COURT OF APPEALS
DECISION
DATED AND RELEASED

November 5, 1997

NOTICE

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

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No. 96-3007-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LAWRENCE H.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Lawrence H. appeals from a judgment of conviction of seven counts of sexual assault of a child and from an order denying his postconviction motion. He argues that trial counsel was ineffective in investigating and presenting a defense; that the trial court erroneously exercised its discretion in excluding evidence; and that a new trial should be granted on the

ground that the real controversy has not been fully tried. We affirm the judgment and order.

Lawrence was charged for having sexual contact with his step-daughter between 1988 and 1992, when the girl was eleven to fifteen years old.[1] The charged acts consisted of touching the girl's breasts and vagina with his hands and mouth and forcing the girl to touch his penis. At trial, the victim, then age eighteen, testified about the various assaults. The victim's psychotherapist testified that in 1994 the victim exhibited posttraumatic stress disorder occasioned by a series of traumatic events experienced by the victim between the age of ten to fifteen. The defense presented the testimony of the victim's siblings and mother indicating that they were unaware of any sexual assaults by Lawrence. Lawrence denied that the sexual contact ever occurred.

Lawrence's first claim is that trial counsel was ineffective. "There are two components to a claim of ineffective assistance of counsel: a demonstration that counsel's performance was deficient, and a demonstration that such deficient performance prejudiced the defendant. The defendant has the burden of proof on both components." ***State v. Smith***, 207 Wis.2d 259, 274, 558 N.W.2d 379, 386 (1997) (citation omitted). Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *See* ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). The trial court's findings of

[1] For conduct in May and August 1988, Lawrence was convicted of two counts of first-degree sexual assault for sexual contact with a person twelve years of age or younger. *See* § 940.225(1)(d), STATS., 1987-88 (see revisor's note following para. (2)(f)). For conduct in August 1989 and between September 10 and 30, 1989, Lawrence was convicted of three counts of first-degree sexual assault of a child who had not attained thirteen years of age. *See* § 948.02(1), STATS., 1989-90. For conduct between July 4 and 18, 1992, Lawrence was convicted of two counts of second-degree sexual assault of a child who had not attained sixteen years of age. *See* § 948.02(2), STATS., 1991-92.

what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. *See* ***id.*** However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. *See* ***id.***

When we address a claim of ineffective assistance of counsel, we determine whether trial counsel's performance fell below objective standards of reasonableness. *See* ***State v. McMahon***, 186 Wis.2d 68, 80, 519 N.W.2d 621, 626 (Ct. App. 1994). This standard encompasses a wide range of professionally competent assistance. *See* ***id.*** We presume that counsel's performance was satisfactory; we do not look to what would have been ideal, but rather to what amounts to reasonably effective representation. *See* ***id.***

To establish prejudice, the defendant must show that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's errors. *See* ***State v. Pitsch***, 124 Wis.2d 628, 642, 369 N.W.2d 711, 718 (1985). But this is not an outcome determinative standard. *See* ***id.*** Rather, reasonable probability contemplates a probability sufficient to undermine confidence in the outcome. *See* ***id.*** at 642, 369 N.W.2d at 719.

A. Victim's Writings

Lawrence first faults trial counsel for not using significant portions of the victim's diary[2] and a letter to her mother in support of the defense theory that the victim was fabricating the assaults in order to improve her life by placement in a foster home. He claims he was prejudiced by counsel's failure to utilize these various writings because they were fodder to attack the victim's

[2] The victim kept a diary between December 1991 and May 1993.

credibility. In reviewing Lawrence's claim of prejudice, we bear in mind that the impeachment of a sexual assault witness may be a "double-edged sword"—it may cast doubt upon the victim's credibility but may also cast both the defendant and defense counsel in a negative light. *Cf.* ***State v. DeLeon***, 127 Wis.2d 74, 85, 377 N.W.2d 635, 641 (Ct. App. 1985) (impeachment of child witness is a double-edged sword).

Lawrence first focuses the last entry in the victim's diary: "I hope that I can talk to the policeman or investigator before my parents are talken [sic] to. I have speech made up for court and the investigator. I have a feeling I will go to a group home for models and making dreams come true." In a letter to her mother after being placed in a foster home, the victim explained that she was "doing this … to prove a point to you and Tammy [the victim's sister]. I was sick and tired of you and Tammy saying that want to get rid of Larry, but you refuse to make things happen." Later in the letter the victim states:

> I realized the only way to get what you want is to go for it. And I'm trying the best I can to do just that. I didn't get enough support at first and that is my downfall, but I know that I can overcome that and maybe make a mark for our family in show biz.

