COURT OF APPEALS
DECISION
DATED AND FILED

November 9, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3104-CR **Cir. Ct. No. 01CF000837**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT L. VON HADEN, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: JAMES T. BAYORGEON, Judge. *Affirmed in part and cause remanded with directions.*

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

¶1 PER CURIAM. Robert Von Haden, Jr., appeals a judgment of conviction for one count of causing mental harm to a child and one count of disorderly conduct. He also appeals an order denying his postconviction motion

for a new trial. Von Haden argues he is entitled to a new trial because: (1) testimony of an expert witness who did not testify at trial constitutes newly discovered evidence; (2) the jury's verdict was coerced; (3) his trial counsel provided ineffective assistance; (4) the court erred by allowing the jury to hear an audiotape conversation between him and the victim; (5) the court erred by denying his request to have an independent psychological examination of the victim; (6) the court's in camera review of the State's expert witness's records was improper; (7) the court erred by overruling his objection to the State's expert witness's testimony; and (8) the court erred by denying his motion to modify his sentence. The State concedes that Von Haden may have been entitled to an independent psychological examination of the victim, Von Haden's fifth issue. For that reason we remand to the circuit court for a hearing under ***State v. Maday***, 179 Wis. 2d 346, 507 N.W.2d 365 (Ct. App. 1993). We affirm on the remaining seven issues.

BACKGROUND

¶2 Von Haden first met the victim, ten-year-old Kelsey B., at a group camping trip organized by Von Haden's wife together with three mothers and their children in June 2001. He met Kelsey again on several other similar outings. Kelsey alleged that Von Haden french kissed her, touched her buttocks over her clothing, and rubbed her abdomen. Von Haden also gave Kelsey jewelry for her birthday and for Sweetest Day. In November 2001, Kelsey told her mother about the incidents when Von Haden had touched her.

¶3 Kelsey's mother called the police, who subsequently recorded a telephone conversation between Von Haden and Kelsey. During this conversation, Von Haden told Kelsey that he kissed his wife, but "not with the

same kind of passion I kiss you with." He also apologized for inappropriately kissing Kelsey.

¶4 The State charged Von Haden with one count of causing mental harm to a child and two counts of disorderly conduct. He pled not guilty to all counts and requested a jury trial. He filed a motion to suppress the playing of the audiotape recording of the phone conversation between him and Kelsey. In response to the motion, the court stated it would rule on that issue when the State asked for the tape to be played to the jury at trial.

¶5 Von Haden also filed a motion for an independent psychological examination of Kelsey, which the court denied. Further, the parties entered into a stipulation for the court to make an in camera review of the State's expert witness's counseling records concerning Kelsey. The court stated it would review the records to determine whether they were relevant, and if they were not, it would seal the records.

¶6 The jury trial began on July 1, 2002. On the second day of trial, Von Haden objected to the testimony of the State's expert witness, psychotherapist Beth Young-Verkuilen, on the basis that it was impermissible ***Jensen*** testimony.[1] The court overruled the objection. Young-Verkuilen testified that Kelsey suffered from sexual abuse. She also stated that Von Haden's relationship with Kelsey was "extremely harmful" to Kelsey psychologically and emotionally.

[1] ***State v. Jensen***, 147 Wis. 2d 240, 432 N.W.2d 913 (1988). ***Jensen*** evidence is expert testimony regarding whether a victim's actions are consistent with other victims of the same or similar crime. ***Id.*** at 256. When this type of evidence is presented, a defendant may be entitled to a psychological examination of the victim. ***State v. Maday***, 179 Wis. 2d 346, 359-60, 507 N.W.2d 365 (Ct. App. 1993). This issue will be analyzed more fully in Part 5 of the Discussion section of this opinion.

¶7 The following day, the court permitted the State to play the audio recording of the phone conversation between Von Haden and Kelsey. Additionally, the court stated that it had conducted the in camera review of Young-Verkuilen's counseling records and determined "there was nothing in there of relevance or exculpatory for the defense." The court therefore sealed the records.

