COURT OF APPEALS
DECISION
DATED AND FILED

September 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2838-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GLEN D. HOLLISTER,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Trempealeau County: ROBERT W. RADCLIFFE, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Glen Hollister appeals judgments convicting him of one count of first-degree sexual assault and one count of burglary. He argues that the trial court erred by admitting the victim's statements to a social worker because they were inadmissible hearsay. He further argues: (1) evidence should have been suppressed; (2) the fingerprint evidence was insufficient; (3) his due

process rights were violated; (4) the trial court erroneously refused to permit the jury to take notes; (5) § 948.02(1), STATS., is unconstitutional; and (6) he was denied his right to effective assistance of counsel.[1] We reject these arguments and affirm the judgment.

Hollister and the victim, J., who was six years old at the time of the offense, lived in the same apartment building. Hollister resided on an upper floor of the building, and the victim and her family resided in a basement apartment. The door to the basement apartment entered into the kitchen, which led into the living room and then straight through to the bedroom. J. slept in the bedroom.

At approximately 6:45 a.m., on March 10, 1995, J.'s mother was sleeping on the couch in the living room. J.'s father had left for work. Her mother awoke to a scream coming from the children's bedroom. She saw the back of a person going through the kitchen and out the door of the apartment. He was wearing a plaid shirt and jeans. From the distance of six or seven feet, she recognized the intruder as Glen Hollister.[2] She said, "Glen, stop," but he walked faster out the door.

The mother went into the children's bedroom and found J. in the closet, hiding under a blanket. In response to her mother's questions, the child answered affirmatively that "Glen" had been in the room, had touched her chest and had touched her "down below."[3] The mother also asked J. if he had "put it in"

[1] Appellate counsel briefed the first issue. With this court's permission, Hollister filed a supplemental pro se brief discussing the six additional issues.

[2] The victim's mother testified that she has known Hollister for 11 or 12 years.

[3] The mother's testimony at trial was inconsistent with that of J.'s daughter. Mother testified that she asked the child who had been in the room and the child answered "Glen." The child on the other hand testified that her mother asked if "Glen" had been in her room.

her but did not define what she meant by that. J. answered "Yes." The mother noticed redness in the vaginal area and a clear substance on the child's thigh that was later identified as "K-Y" jelly.

J. testified at trial that Glen was in her room when she awoke that morning and touched her crotch with his hand and put some "runny stuff" on her from a little tube. He also had his hand on her mouth but she was able to pull it off and scream, causing Glen to run out. She denied that he rubbed her chest or touched her elsewhere. She did not see Glen's face during the assault because the room was dark, but knew it was him when she saw the back of his head as he left the living room.

J. was taken to the emergency room, where she was questioned by a registered nurse. J. denied that anyone had touched her, saying that Glen had made her mad so she went into her closet. The examining physician observed reddening of the hymenal area and that the vulva was tender to his touch. He opined the cause to be trauma rather than infection. In response to his questions as he swabbed each area, J. answered that she had been touched by a penis in the rectum, vulva, and introitus, but not the mouth. She did not respond when asked if she had been touched with a finger and did not mention any names. Residue recovered from the rectal swabs and panties was identified as K-Y jelly.

Shortly after the physical examination, a social worker interviewed J., who said that Glen had put his hand over her mouth and touched her by her heart. She said that she began to scream when she started falling out of bed, and Glen then ran out of the room.

After returning from the hospital, a tube of K-Y jelly was found in a dresser drawer. Her mother had never seen the tube before and called the police.

The tube was eventually sent to the crime lab, which discovered among several prints only one suitable for identification. It matched Hollister's left thumb.

Four days later the social worker again interviewed J., who initially could not remember anything. After a ten-minute conversation, J. disclosed that Glen was lying on her bed when he touched her crotch over her clothes and put some "white stuff" on her "peeper" with his hand. He placed his other hand over her mouth. J. struggled to get his hand off her mouth and screamed. He ran out of the room.

Hollister testified at trial that after his friend left his apartment at approximately 3:30 a.m., he fell asleep and did not awaken until a friend called early in the morning. He denied going into J.'s apartment that morning. He believed, however, that the tube of K-Y jelly was his because he "had one stolen" two weeks prior to the assault.

Hollister's friends testified that they were with Hollister until 3:30 a.m. A friend, Tabatha, testified that she calls Hollister almost every day and believed but was not certain that she had called and spoken to him at about quarter to seven the morning of the assault.

