconviction relief. Steven claims that the trial court erred in denying a mistrial because two questions regarding "other acts" were heard by the jury, and because the State had failed to provide him a police report describing the acts in question. He also argues that he should have been permitted further cross-examination of the three victims, whose testimony was admitted at trial by videotaped depositions under § 967.04(9), STATS. Finally, he claims that his trial counsel was ineffective for failing to suppress evidence regarding an altercation between him and his current wife, Jari H., and for failing to object to certain testimony from a social worker, which he claims improperly bolstered the credibility of the victims' testimony.

We are not persuaded by any of Steven's claims, and therefore, we affirm the judgment of conviction and the order denying postconviction relief.

BACKGROUND

The victims of the sexual assaults were Steven's three daughters. He and the victims' mother were divorced in 1991. The girls were 5, 6 and 8 years old at the time of the offenses in December 1988; and 9, 10 and 12 at the time of Steven's trial in November 1992. Steven and his initial counsel were present for the videotaped depositions of the victims, taken in March 1990, at which Steven's counsel cross-examined each of the girls. A different attorney represented Steven at the time of his trial. The videotaped depositions were admitted into evidence at

[1] The offenses were committed in December 1988 and January 1989. Prior to July 1, 1989, § 940.225(1)(d), STATS., provided that whoever "[h]as sexual contact or sexual intercourse with a person 12 years of age or younger" is guilty of a Class B felony. 1987 Wis. Act 332 repealed subsection (1)(d) and recreated the offense under § 948.02(1), STATS.

trial and presented to the jury. The trial court denied Steven's motions under § 967.04(10), STATS.,[2] to require the victims to testify in person at trial.

Steven testified at trial and denied the victims' allegations. Steven's counsel asked him about an incident that had occurred a year before trial between him and Jari H., who was his girlfriend at the time of the incident and his wife at the time of trial. Steven's trial counsel testified at the postconviction hearing that it was "our … trial strategy" to "elicit character evidence" from Jari, who had also been subpoenaed by the State. The incident in question had resulted in a domestic abuse investigation by police in Rantoul, Illinois. Counsel later explained that he viewed the incident as relatively innocuous based on a police report he had regarding the matter. Counsel elected to raise the incident preemptively through Steven, fearing the matter might be addressed by the State in cross-examining Steven or Jari, or if the State presented Jari in rebuttal.

During Steven's cross-examination, the State asked him the following:

> Q Well, at the time of this fight in September of 1991 it was a little bit more than a fight, wasn't it?

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[2] Section 967.04(7), STATS., sets forth the matters a court must consider when a request is made for a videotaped deposition of a child witness in a criminal proceeding. Section 967.04(9) permits a court to admit a videotaped deposition into evidence at trial. Section 967.04(10) provides as follows:

> If a court or hearing examiner admits a videotaped deposition into evidence under sub. (9), the child may not be called as a witness at the proceeding in which it was admitted unless the court or hearing examiner so orders upon a showing that additional testimony by the child is required in the interest of fairness for reasons neither known nor with reasonable diligence discoverable at the time of the deposition by the party seeking to call the child.

A No, it wasn't.

Q Well, isn't it true that prior to the time of this fight that you had had anal intercourse with her to the effect--to the extent you had--

A No.

Q --ripped her anus?

A No. Where did you get that? No. That--No.

Q That you wanted to have sex with her three or four times a day.

A No.

At that point, Steven's counsel objected, and, outside the presence of the jury, moved for a mistrial on two grounds: (1) because the State had put inflammatory, "other acts" evidence before the jury; and (2) because the information in question was contained in a police report not provided to the defense, in violation of a discovery order. The court denied the motion for a mistrial but ruled that the State could pursue no further questioning regarding the matters contained in the disputed report because of their prejudicial nature. The court noted that, at the point of objection, no "evidence" of the prior acts had been admitted inasmuch as there had been only two questions and denials. Upon the jury's return, the court instructed it as follows:

> When you left for the last [] recess, ladies and gentlemen, Mr. H[] had denied any attempt to have anal intercourse with the present Mrs. H[] on the night of this alleged police investigation at Chanute Air Force Base. You should disregard any statements of counsel after Mr. H[]'s denial of that question ….

A social worker who had interviewed the children regarding the sexual abuse allegations testified as a State rebuttal witness regarding the

techniques employed during her interviews. She also testified as to the things she, as a trained and experienced sexual abuse investigator, looked for in evaluating the credibility of children's allegations, such as evidence of prompting, body language, consistency, detail and spontaneity. She also stated that her observations during her interviews led her to conclude that what the children had related to her had not been prompted.