¶8 The jury began its deliberations on July 3. During deliberations, the jury asked for a transcript of the telephone conversation between Von Haden and Kelsey. Von Haden objected, but the court ruled that all exhibits, including the transcripts, were to be sent into the jury room except for the audiotape recording itself. The jury later asked to hear the audiotape again. Von Haden again objected, but the court ruled the jury could listen to the tape again. Ultimately, the jury found Von Haden guilty of one count of causing mental harm to a child and one count of disorderly conduct. The jury acquitted Von Haden on the second count of disorderly conduct. The court asked if either the State or Von Haden wished to poll the jury and both declined.

¶9 The court sentenced Von Haden to a total of fourteen years: eighteen months' initial confinement, followed by twelve years and six months' extended supervision on the charge of causing mental harm to a child. The court sentenced him to ninety days' confinement on the disorderly conduct charge, to be served concurrently to the sentence for causing mental harm to a child.

¶10 On July 11, 2002, Von Haden filed a motion for a new trial. He argued (1) since his trial he had retained an expert who would rebut

Young-Verkuilen's testimony; (2) one juror was coerced into going along with the guilty verdicts; (3) he received ineffective assistance from his trial counsel;[2] (4) the court erroneously allowed the audiotape of the telephone call to be played to the jury after the State's rebuttal; (5) the court erroneously allowed Young-Verkuilen to testify that Kelsey suffered from sexual abuse, when Von Haden was not charged with sexual abuse; (6) he was entitled to a psychological examination of Kelsey; (7) the court's in camera review of Young-Verkuilen's records was improper; and (8) the jury was not instructed that it did not have to believe expert testimony. In the alternative, Von Haden asked for sentence modification.

¶11 At the motion hearing, juror Charles Siroin testified that if the court had polled the jury he would have said he did not agree with the verdict. He testified that one juror kept yelling and screaming until "finally everybody more or less tossed in the chips." Siroin stated he eventually became exhausted and went along with the verdict but told the rest of the jurors to "be prepared to get this kicked back in your face."

¶12 Dr. Stephen Emiley testified that he questioned Young-Verkuilen's evaluation methods and therefore felt her diagnosis was questionable. He added that Kelsey's harm could have been caused by other things, such as problems within her family. Finally, Von Haden's trial counsel testified during the ***Machner***[3] portion of the hearing. Ultimately, the court denied Von Haden's motion for a new trial as well as his request for sentence modification.

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[2] Von Haden retained new counsel for his postconviction motions and appeal.

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

DISCUSSION

1. Newly Discovered Evidence

¶13 Von Haden argues he is entitled to a new trial based on newly discovered evidence, namely, Dr. Stephen Emiley's testimony. Emiley did not testify at Von Haden's trial. Von Haden claims Emiley's testimony would rebut Young-Verkuilen's testimony that Von Haden's actions were a substantial factor in the harm done to Kelsey. Emiley would testify that Kelsey's harm could have been caused by other factors. He would also dispute the method Young-Verkuilen used to evaluate Kelsey.

¶14 A new trial will be granted based upon newly discovered evidence if a defendant establishes by clear and convincing evidence that:

> (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking to discover it; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative to the testimony introduced at trial; and (5) it is reasonably probable that, with the evidence, a different result would be reached at a new trial.

State v. Carnemolla, 229 Wis. 2d 648, 656, 600 N.W.2d 236 (Ct. App. 1999). If the newly discovered evidence fails to satisfy any one of these five requirements, it is not sufficient to warrant a new trial. ***State v. Kaster***, 148 Wis. 2d 789, 801, 436 N.W.2d 891 (Ct. App. 1989).