Lawrence argues that prejudice[3] exists because the last diary entry and the victim's letter to her mother reflect the victim's premeditated plan and motive for making false accusations. We acknowledge that the victim's credibility was the critical factor of the trial. Neither writing, however, would have toppled the credibility tower because they were consistent with the victim's trial testimony that she was interested in getting into foster care. Neither constitutes an admission

[3] The trial court found that trial counsel was deficient for not bringing these writings to the jury's attention but that Lawrence was not prejudiced.

that the allegations were false. Moreover, the statement that she has a "speech made up for court" was ambiguous in meaning—it could mean a fabricated statement or simply that she had decided what she was going to say.

The statement that the victim was pursuing her allegations to "get rid of" Lawrence does not directly suggest that the victim was making false allegations. It was consistent with the victim's testimony that she had told her sister and mother about the assaults and nothing was done. It was also consistent with her desires to return to the family with Lawrence removed or in treatment. The letter represented a double edged sword and Lawrence was not prejudiced by trial counsel's failure to use it.[4]

We turn to the additional diary entries Lawrence cites. We conclude that Lawrence was not prejudiced by their nonuse.[5]

> 1. Tammy made me do all the work in the house when I work harder than she does. I just got to bed and I was woken up more to do more work. I don't think I can take living with this family anymore. God help me out.[6]

Lawrence claims this provided a motive—antipathy to housework—for the victim's desire to get removed from the home and supports his theory that the allegations were just a means to that end. Not only is the suggested motive

[4] Lawrence contends that the letter to her mother reflects that the accusations were the victim's mode of "going for it" and her attempt to make things happen. We agree with the State's response that by omitting the victim's reference to education just prior to statements about making things happen, Lawrence has misrepresented the content of the letter.

[5] The trial court did not make specific findings as to these entries.

[6] At trial, the victim was cross-examined about a redacted portion of this entry: "I don't think I can take living with this family any more. God help me out."

consistent with the victim's testimony that she wanted a foster home, the information about the housework could have created sympathy for the victim. In addition, trial counsel testified that he did not use the entire entry because he did not want to "beat up on Tammy." This was a reasonable strategy decision because Tammy was a witness for the defense. It was best that a defense witness not be cast as an insensitive task master.

> 2. I slept over at Kim's house. In a way, I could relate to her. My parents aren't as bad as her parents, but they aren't the best. I guess that's the way just about all teens feel.

Lawrence notes that this entry was made two months after one of the assaults and reflects the victim's appreciation for her family at a time that she should have still been angry about Lawrence's assault. The theory of defense was to show the victim's disdain for her family and desire to be removed from the home. It was inconsistent with the theory of defense to suggest that the victim appreciated her parents even in the smallest way. A trial attorney need not undermine the chosen strategy by presenting inconsistent alternatives. *See* ***State v. Hubanks***, 173 Wis.2d 1, 28, 496 N.W.2d 96, 106 (Ct. App. 1992). Additionally, this statement was ambiguous without knowledge of what Kim's parents were doing that was so bad.

> 3. I told my friends about my having diabetes. Holly, my music teacher was the most supportive.

Lawrence points out that the victim never had diabetes. He argues that this statement reflects the victim's penchant for fabricating stories to achieve specific goals, among them more attention. Other diary entries reflect that the victim was suffering some health problem regarding the ingestion of sugar, that she was concerned that she had diabetes or a bleeding ulcer, and that hospital tests

were conducted. The victim was not faking about her medical condition. Reference to it could have created sympathy for the victim.

B. Events Pertaining to Victim's Biological Father

Lawrence argues that trial counsel was deficient for not investigating, developing and using at trial evidence that the victim was sexually assaulted by her biological father in 1982. Lawrence claims that such evidence would have established an alternative source for the posttraumatic stress the victim's psychotherapist testified about. He also claims that for the same purpose, trial counsel should have discovered and used evidence that in 1992 the victim was very concerned about her biological father's attempt to obtain custody[7] of her and her younger brother. We conclude, as the trial court did, that Lawrence was not prejudiced by any deficient performance with respect to the victim's relationship or fear of her biological father.[8]

At best, evidence of the biological father's sexual assault would have provided not an alternative source for the victim's posttraumatic stress syndrome but only an additional source. But the victim's manifestation of the syndrome belies any causal relationship to the biological father's assault or attempt to gain custody. The evidence showed that the victim acknowledged to her therapist the past events concerning her biological father and that the victim did not presently view those events as traumatic. The therapist testified that the victim's night

[7] The biological father filed a motion to obtain periods of physical custody or visitation with the children. The victim perceived the litigation as involving custody.

