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

January 17, 2001

**Cornelia G. Clark**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 99-1074-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**ROBERT E. ZASTROW,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Marathon County: RAYMOND F. THUMS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Robert Zastrow appeals a judgment, entered upon a jury's verdict, convicting him of one count of first-degree sexual assault of a child,

contrary to WIS. STAT. § 948.02(1).[1] Zastrow additionally appeals the order denying his postconviction motion. He argues that trial counsel was ineffective for failing to object to (1) various issues relating to the admission of other acts evidence and (2) testimony by two expert witnesses that he claims gave impermissible opinions about the victim's credibility. Zastrow also argues that a new trial should be granted in the interest of justice because the real controversy was not fully tried. We reject Zastrow's arguments and affirm the judgment.

## BACKGROUND

¶2 In September of 1996, Zastrow was charged with first-degree sexual assault of a child, Kelsey Z. (d.o.b. 04/09/89). Prior to trial, the State moved to admit other acts evidence consisting of testimony that Zastrow had sexually assaulted Kelsey's sisters, Kylee R. and Krystal R. Defense counsel did not object and the trial court granted the motion. Zastrow was ultimately convicted. The trial court denied his postconviction motion and this appeal followed.

## ANALYSIS

### I. INEFFECTIVE ASSISTANCE OF COUNSEL

¶3 Zastrow argues that he was denied effective assistance of counsel. This court's review of an ineffective assistance of counsel claim is a mixed question of fact and law. *See* ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The trial court's findings of fact will not be disturbed unless they are clearly erroneous. *See* ***id***. "However, the ultimate determination of

[1] All statutory references are to the 1999-2000 version unless otherwise noted.

whether the attorney's performance falls below the constitutional minimum is a question of law which this court reviews independently of [the trial court]." ***Id***.

¶4 Wisconsin employs a two-prong test to determine the validity of an ineffective assistance of counsel claim. *See* ***id***. (citing ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)). To succeed on his claim, Zastrow "must show both (1) that his counsel's representation was deficient and (2) that this deficiency prejudiced him." ***Id***. at 768 (citing ***Strickland***, 466 U.S. at 694). Further, we may reverse the order of the tests "or avoid the deficient performance analysis altogether if the defendant has failed to show prejudice." ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990) (citing ***Strickland***, 466 U.S. at 697).

¶5 In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id***. at 127 (quoting ***Strickland***, 466 U.S. at 687). However, "every effort is made to avoid determinations of ineffectiveness based on hindsight … and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***Id***. In reviewing counsel's performance, we judge the reasonableness of counsel's conduct based on the facts of the particular case as they existed at the time of the conduct, and determine whether, in light of all the circumstances, the omissions fell outside the wide range of professionally competent representation. *See* ***Strickland***, 466 U.S. at 690. Because "[j]udicial scrutiny of counsel's performance must be highly deferential … the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." ***Id.*** at 689 (citation omitted). Further, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." ***Id.*** at 690.

¶6 The prejudice prong of the ***Strickland*** test is satisfied where "the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, 'the result of the proceeding would have been different.'" ***Erickson***, 227 Wis. 2d at 769 (quoting ***Strickland***, 466 U.S. at 694).

A. The Other Acts Evidence

¶7 Here, Zastrow initially contends his counsel was ineffective for failing to object to the admission of the other acts evidence. Zastrow argues that because the other acts evidence was inadmissible on a number of grounds, his counsel was ineffective for failing to either argue against its admissibility or offer a ***Wallerman*** stipulation to avoid its introduction.[2] However, because we conclude that counsel's performance evinced a reasonable trial strategy, we need not address whether the other acts evidence was, in fact, admissible at trial.

¶8 At the ***Machner*** hearing,[3] Zastrow's trial counsel testified that, given the physical evidence, the defense could not dispute that the sexual abuse

[2] In ***State v. Wallerman***, 203 Wis. 2d 158, 552 N.W.2d 128 (Ct. App. 1996), this court held that a defendant can concede elements of a crime in order to avoid the introduction of other acts evidence. Citing ***State v. DeKeyser***, 221 Wis. 2d 435, 443, 585 N.W.2d 668 (Ct. App. 1998), Zastrow argues that trial counsel's failure to know and apply ***Wallerman*** constituted deficient performance and prejudiced the outcome of the trial. ***DeKeyser***, however, was decided more than a year after Zastrow's trial. Further, the ***DeKeyser*** court recognized that counsel may decline to utilize a ***Wallerman*** stipulation for a variety of strategic reasons. *See* ***id.*** at 453-54. Here, we conclude that counsel's performance evinced a reasonable trial strategy consistent with the defense theory that the girls' mother had encouraged their allegations against Zastrow.

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) ("[I]t is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel.").

occurred, but could dispute the identity of the person responsible for that abuse.[4] Counsel believed that the other acts evidence would support the defense theory that the girls' mother had not only encouraged, but coached their allegations against Zastrow. Counsel testified that "[t]here was information there that I could use hopefully to attack the credibility of these children, and there would have been no other way that I could have gotten those things in without the stuff." Counsel further explained:

> Well, … – one of the little kids had said at the age of 30 months, that he put his penis in my Oreo and went pee pee. Those of us who have ever had small children, worked with small children, know that no child at the age of 30 months is going to articulate that unless they have heard it someplace else or unless they have been coached.
>
> And because these kids were talking about stuff that was so similar, when they were making the allegations, there was just such an opportunity to argue that their testimony was formulated based upon their involvement with social workers, police people, asking questions, asking leading questions. Mom was preoccupied with the notion of sexual assault. She took the kids to the doctor, and the doctor talked with her about not asking leading questions of the kids. So they're in an environment where all of this stuff is being talked about, almost drilled. And if you're going … to attack the credibility of one child, you have to show how she is part of a whole process.