¶15 When reviewing a trial court's decision concerning a motion for a new trial based upon newly discovered evidence, we look to whether the trial court properly exercised its discretion. ***State v. Brunton***, 203 Wis. 2d 195, 201-02, 552 N.W.2d 452 (Ct. App. 1996). "However, whether due process requires a new trial because of newly-discovered evidence is a constitutional question subject to

independent review[.]" ***State v. Kimpel***, 153 Wis. 2d 697, 702, 451 N.W.2d 790 (Ct. App. 1989).

¶16 We conclude Emiley's testimony does not constitute newly discovered evidence. What Von Haden calls newly discovered evidence is in fact merely another expert opinion regarding the evidence presented at trial. "New expert opinions obtained postconviction do not qualify as newly discovered evidence regarding a defendant's mental responsibility for a crime." ***State v. Fosnow***, 2001 WI App 2, ¶26, 240 Wis. 2d 699, 624 N.W.2d 883. In ***Fosnow***, we cited a Washington Court of Appeals decision that stated:

> [W]e must ask whether all of those defendants who could now unearth a new expert, who finds "new facts"—which if believed by the same jury might cause them to acquit—were denied a fair trial, i.e. failed to receive substantial justice. Surely we have to answer in the negative, or finality goes by the boards and the system fails.

Id. (quoting ***State v. Harper***, 823 P.2d 1137, 1143 (Wash. App. 1992)).

¶17 Furthermore, Von Haden wishes to use Emiley's testimony only to rebut the testimony of other witnesses, particularly Young-Verkuilen. However, evidence that would merely impeach the credibility of a witness is not by itself a basis for a new trial. *See* ***Simos v. State***, 53 Wis. 2d 493, 499, 192 N.W.2d 877 (1972).

¶18 Finally, even if Emiley's testimony did constitute newly discovered evidence, Von Haden has not established that a new trial would probably result in a different outcome. We agree with the circuit court's assessment that "there is nothing to indicate that a different result would have been reached by the jury had there been a battle of the experts." Thus, Von Haden has failed to establish the

fifth factor of the five he must establish by clear and convincing evidence in order to be entitled to a new trial. *See* ***Carnemolla***, 229 Wis. 2d at 656.

2. Juror Coercion

¶19 Von Haden argues that one juror, Charles Siroin, was forced into going along with the rest of the jury in arriving at a guilty verdict. At the postconviction motion hearing, Siroin testified that he "argued for Mr. Von Haden [from the time] we went in to the jury room until the time we came out, and I told them I would go along with the rest of the jurors, but I said, 'Be prepared to get this kicked back in your face,' and here we are." He stated that he became exhausted during deliberations, and that one juror "kept yelling and screaming" until "finally everybody more or less tossed in the chips." Finally, Siroin stated that if the jury had been polled after the verdict he would have said he did not agree. Von Haden contends that Siroin's testimony shows that the verdict was coerced and he is therefore entitled to a new trial.

¶20 However, WIS. STAT. § 906.06(2)[4] states in part:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

[4] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

This statute establishes that a juror may only testify regarding extraneous prejudicial information or improper outside influences brought to the jury's attention. Von Haden has not alleged that either of these circumstances occurred, nor did Siroin testify that they occurred. Rather, Siroin's testimony was solely about what occurred during the course of the jury's deliberations and what influenced him to assent to the verdict. The statute clearly prohibits testimony on these issues in order to invalidate a verdict. Therefore, Siroin's testimony cannot be a basis for a new trial.

3. Ineffective Assistance of Counsel

¶21 Von Haden alleges four instances that he argues show he received ineffective assistance of counsel: (1) his attorney failed to retain an expert, such as Emiley, to rebut Young-Verkuilen; (2) his attorney failed to object to Young-Verkuilen's testimony that Kelsey was a victim of sexual abuse as being irrelevant and prejudicial; (3) his attorney failed to request that the jury be polled after the verdict; and (4) his attorney failed to request a jury instruction on expert testimony and a cautionary instruction regarding the audiotape when it was replayed for the jury. We will analyze each of these issues in turn.