Hollister contends that the trial court erroneously admitted evidence of the second statement J. made to the social worker. We are unpersuaded. Evidentiary issues are addressed to trial court discretion, and we review the record to determine whether it provides a rational basis for the trial court's determination. ***State v. Jagielski***, 161 Wis.2d 67, 73, 467 N.W.2d 196, 198 (Ct. App. 1991). Underlying a discretionary decision may be issues of law that we review de novo. *See* ***id***.

The residual hearsay exception may be used to admit hearsay if it is proven sufficiently trustworthy. ***State v. Sorenson***, 143 Wis.2d 226, 243, 421 N.W.2d 77, 84 (1988). The trial court should consider: (1) the attributes of the child making the statements, including age, comprehension, and verbal ability; (2) the person to whom the statements were made, the relationship to the child and potential motivations to fabricate or distort; (3) the circumstances under which the statements were made, including the time of the assault and other contextual factors; (4) the statement's content, noting any sign of deceit, falsity and whether they reveal a knowledge of matters not ordinarily attributable to a child of similar age; and (5) other corroborating evidence, such as physical evidence of an assault, statements made to others and opportunity or motive of the defendant. ***Id***. at 245-46, 421 N.W.2d at 84-85. The weight accorded each factor may vary, and no single factor is dispositive. ***Id***. at 246, 421 N.W.2d at 85.

Because the trial court correctly applied the criteria in ***Sorenson***, we conclude that it properly admitted the statement. The trial court found J. to be a verbal and bright six-year-old who was able to differentiate between truth and falsity. Nonetheless, Hollister argues that the inconsistencies among J.'s statements suggest that she may be easily confused or misled. Confusion and unresponsiveness, however, are factors to which the court is entitled to accord less weight, particularly when deliberate falsity is not otherwise shown. *See* ***id***. at 247, 421 N.W.2d at 85. The trial court was entitled to conclude that inconsistencies among various statements were not so great as to outweigh other factors bearing on reliability.

With respect to the second factor, we note that the challenged statement was made to a social worker who had experience and special training in interviewing child victims of sexual abuse, "with no apparent motive to coerce the

child or distort the statement," thus enhancing the statement's reliability. *See* ***State v. Kevin L.C.***, 216 Wis.2d 166, 181-82, 576 N.W.2d 62, 69-70 (Ct. App. 1997). During the first interview, the social worker talked to J. without mentioning Hollister's name. Because the child named Hollister, the social worker's later references were not suggestive.[4]

In addition, the circumstances under which the statement was made lend support to the court's decision. The second interview took place in the uncoercive environment of the victim's home, just four days after the assault. *See* ***Sorenson***, 143 Wis.2d at 248, 421 N.W.2d at 86. No one else was present during the interview. The content of the statement itself reveals no sign of deceit or falsity. J.'s description of the use of the K-Y lubricant establishes knowledge beyond the ordinary familiarity of a child her age. "A young child is unlikely to fabricate a graphic account of sexual activity because it is beyond the realm of his or her experience." ***Id***. at 249, 421 N.W.2d at 86. In addition, although J. initially stated to the social worker that she did not remember the assault, her statements in general were consistent with statements made to her mother and the physician.

Finally, other evidence, in the form of her mother's testimony, the findings of the physician and the presence of the K-Y jelly, corroborates her statement. Taken as a whole, the trial court could reasonably conclude that the ***Sorenson*** factors support the finding that the challenged statement possesses circumstantial guarantees of trustworthiness. Accordingly, we do not disturb the trial court's exercise of discretion.

---

[4] *Cf.* ***State v. Sorenson,*** 143 Wis.2d 226, 248, 421 N.W.2d 77, 85 (1988) ("[I]t appears the social worker refrained from even mentioning [the defendant] until L.S. raised the matter herself.").

Next, Hollister argues that the trial court erroneously admitted the tube of K-Y jelly because it was discovered as a result of an unreasonable search and seizure. This contention is without merit because Hollister has no reasonable expectation of privacy in J.'s dresser drawer. *See* ***State v. Rewolinski***, 159 Wis.2d 1, 12-13, 464 N.W.2d 401, 405 (1990). Hollister further argues that the evidence was insufficient to prove that it was his thumbprint on the tube. The State's fingerprint expert testified to a reasonable degree of scientific certainty that the print was Hollister's. The jury, not the appellate court, determines the weight and credibility of the testimony. ***State v. Poellinger***, 153 Wis.2d 493, 506, 451 N.W.2d 752, 757 (1990).