[8] Because we conclude there was no prejudice, we need not address whether evidence that the victim had been sexually assaulted before would have been admissible under § 972.11(2), STATS., or whether, upon further investigation, trial counsel's motion for admission of such evidence under ***State v. Pulizzano,*** 155 Wis.2d 633, 456 N.W.2d 325 (1990), would have been successful.

terrors and flashbacks concerned only Lawrence. The custody litigation resolved itself in a manner favorable to the victim's desires.[9] Moreover, the evidence could have prejudiced the defense by creating sympathy for the victim and by bolstering the victim's credibility on the accurate reporting of sexual assault.[10]

Evidence of the biological father's motion to obtain custody was a double-edged sword. While a letter written by the victim during a custody study completed in the first half of 1992 contained complaints about nightmares about the biological father's abuse, there were also statements about how happy the victim was in Lawrence's household and how he took better care of her than the biological father ever did. These statements were inconsistent with the theory of defense.[11]

In summary, we conclude that Lawrence was not prejudiced by trial counsel's failure to make use of the various diary entries or the victim's letter to her mother. Also, the failure to pursue and use evidence regarding the victim's sexual assault by her biological father and the victim's concern over the biological father's custody motion did not prejudice the defense. This is not a case like ***State***

[9] The custody study recommended that the victim not be forced to visit her biological father. Evidence of the custody litigation would not have served to impeach the therapist's testimony that the victim had no fear of her biological father.

[10] The victim's biological father was convicted of sexual assault. The jury could have concluded from evidence of the conviction that the victim had been truthful before and was therefore being truthful about Lawrence's assaults.

[11] Lawrence argues that the victim's affirmative statements of satisfaction with the Lawrence household during the period of alleged abuse was consistent with the defense strategy "of showing a lack of contemporaneous accusations." Lawrence posits yet another theory of defense. Trial counsel was not required to pursue alternative theories. Additionally, the victim's statements of satisfaction with the Lawrence household were made for the purpose of avoiding contact with an abusive biological father and made at a time when according to the victim's testimony, the assaults occurred less frequently. The jury could view the victim's statements as reflecting a choice of the lesser of two evils.

v. Marty, 137 Wis.2d 352, 365, 404 N.W.2d 120, 126 (Ct. App. 1987), *overruled on other grounds by* ***State v. Sanchez,*** 201 Wis.2d 219, 231-32, 548 N.W.2d 69, 74 (1996), where trial counsel's failure to use evidence which tended to show that the victim was lying was held to be deficient and prejudicial representation. In ***Marty***, not only was the victim the prosecution's only witness to the assault, but the unused evidence directly impeached the victim's account of how the assailant got into her bedroom and other unused evidence would have impeached "other acts" witnesses. *See* ***id.*** Here, layers of inferences are required before the unused evidence is suggestive that the victim was making false accusations. Given the ambiguity in some of the victim's writings and that much of the unused evidence was inconsistent with the theory of defense, our confidence in the outcome is not undermined.

C. Comment on Victim's Credibility

Lawrence next argues that trial counsel was ineffective for failing to object to the therapist's testimony that the victim was telling the truth. It is well settled that a witness, expert or otherwise, may not testify that another physically and mentally competent witness is telling the truth. *See* ***State v. Romero***, 147 Wis.2d 264, 278, 432 N.W.2d 899, 905 (1988); *see also* ***State v. Smith***, 170 Wis.2d 701, 718, 490 N.W.2d 40, 48 (Ct. App. 1992); ***State v. Haseltine***, 120 Wis.2d 92, 96, 352 N.W.2d 673, 676 (Ct. App. 1984). Whether the testimony constituted improper comment on the credibility of another witness is a question of law which we decide independently of the trial court. ***State v. Davis***, 199 Wis.2d 513, 519, 545 N.W.2d 244, 246 (Ct. App. 1996).