¶22 The familiar two-pronged test for ineffective assistance of counsel claims requires a defendant to prove: deficient performance and prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. It is not enough, however, "for the defendant to

show that the errors had some conceivable effect on the outcome of the proceeding." ***Id.*** at 693. The defendant's burden is to show that counsel's errors "actually had an adverse effect on the defense." ***Id.***

¶23 Our standard for reviewing this claim involves mixed questions of law and fact. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Findings of fact will not be disturbed unless clearly erroneous. ***Id.*** The legal conclusions, however, as to whether counsel's performance was deficient and prejudicial, present questions of law. ***Id.*** at 128. Finally, we need not address both prongs if the defendant fails to make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

a. Failure to retain an expert

¶24 Von Haden argues that his attorney's performance was deficient and that he was prejudiced because his attorney did not retain an expert such as Emiley during the trial. He contends that the testimony would have addressed issues critical to the outcome of the case.

¶25 During the ***Machner*** portion of the postconviction hearing, Von Haden's trial attorney, Jeffrey Oswald, testified regarding his strategy and reasoning for not retaining an expert witness. He stated that the strategy was based on the fact that Von Haden maintained he was innocent. Oswald determined it was more reasonable to focus entirely on Von Haden's behavior rather than whether Kelsey was harmed. Von Haden never denied that Kelsey had been harmed, but maintained that he did not cause the harm. Young-Verkuilen's testimony was that Kelsey was harmed but they were not contesting that issue. Oswald reasoned an expert witness to rebut Young-Verkuilen was unnecessary as a result. This court will not second-guess a trial attorney's considered selection of

trial tactics or the exercise of professional judgment in the face of alternatives that have been weighed by trial counsel. ***State v. Elm***, 201 Wis. 2d 452, 464, 549 N.W.2d 471 (Ct App. 1996). A strategic trial decision rationally based on the facts and law will not support a claim of ineffective assistance of counsel. ***Id.*** at 464-65.

b. Failure to object to testimony that Kelsey was a sexual abuse victim

¶26 Von Haden argues that Young-Verkuilen's testimony that Kelsey was a sexual abuse victim was irrelevant and prejudicial. He maintains this was not a sexual abuse case because he was not charged with sexual abuse. He contends that his trial counsel's performance was deficient because he should have objected to the testimony. He maintains that he was prejudiced as a result because the jury could infer that he had sexually abused Kelsey. However, this was not an issue the jury was asked to determine. Instead, the jury was to determine whether Von Haden caused Kelsey mental harm and whether he engaged in disorderly conduct.

¶27 Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01. Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. WIS. STAT. § 904.03. We conclude the evidence was relevant and was not unfairly prejudicial.

¶28 WISCONSIN STAT. § 907.04 states that an expert may testify regarding his or her opinion on an ultimate issue. Here, the ultimate issue is whether Kelsey suffered mental harm and whether Von Haden caused that harm.

Young-Verkuilen's opinion was that Kelsey suffered mental harm as a result of sexual abuse. Thus the testimony was relevant.

¶29 Furthermore, the testimony was not unfairly prejudicial to Von Haden. Evidence is unfairly prejudicial if it tends to influence the outcome by improper means, appeals to jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes it to base its decision on something other than established propositions in case. ***Lease Am. Corp. v. Insurance Co. of N. Am.***, 88 Wis. 2d 395, 401, 276 N.W.2d 767 (1979). Here, the jury had already heard other evidence regarding Von Haden's conduct toward Kelsey. The fact that Young-Verkuilen characterized Kelsey as a sexual abuse victim was not likely to influence the outcome or cause the jury to base its decision on anything other than the totality of the evidence and testimony submitted at trial. Therefore, Von Haden's trial attorney was not deficient for failing to object to Young-Verkuilen's testimony as irrelevant and unfairly prejudicial.

c. Failure to request polling of the jury

¶30 After the jury delivered its verdict, the court asked the parties whether they wished to have the jury polled, and both declined. Von Haden argues his trial attorney's performance was deficient because he did not ask to have the jury polled; nor did his attorney consult with Von Haden regarding his right to poll the jury. He points out that if the jury had been polled, Siroin would have stated that he did not agree with the verdict. Therefore, Von Haden argues he was prejudiced by the entry of a verdict that was not unanimous.