Counsel continued: "I thought [the other acts evidence] had the potential of being more helpful than harmful. But in hindsight, of course, the jury didn't agree with me for whatever reason." Given the defense theory, counsel's performance was

[4] In March of 1995, the Outagamie County Department of Human Services had investigated allegations that Kelsey, Kylee and Krystal had been sexually abused by a boy at an Appleton women's shelter. The department determined that the allegation involving the boy at the shelter was "unsubstantiated." *See* infra, ¶13. The department's child protection intake worker, Beth Reimer, testified at trial that although she believed the girls and "felt there was a possibility that something happened," the department could not really prove that sexual abuse had occurred in that instance.

not deficient, but rather, evinced a reasonable trial strategy consistent with that theory.

¶9 Zastrow additionally argues that his trial counsel was ineffective for failing to object to the court's jury instruction on the other acts evidence. We are not persuaded. The first of a three-part analysis to determine the admissibility of other acts evidence asks if the other acts evidence is offered for an acceptable purpose under WIS. STAT. § 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[5] *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

¶10 Here, although the State never relied on "opportunity" as a basis for seeking the admission of the other acts evidence, the jury was instructed that the other acts evidence could be considered "only on the issue of opportunity and/or intent." Zastrow contends that counsel's failure to object to the inclusion of "opportunity" in the jury instruction constituted ineffective assistance because the opportunity exception had no relevance to his case. It is undisputed, however, that opportunity was never an issue in the case, as there was no dispute at trial that Zastrow had the opportunity to be alone with Kelsey at various times during his residence with her family. Thus, even were we to assume that trial counsel was deficient for failing to object to the superfluous inclusion of "opportunity" in the jury instruction, Zastrow has failed to establish how the claimed deficiency resulted in any prejudice.

[5] After ascertaining whether the other acts evidence is offered for a permissible purpose under WIS. STAT. § 904.04(2), the analysis turns to whether the other acts evidence is relevant and finally, whether its probative value outweighs the danger of unfair prejudice. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

B. Expert Testimony

¶11 In ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984), this court held that "[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." Citing ***Haseltine***, Zastrow argues that his trial counsel was ineffective for failing to object to testimony by two expert witnesses that he claims gave impermissible opinions about the victim's credibility. We are not persuaded.

¶12 The complaint against Zastrow was based on a report made to Outagamie County Department of Human Services child protection intake worker, Beth Reimer, in May of 1995. Reimer had originally been assigned to the case in March of 1995 to investigate allegations that Kelsey, Kylee and Krystal had been sexually abused by a boy at an Appleton women's shelter. As a foundation to her testimony regarding her discussions with the girls about the past and present allegations of abuse, Reimer described the procedures utilized by the department to investigate child abuse allegations.

¶13 Specifically, Reimer testified that in investigating claims of child abuse, the department must "either substantiate or unsubstantiate each case that is reported." Reimer explained that "substantiated," as an internal standard used by the department, means that the department is 51% sure that the alleged abuse has occurred. "Unsubstantiated," however, means that the department did not have sufficient information to determine whether the incident occurred. The department uses this standard to determine whether allegations of abuse will be forwarded to the proper authorities for appropriate action. With respect to the allegations involving Zastrow, Reimer testified: "I felt, based on the girls' statements, that there was—again, you understand that our protocol is 51% that

something has occurred, and based on what the girls told me I did believe that something occurred."

¶14 Similarly, Geri Heinz, the Victim/Witness Coordinator for the Marathon County District Attorney's office, testified that she had interviewed the children in the present case. Again, as a foundation to describing her duties, Heinz emphasized that she attempts to "verify" or "double check" a complaining child's story in order to avoid falsely charging someone. The following exchange subsequently occurred:

> [Prosecutor]: Miss Heinz, there are children who make up stories about this, is that right?
>
> [Heinz]: Yes.
>
> [Prosecutor]: Okay. And there are adults who put children up to doing things where there is some kind of at least report to law enforcement, isn't that right?
>
> [Heinz]: Yes.
>
> [Prosecutor]: How important is it in your job to try to make determinations about whether that has occurred in any given case?
>
> [Heinz]: I consider it very important in my job.

¶15 Contrary to Zastrow's assertions, neither Reimer nor Heinz testified that the children here were being truthful. Rather, their comments were in context of generally describing their investigative procedures for cases involving allegations of child abuse. It was self-evident that those involved with investigating the matter placed some credence in the children's allegation, because they formed the basis of the charges against Zastrow. Trial counsel was, therefore, not deficient for failing to object to this testimony.

¶16 Because Zastrow has failed to show how his counsel's performance was deficient or how he has been prejudiced by any of the claimed deficiencies, we conclude that Zastrow was not denied effective assistance of counsel.

## II. A NEW TRIAL IN THE INTEREST OF JUSTICE

¶17 Zastrow seeks a new trial under WIS. STAT. § 752.35, which permits us to grant relief if we are convinced "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." In order to establish that the real controversy has not been fully tried, Zastrow must convince us "that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoting ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996)). To establish a miscarriage of justice, Zastrow "must convince us 'there is a substantial degree of probability that a new trial would produce a different result.'" ***Darcy***, 218 Wis. 2d at 667 (quoting ***State v. Caban***, 210 Wis. 2d 597, 611, 563 N.W.2d 501 (1997)). An appellate court will exercise its discretion to grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶18 As we discussed above, Zastrow has failed to establish that he was denied the effective assistance of counsel as to the admission of the other acts evidence, the jury instructions, or the expert witness testimony. Accordingly, we conclude there is no reason to exercise our discretionary authority under WIS. STAT. § 752.35 to grant Zastrow a new trial.

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

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