Lawrence claims that three times the therapist testified that the victim was being truthful in her claims. We have reviewed the testimony cited by Lawrence and conclude that Lawrence has mischaracterized the testimony as

commenting on the victim's credibility. The first statement was merely a confirmation that the therapist had diagnosed the victim with posttraumatic stress occasioned by assaults recounted by the victim.[12] Lawrence argues that the second and third statements cited imply that anything other than testimony that the assaults occurred would be a lie. The second statement was simply an acknowledgment that parents pressure children to recant their allegations. The third statement was recounting the victim's impression that to deny the allegations in court would be a lie. Neither remark in the therapist's testimony related to the therapist's own belief that the victim would be lying if she denied the allegations. The remarks were not objectionable and counsel was not deficient for not objecting.

D. Failure to Obtain Psychological Examination of Victim

Lawrence claims that trial counsel should have retained an independent mental health expert in order to challenge the therapist's testimony about the victim's posttraumatic stress syndrome. The trial court found that counsel had discussed the possibility of hiring an expert and that Lawrence agreed not to do so. This finding is not clearly erroneous. Trial counsel testified that the defense lacked the money to retain an expert and that the defense was trying to turn the case away from posttraumatic stress in order to focus on the victim's other motives for making false allegations. A defendant who participates in making a

[12] The testimony Lawrence cites follows:

(1) "All of the symptoms with the dreams and the flashbacks, they all surrounded what I believe to be the traumas that [the victim] experienced from the age of 10 to 15."

(2) "To put pressure on the child to lie in court, is that unusual, no."

(3) "[The victim] was thinking about lying in court that it had never happened."

decision cannot subsequently complain that the attorney was ineffective for complying with the decision made. *See* ***State v. Divanovic***, 200 Wis.2d 210, 225, 546 N.W.2d 501, 507 (Ct. App. 1996).

Lawrence claims that trial counsel did not do enough investigation in giving advice about whether to hire an expert. The record establishes that there was no money to hire an expert, it was not obvious that retaining an expert would produce evidence favorable to the defense, and that any testimony confirming that the victim suffered from posttraumatic stress, even if occasioned by the victim's biological father, was inconsistent with the theory of defense. Additional investigation into the need to hire an expert would not have changed these facts. Trial counsel's strategy reason for not hiring an expert is justified. *See* ***Strickland v. Washington,*** 466 U.S. 668, 690-91 (1984) ("[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.... In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.").

Lawrence also claims that trial counsel was deficient for not moving the trial court for an order requiring the victim to submit to a pretrial psychological examination. *See* ***State v. Maday,*** 179 Wis.2d 346, 507 N.W.2d 365 (Ct. App. 1993). ***Maday*** holds that fundamental fairness requires that a defendant be given the opportunity to discover the psychological condition of a victim through a pretrial psychological examination. *See* ***id.*** at 357, 507 N.W.2d at 370-71. The examination authorized in ***Maday*** is strictly limited to situations in which the prosecution retains experts in anticipation of trial in order to present evidence that the victim's behavior was consistent with the behaviors of sexual assault victims

generally. ***State v. David J.K.***, 190 Wis.2d 726, 735, 528 N.W.2d 434, 438 (Ct. App. 1994).

The trial court found that the therapist who testified had not been retained in anticipation of trial. This finding is not clearly erroneous. The therapist was the victim's treating therapist. The victim was referred to the therapist by social services. The prosecution did not select the therapist or send the victim to the therapist for the purpose of producing trial testimony. ***Maday*** is inapplicable. *See* ***David J.K.*** at 734, 528 N.W.2d at 437. Counsel was not ineffective for not pursuing a motion for a pretrial psychological examination.

E. Failure to Object to Rebuttal Evidence

At trial, the prosecution cross-examined the victim's mother about her delivery of the victim's clothing to the social worker. The mother testified that she did it "as soon as I was requested to." The prosecution offered rebuttal testimony from the social worker that the clothing was not promptly provided and that a court order was necessary to permit the social worker to pick up the victim's personal effects. Lawrence argues that trial counsel should have objected to impeachment based on a collateral matter.

Bias or prejudice of a witness is not a collateral matter and extrinsic evidence may be used to prove such bias. *See* ***State v. Williamson***, 84 Wis.2d 370, 383, 267 N.W.2d 337, 343 (1978). The mother's actions with respect to the clothing would have been admissible even if counsel had objected. The mother's failure to promptly deliver the victim's clothing was consistent with the mother's desire to make it uncomfortable for the victim to remain in foster care. It was additional pressure to make the victim recant her allegations. Trial counsel was not deficient for not objecting to the rebuttal evidence.