¶31 The decision regarding whether to request an individual polling is one delegated to counsel. ***State v. Yang***, 201 Wis. 2d 725, 745, 549 N.W.2d 769

(Ct. App. 1996). Therefore, counsel's decision to not even inform Von Haden of his right to an individual polling is not in itself deficient performance. *See* ***id.*** "[W]hen defense counsel is present at the return of the jury verdict and does not request an individual polling, whether counsel's performance is deficient depends on all the circumstances." ***Id.***

¶32 Von Haden's argument is based on Siroin's testimony, which we have already noted was incompetent. *See* WIS. STAT. § 906.06(2). Moreover, the standard jury instruction, which was given in this case, tells the jury that the verdict must be unanimous, and that all twelve must agree on the verdict. *See* WIS JI—CRIMINAL 515. The jurors did not present any questions to the court during deliberations that revealed any discord with respect to their unanimity. After the verdict was delivered, the court asked the jury, "Are those your verdicts?" No one, including Siroin, indicated that the verdict was not correct. Therefore, there is no indication that the jury's verdict was not unanimous. Thus, Von Haden's counsel's performance was not deficient because he failed to ask the court to poll the jury.

d. Failure to request jury instructions regarding the State's expert witness and the audiotape

¶33 Young-Verkuilen, the only expert to testify, stated that the harm Kelsey suffered was "extremely harmful." Von Haden argues his trial attorney's performance was deficient because he failed to request an instruction that the jury was not bound by expert testimony. He argues he was prejudiced because the jury may have thought it had to accept Young-Verkuilen's testimony and arrived at a guilty verdict as a result.

¶34 Further, Von Haden argues he was prejudiced by the replaying of the audiotape for the jury without an instruction that the tape was only one piece of evidence. He contends that, without this instruction, the jury was left with the impression that the tape was more important than other evidence. He argues his attorney's performance was deficient because he failed to ask for this cautionary instruction.

¶35 We conclude that the prejudice Von Haden posits is too speculative. First, there is no indication that the jury had the impression that it must accept Young-Verkuilen's testimony. The jury was instructed that, "It is the duty of the jury to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the credibility, that is, the believability, of the witnesses or of the weight to be given to their testimony." Jurors are presumed to follow the court's instructions. ***State v. Delgado***, 2002 WI App 38, ¶ 17, 250 Wis. 2d 689, 641 N.W.2d 490. There is nothing to suggest that the jurors would have thought they had to believe Young-Verkuilen when they were told it was their duty to determine each witness's credibility.

¶36 Further, there is no indication that the jury placed undue emphasis on the audiotape. The jury was instructed to "be very careful and deliberate in weighing the evidence." The jury showed it was obeying this instruction by wanting to be sure it understood what was said on the tape before it decided what its verdict was. There is nothing to indicate that the jury's verdict would have been different if they had the two instructions Von Haden mentions. Therefore, we conclude that Von Haden suffered no prejudice because the instructions were not given.

4. Audio Recording of Telephone Conversation

¶37 Von Haden argues that, because the audiotape of his phone conversation with Kelsey was made without his consent, it was inadmissible. A trial court's decision to admit or exclude evidence is a discretionary determination and will not be upset on appeal if it has a reasonable basis and was made "in accordance with accepted legal standards and in accordance with the facts of record." ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983) (citation omitted).