The jury returned guilty verdicts on all twelve counts and the court subsequently sentenced Steven to a total of ninety-six years imprisonment. Steven then filed a postconviction motion requesting a new trial because of: the State's failure to provide his counsel the police report containing Jari's "inflammatory" statements; the erroneous denial of a mistrial; the denial of additional cross-examination of the victims at trial; a claim of ineffective assistance of counsel; failure to try the real controversy; and miscarriage of justice. In the alternative, Steven sought a modification of his sentence. Following a hearing, at which two of the attorneys who had represented Steven testified, the court denied the motion for postconviction relief. Steven appeals his conviction and the order denying his postconviction motion.

ANALYSIS

a. Standard of Review

The decision to grant or deny a motion for a mistrial is a matter of discretion for the trial court, and we will reverse the denial of a mistrial motion only on a "clear showing" that the court erroneously exercised its discretion. ***State v. Pankow***, 144 Wis.2d 23, 47, 422 N.W.2d 913, 921 (Ct. App. 1988).

In order for Steven to prevail on his motion for additional testimony from the children at trial after their videotaped depositions had been admitted, § 967.04(10), STATS., requires him to show that the additional testimony "is required in the interest of fairness." This determination also calls for the exercise of discretion by the trial court. Whether the use of a videotaped deposition in lieu of live testimony infringes a defendant's constitutional right of confrontation, however, is a question of law which we review de novo. ***State v. Kirschbaum***, 195 Wis.2d 11, 27, 535 N.W.2d 462, 468 (Ct. App. 1995).

Finally, a trial court's findings of historical or evidentiary facts regarding a claim of ineffectiveness of counsel, that is, what was done or not done and why, may not be set aside unless the findings are clearly erroneous. Section 805.17(2), STATS.; ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). Whether those facts constitute deficient performance, and whether the defendant was prejudiced by counsel's performance, are legal questions which we review de novo. ***Id.*** at 698.

b. The Missing Police Report and the State's Cross-Examination

Steven claims that a mistrial should have been granted, and that a new trial should now be ordered, because of the prejudice he suffered when the State asked him during cross-examination whether he had injured Jari during anal intercourse with her and whether he "wanted to have sex with her three or four times a day." Moreover, he claims his trial counsel was blindsided by these questions because of the failure of the State to make available a police report containing these accusations, which had been made by his present wife, Jari, to a detective prior to her marriage to Steven. Steven asserts that the information in that police report, coming to counsel's attention for the first time on the third day

of trial, forced counsel to forego certain character testimony from Jari which he had planned to elicit. Furthermore, had the accusations in the report been known before trial, Steven claims that he may have elected not to testify at trial.

We agree with the trial court that no "evidence" of Steven's "other acts" with his present wife was put before the jury: two questions were asked of Steven, and he gave two emphatic denials. The trial court gave an immediate curative instruction, quoted above, and told the jury in closing instructions:

> The remarks of the attorneys are not evidence. If the remarks of the attorneys implied the existence of certain facts not in evidence, disregard any such implication and draw no inference from such remarks.

We assume that a jury acts in accordance with the instructions it is given. ***State v. Lukensmeyer***, 140 Wis.2d 92, 110, 409 N.W.2d 395, 403 (Ct. App. 1987). Any prejudice from the jury's hearing the State's two questions and Steven's denials was cured by the court's instructions. *See* ***Pankow***, 144 Wis.2d at 47, 422 N.W.2d at 921-22.

The trial court prohibited any further mention of Steven's sexual activities with his wife, Jari, and no further mention of those matters was made by any witnesses or during the closing arguments of counsel. We agree with the trial court's assessment that the two questions were little more than a "bump in the road" of the four-day trial. When viewed "in light of the whole proceeding," the two questions were "[in]sufficiently prejudicial to warrant a new trial." ***Id.***, (citation omitted). The trial court did not err in denying a mistrial on this ground.

By the same token, we conclude the fact that Steven's trial counsel did not have the police report containing Jari's accusations against Steven prior to the State's cross-examination provides no grounds for a new trial. The trial court

found that there was a "stalemate" in the evidence regarding whether the State had failed to make the report available or whether Steven's attorneys had simply overlooked it during their discovery of the State's files. Two of Steven's attorneys testified that they had never seen the report in question prior to its production at trial during the State's cross-examination of Steven, but neither testified that it had been deliberately withheld from them. The trial court's finding of evidentiary equipoise on the issue is not clearly erroneous, and Steven has not met his burden to show that the State violated a discovery order or obligation.