F. Failure to Object to Closing Argument

The final claim of ineffective trial counsel is that counsel failed to object to allegedly improper remarks in the prosecutor's closing argument. "The line between permissible and impermissible argument is drawn where the prosecutor goes beyond reasoning from the evidence and suggests that the jury arrive at a verdict by considering factors other than the evidence." ***State v. Neuser***, 191 Wis.2d 131, 136, 528 N.W.2d 49, 51 (Ct. App. 1995).

The first comment Lawrence cites is: "[Lawrence] exercised his right to a trial. He's rolled the dice." We conclude, as did the trial court, that the comment was not improper and that counsel was not deficient for not objecting. Lawrence suggests the comment diverts the jury from holding the prosecution to its burden of proof. We must view the comment in context. *See* ***id.*** The context of this comment was to convince the jury not to be swayed by sympathy for the defendant or fear of returning a guilty verdict. The comment was to illustrate for the jury that Lawrence had as much to gain as to lose by going to trial. The comment did not rise to the level of telling the jury to disregard the burden of proof instruction nor was it a gross misrepresentation of the trial system.

The next comment cited is: "Juvenile intake did an immediate risk assessment and placed [the victim] in foster care that night." Lawrence characterizes this statement as telling the jury that unnamed professionals evaluated the victim's story and believed she was telling the truth. The trial court found that counsel should have objected but that the failure to do so was not prejudicial. We agree that there was no prejudice. The comment cannot be equated with a summation that various authorities believed the victim's allegations. It was only a statement of historical fact.

The last comment cited is from the prosecutor's rebuttal argument: "These people are blood relatives to [the victim] who they've ostracized, kicked out and rejected like some sort of species in the wild with their young. Animals behave more appropriately with their children than this mother did with hers." The trial court found that counsel was not deficient for allowing the passionate comment to pass without objection. The desire not to call the jury's attention to a potentially prejudicial circumstance of trial procedure is reasonable. *Cf.* ***Watson v. State***, 64 Wis.2d 264, 279, 219 N.W.2d 398, 406 (1974) (recognizing that defense counsel faces a difficult choice when considering a corrective instruction which again calls to the jury's attention a potentially prejudicial circumstance).

Even if counsel had objected and the objection should have been sustained, the comment did not prejudice the defense. To the extent the comment was overly emotional, it was merely an analysis of the evidence. *See* ***State v. Johnson***, 153 Wis.2d 121, 132-33, 449 N.W.2d 845, 850 (1990) ("Although there are calmer yet equally accusatorial words that could have been used, this court recognizes the stress and emotional involvement both counsel face when presenting their respective cases."). Moreover, the unflattering characterization was confined to the victim's mother. We are not persuaded that the comment was so grossly overstated as to invite the jury to convict Lawrence on factors other than the evidence. Lawrence was not denied the effective assistance of counsel.

G. Evidentiary Rulings

The next issue on appeal is whether the trial court erroneously exercised its discretion in excluding entries in the victim's diary about sexual conduct with boyfriends and other sexual references. Evidentiary rulings, particularly relevancy determinations, are left to the discretion of the trial court and will not be upset on appeal unless the court misused its discretion. ***Shawn B.N. v. State***, 173 Wis.2d 343, 366-67, 497 N.W.2d 141, 149 (Ct. App. 1992). We will affirm the trial court's discretionary ruling if it is supported by a logical rationale, is based on facts of record and involves no error of law. ***Id.*** at 367, 497 N.W.2d at 149.

Lawrence argues that evidence supported the defense theory that the allegations were false because the victim never made contemporaneous allegations about the assaults in her diary, a document in which she confessed sexual matters. The trial court ruled that evidence of the victim's voluntary sexual conduct with boyfriends was irrelevant. Judges exercise broad discretion with respect to the admissibility of evidence as long as the evidence tends to prove a material fact. ***State v. Denny***, 120 Wis.2d 614, 623, 357 N.W.2d 12, 16 (Ct. App. 1984) (citing ***State v. Pharr***, 115 Wis.2d 334, 344, 340 N.W.2d 498, 502 (1983)). Material facts are those that are of consequence to the merits of the litigation. ***Michael R.B. v. State***, 175 Wis.2d 713, 724, 499 N.W.2d 641, 646 (1993). Relevancy is a function of whether the evidence tends to make the existence of a material fact more or less probable than it would be without the evidence. *See* ***Denny***, 120 Wis.2d at 623, 357 N.W.2d at 16.