¶38 Von Haden cites ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 571, 261 N.W.2d 147 (1978), for his proposition that the recording was inadmissible. In that case, the court stated that although one-party consent tapes are legal for purposes of detecting crime, they cannot be used as evidence in court unless the defense opens the door to its use. ***Id.*** at 572-73. Von Haden states that because he did not open the door to the use of the recording, it is inadmissible.

¶39 However, our statutes have been amended since that case was decided. WISCONSIN STAT. § 968.29(3)(b) states that one-party consent recordings are admissible in a case "in which a person is accused of any act constituting a felony, and only if the party who consented to the interception is available to testify at the proceeding or if another witness is available to authenticate the recording." Von Haden's argument ignores the statute and therefore he has failed to show that the court's determination was unreasonable or not in accordance with legal standards or facts of record.

5. Independent Psychological Examination

¶40 Both prior to and during trial, Von Haden asked to have an independent psychological examination of Kelsey. Von Haden argues the court erred when it failed to consider whether, under ***Maday***, he was entitled to an independent medical examination of Kelsey. Consequently, he contends he is entitled to a new trial.

¶41 Under ***Maday***:

> When the state manifests an intent during its case-in-chief to present testimony of one or more experts, who have personally examined a victim of an alleged sexual assault, and will testify that the victim's behavior is consistent with the behaviors of other victims of sexual assault, a defendant may request a psychological examination of the victim. A defendant making such a request must present the court with evidence that he or she has a compelling need or reason for the psychological examinations.

Maday, 179 Wis. 2d at 359-60. ***Maday*** sets forth seven elements the court should consider to determine whether a defendant is entitled to the psychological examination: (1) the nature of the examination requested and the intrusiveness inherent in that examination; (2) the victim's age; (3) the resulting physical and/or emotional effects of the examination on the victim; (4) the probative value of the examination to the issue before the court; (5) the remoteness in time of the examination to the alleged criminal act; (6) the evidence already available for the defendant's use; and (7) based on the testimony of the defendant's named experts, whether or not a personal interview with the victim is essential before the expert can form an opinion, to a reasonable degree of psychological or psychiatric certainty, that the victim's behaviors are consistent with the behaviors of other victims of sexual abuse. ***Id.*** at 360. Whether a defendant has provided sufficient

evidence is a discretionary determination for the circuit court. ***State v. Rizzo***, 2002 WI 20, ¶43, 250 Wis. 2d 407, 640 N.W.2d 93.

¶42 Prior to trial, the State said it would not be asking Young-Verkuilen whether Kelsey's behavior was consistent with other victims of sexual abuse. Instead, it would only ask whether Kelsey was harmed. Thus, ***Maday*** did not apply at that point. ***Maday*** only applies when the State makes it clear it will offer evidence regarding whether a victim's behavior is consistent with other victims of the same or similar crimes. The State did not intend to present that type of evidence. Consequently, Von Haden was not entitled to an independent examination at that point and the court properly denied his request.

¶43 However, during trial Young-Verkuilen testified that Kelsey was a sexual abuse victim. The State concedes that this statement is no less likely to trigger ***Maday*** than a statement that Kelsey's behavior was consistent with sexual abuse victims. Thus, the State agrees that the court erred by not applying ***Maday*** at this point.

¶44 The State disagrees with Von Haden's assertion that a new trial is warranted as a result of the error. Instead, it maintains that the case should be remanded to the circuit court. We agree. On remand, Von Haden will have the opportunity to address the ***Maday*** factors. If the court determines that Von Haden has presented a compelling need or reason for the psychological examination, then he will be entitled to the examination. If the examination produces exculpatory evidence, Von Haden will be entitled to a new trial. Consequently, we remand the matter to the circuit court for a hearing consistent with ***Maday***. Obviously, if Von Haden fails to meet the ***Maday*** factors and the examination fails to produce exculpatory evidence, he would not be entitled to a new trial.