Moreover, as the State points out, the statements in the "missing" police report were within the knowledge of a defense witness, Jari H. The record does not disclose whether defense counsel made inquiries of Jari regarding other statements she may have made to police regarding Steven, nor whether she informed Steven or his counsel that she had done so. At a minimum, Steven and his trial counsel knew of the incident in Rantoul, and they had a copy of a police report characterizing it as "a simple assault and attempted rape." As the trial court noted, there were risks involved in the defense strategy of putting Steven and Jari on the witness stand, and especially in having them testify as to their positive marital relationship.

Once the "missing" report came to light, the court prevented all further testimony and references to the matters contained in it. Thus, the balance of the trial was conducted in the manner it would have been had Steven moved *in limine* to prevent introduction of Jari's inflammatory statements. Steven was not unduly prejudiced, therefore, by the late discovery of the report. The trial court did not err in denying his motions for mistrial and a new trial grounded on the late discovery of the report in question.

c. Videotaped Deposition in lieu of In Person Testimony of Victims

Admission of the videotaped depositions did not violate Steven's constitutional right to confront the three child witnesses: his counsel cross-examined the girls during the depositions; the jury was able to observe their demeanor while testifying; and they testified "under oaths" appropriate to their ages. *See* ***Kirschbaum***, 195 Wis.2d at 33, 535 N.W.2d at 470. Steven claims, however, that, "in the interest of fairness," the trial court should have allowed him to further cross-examine the three victims at trial. He argues that they were not "extensively" cross-examined during their videotaped depositions, and that new information came to light after the depositions, but before trial, which necessitated further cross-examination of the victims. We disagree.

We concur with the trial court's determination that Steven did not meet his burden to show that trial testimony by the victims was required "in the interest of fairness" under § 967.04(10), STATS. *See* ***Kirschbaum,*** 195 Wis.2d at 34-36, 535 N.W.2d at 470-71. The matters upon which Steven claims he wanted to further cross-examine the victims were introduced through other witnesses at the trial. The girls' statements regarding participation in satanic rituals, the possible use of candy rewards for incriminating testimony, and other evidence of coaching were all matters put before the jury and argued extensively by Steven's counsel during closing.

We cannot conclude on this record that the trial court erred in denying Steven's motion for in person testimony and additional cross-examination of the three children at trial. The court applied the correct legal standard to the facts before it, and, using a rational process, reached a conclusion that a reasonable

judge could reach. ***Loy v. Bunderson***, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982). The trial court did not erroneously exercise its discretion in denying Steven's motion.

d. Ineffective Assistance of Counsel

Steven claims that his trial counsel was ineffective for failing to suppress evidence of the pre-marital altercation between him and Jari, and also for failing to object to testimony from a social worker that allegedly bolstered the credibility of the victims. We conclude, however, in light of the strong presumption that counsel "made all significant decisions in the exercise of reasonable professional judgment," that defense counsel's performance was not deficient in either matter, when viewed as of the time of trial. *See* ***Strickland***, 466 U.S. at 690.

As we have discussed above, at the time of trial, Steven's counsel knew of the 1991 incident between Steven and Jari, but counsel did not have in his possession the subsequent police report containing Jari's more inflammatory statements to a detective. The defense strategy was to undermine the credibility of the young victims and present Steven's denials together with evidence of his good character. The strategy was perhaps "risky," as the trial court noted, but not unreasonable. Consistent with that strategy, and based upon the information known to counsel at the time, we cannot conclude that it was an unreasonable exercise of professional judgment to call Steven's current wife, Jari, to testify positively regarding Steven's character, and to preemptively defuse a potential State counterattack by affirmatively raising, and minimizing, the 1991 incident.

By the same token, Steven's trial counsel did not perform deficiently by not objecting to the testimony of the social worker, in which she described her

interviewing techniques and indicia for evaluating the reliability of statements made by young sexual abuse victims. Unlike the expert in ***State v. Haseltine,*** 120 Wis.2d 92, 95-96, 352 N.W.2d 673, 675-76 (Ct. App. 1984), on which Steven relies, the social worker here did not testify that there "was no doubt whatsoever" that the girls were incest victims. The trial court found nothing in the social worker's testimony constituting an opinion by her regarding the credibility of the three victims, and neither do we. Any objection by Steven's counsel to this testimony would have been properly overruled, and thus, the failure to object does not constitute deficient performance. *See* ***State v. Traylor***, 170 Wis.2d 393, 405, 489 N.W.2d 626, 631 (Ct. App. 1992).

Since we conclude that the performance of defense counsel in the two matters Steven raises was not deficient, it is not necessary that we consider whether Steven was prejudiced by counsel's conduct. ***Strickland***, 466 U.S. at 697.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.