Next, Hollister argues that his due process arguments were violated when suggestive and misidentification evidence was admitted. This challenge is directed at the victim's mother's testimony. It is the jury's function, not this court's, to weigh the evidence and draw inferences therefrom. ***Id***. Nothing in the record suggests that the testimony was inherently or patently incredible. *See* ***id***. at 506-07, 451 N.W.2d at 757.

Hollister also argues that the trial court erroneously exercised its discretion when it refused to allow the jury to take notes during the two-day trial. Section 972.10, STATS., provides in part:

> (1)(a) After the selection of a jury, the court shall determine if the jurors may take notes of the proceedings:
>
> ….
>
> 2. If the court does not authorize note-taking, the court shall state the reasons for the determination on the record.

The trial court stated its reasons on the record. It stated that in its experience, only one or two people elect to take notes, and undue consideration

may be given by the members of the jury to the notes of the one or two people rather than on the recollection of the jury as a whole. The record reflects a reasonable exercise of discretion.

Next, Hollister argues that § 948.02(1), STATS., the statute under which he was convicted, is unconstitutional.[5] This argument is inadequately briefed and was not raised at the trial court level.[6] The thrust of Hollister's argument appears that sexual contact and sexual intercourse without consent should not carry the same penalty. It is the function of the legislature to define criminal conduct and to prohibit and punish any act as a crime. *See* ***State v. Wolske***, 143 Wis.2d 175, 187, 420 N.W.2d 60, 64 (Ct. App. 1988). If Hollister is contending that the statute is not sufficiently definite to give him fair notice of the conduct prohibited, we are unpersuaded. Section 948.02(1), STATS., prohibits sexual contact with a person who has not attained age thirteen. Section 948.01(5)(a) defines "sexual contact" as the intentional touching of intimate parts of another, clothed or unclothed. Because Hollister must have realized that touching a child's vaginal area constitutes sexual assault, § 948.02(1) is not unconstitutionally vague. *See* ***State v. Olson***, 113 Wis.2d 249, 256, 335 N.W.2d 433, 437 (Ct. App. 1983). We therefore conclude that Hollister's constitutional argument is without merit.

---

[5] Section 948.02(1), STATS., provides: "FIRST DEGREE SEXUAL ASSAULT. Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony."

[6] It is not this court's job to supply legal research and argument to an appellant who raises unsupported claims. *See* ***State v. Waste Management, Inc.***, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978). Nonetheless, because Hollister is an incarcerated litigant, we address his argument.

Finally, Hollister argues that he was denied effective assistance of trial counsel.[7] To demonstrate ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced his defense. *See* ***State v. Pitsch***, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). To demonstrate deficiency, a defendant must show that counsel's representation fell below an objective standard of reasonableness. ***Id***. at 636, 369 N.W.2d at 716. To demonstrate prejudice, a defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. ***Id***. at 642, 369 N.W.2d at 718. To be entitled to an evidentiary hearing, a defendant must do more than merely make general allegations; his such allegations must be supported by objective factual assertions. *See* ***State v. Bentley***, 201 Wis.2d 303, 316-17, 548 N.W.2d 50, 56 (1996). Conclusory allegations are insufficient. ***Id***.

Hollister argues that his counsel was deficient because he failed to file a motion to suppress the K-Y jelly. This argument fails because, as indicated earlier, Hollister would not have been entitled to a suppression order. Hollister also argues that his counsel was deficient for failing to have his clothing tested to show the absence of K-Y jelly or urine.[8] Hollister fails to demonstrate the prejudice component, however, because the absence of urine or K-Y jelly on his clothing would not have changed the outcome, as it was possible for Hollister to have assaulted J. without getting K-Y jelly or urine on his clothes. Hollister

[7] To the extent Hollister challenges appellate counsel's effectiveness, this direct appeal is not the appropriate procedure. *See* ***State v. Knight,*** 168 Wis.2d 509, 521, 484 N.W.2d 540, 544 (1992).

[8] Apparently this is in reference to testimony to the effect that the child may have wet the bed.

further claims that defense counsel was ineffective because he did not properly investigate a defense. Because Hollister does not identify who or what counsel failed to investigate, or how the investigation would have helped him, this argument must also fail. *See* ***id***. at 311-12, 548 N.W.2d at 54.