The evidence was irrelevant. The victim testified that she did not make any reference to Lawrence's assaults in her diary. She also explained that she "tried to keep my diary so that it would be kind of a happy book to look

through when I was older" and that she wanted the diary to reflect "things that happened that was normal." In light of this testimony, the fact that the victim wrote about consensual sexual experiences does not mean that she would have made entries about the assaults—events she would rather forget. Not only was the evidence of the diary entries about sexual conduct with boyfriends or sexual fantasies irrelevant and of low probative value, it was highly prejudicial. *See* ***State v. Droste***, 115 Wis.2d 48, 58, 339 N.W.2d 578, 583 (1983) (other consensual sexual conduct by victim was not relevant to whether nonconsensual acts occurred and is evidence of an inflammatory character). We conclude the trial court properly exercised its discretion in excluding diary entries containing references to sexual conduct.[13]

In cross-examining the therapist about the victim's posttraumatic stress, Lawrence wanted to explore whether the sexual assault of the victim's sister by her biological father was a traumatic event which could have contributed to the victim's posttraumatic stress symptoms. Under the "halo" of the rape shield law, § 972.11(2), STATS., the trial court prohibited inquiry about the victim's knowledge of the sexual activities of her family. Lawrence claims that the rape shield law bars only evidence of the victim's sexual experiences and not that of the sexual activities of others. He claims he was improperly prohibited from demonstrating an alternative source of the victim's posttraumatic stress by demonstrating that the victim was upset about the sexual abuse her biological father inflicted on her family.

[13] The trial court properly excluded the evidence under a traditional relevance analysis and we need not address whether such evidence was admissible under § 972.11(2), STATS.

Again a traditional relevancy analysis is dispositive of the evidentiary question. There was simply no link between the sexual assault the victim's sister suffered and the victim's posttraumatic stress symptoms. The flashbacks and night terrors the victim suffered involved only visions of Lawrence. Evidence of the biological father's sexual abuse of the victim's sister was properly excluded as irrelevant.

Lawrence contends he was improperly denied the opportunity to present as "habit" evidence that the victim's mother had reported past sexual abuse. Lawrence wanted to demonstrate that when the victim's sister was sexually assaulted by her biological father, the mother went to the police. The evidence was to impeach the victim's testimony that she told her sister and mother about the assaults. It was to support the mother's testimony that the victim never told her about Lawrence's assaults and to suggest that had the victim told her mother, the mother would have reported the abuse to the police. The trial court ruled that no "habit" existed and even if it did, there was no link between the mother's past reporting and her failure to do so in this case.

A habit is proved by "specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine." Section 904.06(2), STATS. Just "'how frequently and consistently instances of behavior must be multiplied in order to rise to the status of habit … cannot be formulated and, as in other areas of relevancy, admissibility depends on the judge's evaluation of the particular facts of the case.'" ***Steinberg v. Arcilla***, 194 Wis.2d 759, 768, 535 N.W.2d 444, 447 (Ct. App. 1995) (quoted source omitted). The trial court determines whether predicate evidence is "sufficient to permit a reasonable jury to find a 'regular response to a repeated situation.'" ***Id.*** at 769, 535 N.W.2d at 447-48 (quoted source omitted).

We affirm the trial court's finding that the mother's one previous report of sexual abuse does not rise to the level of habit. One instance of reporting in matters which involve intrafamilial sexual assaults and the competing and changing motives for reporting or not reporting, does not rise to the level of habit. Moreover, the other instance of reporting was not relevant or probative to the facts of this case because the circumstances were vastly different. *See* ***Chomicki v. Wittekind***, 128 Wis.2d 188, 196, 381 N.W.2d 561, 565 (Ct. App. 1985) ("The key issue is not how many incidents are testified to, but how relevant and probative are they to the case at bar."). The record demonstrates that the victim's entire family was abused by the victim's biological father. That is not the case here. Also, there would have been countervailing evidence that the victim's mother had financial reasons for wanting to keep Lawrence out of jail. The evidence was properly excluded.

H. New Trial

Finally, Lawrence seeks a new trial in the interests of justice on the grounds that the real controversy has not been fully tried. *See* § 752.35, STATS. His request is based on claims of error that we have rejected. The defendant is not entitled to a new trial in the interest of justice based on a combination of nonerrors. *See* ***Mentek v. State***, 71 Wis.2d 799, 809, 238 N.W.2d 752, 758 (1976). We conclude that the real issue—the credibility of the victim and Lawrence—was fully tried. We see nothing in the record that suggests that the jury's ability to evaluate the evidence was, as Lawrence claims, "fatally tilted." We will not require a new trial.

By the Court.—Judgment and order affirmed.

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