6. In Camera Review of Records

¶45 Prior to trial, Von Haden requested the court to review Young-Verkuilen's treatment records. Included in the record was a letter Young-Verkuilen drafted for discovery purposes summarizing her contacts with Kelsey. After the court reviewed the records, it stated that "there was nothing in there of relevance or exculpatory for the defense," so it sealed the records.

¶46 Von Haden argues the court erred by failing to make a finding that the letter provided by Young-Verkuilen fully summarized her records. He cites ***Rizzo***, 250 Wis. 2d 407, ¶48, for the proposition that the court was required to compare the letter with the records and specifically state that the letter accurately summarized the records. However, ***Rizzo*** does not mandate the court to make this comparison in a situation such as this. In ***Rizzo***, the victim's therapist testified that the victim behaved in a similar manner to other child victims of sexual assault. However, her summary did not state anything regarding a comparison between the victim and other victims of sexual assault. Rizzo wanted to review the treatment records in order to impeach the therapist's testimony. ***Id.***, ¶51. The court reviewed the treatment records and compared them with the summary and concluded there was nothing different in the summary than was in the records, nor was there anything exculpatory. Thus, Rizzo was not entitled to the records. ***Id.***, ¶48. The ***Rizzo*** court never addressed, however, whether a court must compare a summary of treatment records with the actual records it summarizes.

¶47 As in ***Rizzo***, the circuit court here found there was nothing relevant or exculpatory in the records. We are not persuaded that the court erred simply because it did not specifically state that Young-Verkuilen's letter accurately

summarized her records. Thus, Von Haden is not entitled to a new trial on this basis.

7. Sentence Modification

¶48 Von Haden was sentenced to a total of eighteen months' initial confinement and twelve and a half years' extended supervision. Von Haden subsequently filed a sentencing memorandum asking the court to "modify sentence for extended supervision following incarceration from 12 to five to six years."[5] The memorandum asked the court to allow the Department of Corrections to consider this memorandum when formulating a treatment and supervision plan for him. Von Haden was denied visitation rights with his grandchildren under the age of five, and the memorandum stated that this provision was "based on misguided opinions and/or a lack of information."

¶49 The circuit court first stated that Von Haden had not presented anything to show that the sentence was unduly harsh or unconscionable. Therefore, it denied Von Haden's request to modify his sentence. Second, the court stated that it had no authority to direct the Department of Corrections regarding how it would establish Von Haden's treatment needs.

¶50 To obtain sentence modification, a defendant must establish that (1) a new factor exists, and (2) the new factor justifies sentence modification. ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). Whether a fact or set of facts constitutes a new factor presents a legal issue which we decide de novo. ***Id.*** Whether a new factor justifies sentence modification, however, presents

[5] The memorandum was written by Vicky Padway, a sentencing consultant, at the request of Von Haden's appellate attorney.

an issue for the trial court's discretionary determination, subject to our review under the erroneous exercise of discretion standard.

¶51 A new factor is a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of the original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties. ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). Further, a new factor is "an event or development which frustrates the purpose of the original sentence. There must be some connection between the factor and the sentencing—something which strikes at the very purpose of the sentence selected by the trial court." ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989).

¶52 Von Haden appears to believe that his sentencing memorandum is a new factor. However, he has not established that anything in the memorandum was not available to the court or did not exist prior to sentencing. Furthermore, nothing in the memorandum frustrates the purpose of the original sentence. The circuit court explained at sentencing that, "the most important aspect of sentencing in this case is the gravity of the offense." It also stated that "the offense, quite frankly, is indeed most serious. The state recognizes that. It's a 15-year felony. And insofar as imposing sentence, I'm satisfied that not to impose some confinement would unduly depreciate the seriousness of what happened here." Therefore, the purpose of the sentence was to recognize the harm Von Haden imposed on a young child. To reduce the amount of supervision following initial confinement simply because Von Haden wishes to see his grandchild would defeat the purpose of the sentence. Therefore, Von Haden is not entitled to sentence modification.

By the Court.—Judgment affirmed in part and cause remanded with directions.

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