Hollister also contends that defense counsel was ineffective for failing to move for a mistrial when a juror was dismissed after violating the court's admonition not to discuss the case with anyone. This reduced the jury panel to eleven. He argues that his counsel never informed him that he was entitled to a mistrial. Hollister's arguments are not supported by the record. At the hearing, Hollister's counsel stated, "Mr. Hollister has indicated to me that he is willing to waive his right to a 12-person jury and that we can proceed with an 11-person jury, if the court feels we can proceed with 11-person jury rather than declaring a mistrial at this time." Counsel also stated: "Now, the question is whether or not we go forward with the 11-person jury or the court declares a mistrial" and, "[i]f the court does not excuse this juror, then at that point I'm going to ask for a mistrial." The State agreed, stating: "[T]he only options are the stipulation of the parties to an 11-person jury or a mistrial."

The trial court discussed the issue with Hollister personally as follows:

> Mr. Hollister, there's no question that under the Constitution you're entitled to a fair and impartial jury, and under the laws of the state of Wisconsin, that's a 12-person jury, a unanimous verdict from 12 persons, meaning all 12 jurors would have to be satisfied beyond a reasonable doubt of each of the elements … before they could find you guilty of that offense.
>
> ….
>
> If you should give up your right to a 12-person jury, waive your right by permitting the court to excuse this

> juror, you would not have the statutory jury that you're entitled to, and only 11 jurors would be required to be satisfied beyond a reasonable doubt from the evidence in order to return a verdict of guilty.

When asked, Hollister responded that he understood. After further discussion, the court continued:

> Mr. Hollister, have you had adequate time? I note that it's now 8:55. Your attorney was here when I got here this morning at 8:15. I know that he talked to you about this last night after court and after we left. But are you satisfied that you've had adequate time to discuss all of the ramifications of this decision with your attorney?

Hollister stated that he had had enough time. Nonetheless, the trial court again inquired:

> Would you like some more time to discuss it with [counsel] now that you've kind of understand that the -- it's very likely that the court would accept your proposal of proceeding with an 11-person jury?

Hollister responded: "No, it's not necessary, Your Honor." The court asked: "And do you understand that you are the one that is giving up your right to a 12-person jury, not your attorney, not the court, you, personally?" Hollister answered: "Yes, you made that very clear." The court continued:

> And you understand that should you choose not to do that, it's possible that we could determine that we could proceed with the 12 jurors who have now been selected and are in the process of deliberation, it's possible that we could –you could have a new trial by reason of the court declaring a mistrial?

Hollister answered: "Yes, your Honor."

In light of this record, we conclude that Hollister is unable to establish the prejudice component of his ineffective assistance of counsel claim. The trial court advised him of his rights. Hollister fails to identify how any additional consultation with his attorney would have affected his decision in any meaningful way. In any event, Hollister's strategic choice does not provide grounds for a reversal. *See* ***State v. McDonald***, 50 Wis.2d 534, 538, 184 N.W.2d 886, 888 (1971) (A deliberate choice of strategy is binding on a defendant and appellate claim of error based on a defendant's own choice will not be considered by a reviewing tribunal, even if the chosen strategy backfires.).

Hollister further argues that his counsel was ineffective for failing to inform him that double jeopardy would prohibit retrial in the event the trial court declared a mistrial at his request. Hollister is wrong. Under the current state of United States Supreme Court doctrine, a defendant's own motion for mistrial is assumed to remove any barrier to reprosecution, even when necessitated by prosecutorial or judicial error, so long as that error does not rise to the level of "overreaching." ***State v. Jenich***, 94 Wis.2d 74, 92-93, 288, 288 N.W.2d 114, 122-23 (1980).[9] "This is because, when the defendant moves for, or consents to, a mistrial, the defendant, and not the court, exercises primary control over the course to be followed in the event of prejudicial judicial or prosecutorial error." ***State v. Copening***, 100 Wis.2d 700, 712, 303 N.W.2d 821, 827-28 (1981).

[9] The exception applies where the prejudicial error involves prosecutorial or judicial "overreaching" as opposed to ordinary error. ***State v. Copening***, 100 Wis.2d 700, 712, 303 N.W.2d 821, 828 (1981). In ***State v. Harrell***, 85 Wis.2d 331, 335, 270 N.W.2d 428, 431 (Ct. App. 1978), the court of appeals defined judicial overreaching as: "Conduct that is intended to prompt a mistrial request by the defendant or is intended to harass or prejudice the defendant characterizes judicial overreaching." Because there is no suggestion of judicial or prosecutorial misconduct, this exception is inapplicable.

Hollister fails to demonstrate any factual issue that would support a remand for an evidentiary hearing with respect to his allegations of ineffective assistance of counsel.

By the Court.—Judgments affirmed.

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