COURT OF APPEALS DECISION DATED AND FILED

August 26, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

Appeal No. 2007AP1610-CR **Cir. Ct. No. 2004CF84**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD R. VERMAAT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Taylor County: GARY L. CARLSON, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Donald Vermaat appeals a judgment of conviction on one count of sexual assault of a child under age thirteen and an order denying his motion for postconviction relief. Vermaat contends he received ineffective assistance of counsel. He also asserts the trial court impermissibly limited his

cross-examination of a witness. Because we conclude counsel was not deficient and the trial court did not err, we affirm the judgment and order.

Background

¶2 Vermaat went to live with his father, Donald Vermaat, Jr.,[1] and Junior's girlfriend, Darla J., in June or July 2004. Darla's three minor children—Jonathan, Samantha, and Susan—also lived in the home. Junior was a truck driver and was not home often. Samantha and Susan shared bunk beds in their room with Susan on the top bunk; Vermaat slept on a couch in the living room.

¶3 Susan recounted that some night around September 1, 2004, she was alone in her bedroom because Samantha was sleeping in Darla's room. Someone entered Susan's room and put her blanket over her shoulders. Then, the person jumped on top of the bed and used his hand to touch her "in her private" underneath her underwear. The person touched her for a minute, then jumped off the bed and went to the bathroom to wash up. After that, she heard the person lay on the couch. Susan did not see who the person was, but assumed it was Vermaat; Junior was supposed to be driving.

¶4 Susan stated she went to Darla's room and told her what happened. Darla did not report the assault. Some time later, Susan told her aunt what happened and her aunt contacted a social worker and called police. Vermaat was arrested and charged.

[1] Although not so captioned on appeal, the appellant is Donald Vermaat, III. Because the facts require that we mention his father—Donald Vermaat, Jr.—multiple times, we will refer to the defendant as Vermaat and his father as Junior.

¶5 At trial, Darla testified that Susan had in fact come into her bedroom and told her what happened. Darla asked no questions because Susan was half asleep. She testified that she did not report the incident because she previously lost custody of the girls for about a year and was afraid they would be taken again. She also told a social worker she was afraid of Junior's reaction. Both Darla and Samantha testified that Samantha slept in the room with Susan that night, not with Darla.

¶6 Social worker Kathy Tingo, who interviewed Susan, testified that in her professional opinion, Susan's story was consistent throughout the interview. Tingo also testified about her telephone conversations with Junior. In their first conversation, Tingo called the residence. Junior told her Vermaat sleepwalks and had probably ended up in Susan's bedroom, putting an arm over her by mistake. In a second call Tingo placed, Junior told Tingo that Vermaat admitted touching Susan but told his father he had probably been sleepwalking. In a third conversation, Junior told Tingo that Vermaat admitted putting his finger on Susan's inner thigh. Junior also testified, but denied telling Tingo his son sleepwalks, and denied having the second and third conversations.

¶7 Vermaat testified, denying he had sexual contact with Susan. He thought he got along well with the children and was shocked by Susan's accusation. He also testified that he thought the upper bunk would not have supported his weight.

¶8 The jury convicted Vermaat, and the trial court sentenced him to twenty years' initial confinement and ten years' extended supervision. Vermaat filed a postconviction motion seeking a new trial on the basis of ineffective

assistance of counsel. After a hearing on the motion, the court denied Vermaat's request. Vermaat appeals.

I. Ineffective Assistance of Counsel

¶9 To demonstrate ineffective assistance of counsel, a defendant must show counsel's performance was deficient and that the deficiency prejudiced the defense. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. Deficient performance and prejudice both present mixed questions of fact and law. ***Id.*** We uphold the circuit court's factual findings unless clearly erroneous. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. Whether counsel's performance is deficient or prejudicial is a question of law we review de novo. ***Jeannie M.P.***, 286 Wis. 2d 721, ¶6.

¶10 A lawyer's performance is deficient if counsel's conduct "falls below 'an objective standard of reasonableness.'" ***Id.***, ¶7 (citation omitted). We are highly deferential to counsel's strategic choices, and we take care to "avoid the 'distorting effects of hindsight.'" ***Thiel***, 264 Wis. 2d 571, ¶19 (citation omitted). "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." ***State v. Williquette***, 180 Wis. 2d 589, 605, 510 N.W.2d 708 (Ct. App. 1993), *aff'd & remanded,* 190 Wis. 2d 677, 526 N.W.2d 144 (1995).

¶11 To demonstrate prejudice, a 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). A defendant need not demonstrate that, but for counsel's error, there would certainly have been a different result, only that

counsel's errors had an actual adverse effect on the defense. *See* ***State v. Franklin***, 2001 WI 104, ¶14, 245 Wis. 2d 582, 629 N.W.2d 289.

¶12 We may begin our analysis with either the deficient performance or the prejudice prong. Because both elements must be shown to establish ineffective assistance of counsel, failure to prove one of them necessarily defeats the claim and permits us to end our review. *See* ***State v. Williams***, 2000 WI App 123, ¶22, 237 Wis. 2d 591, 614 N.W.2d 11.

A. Failure to Object—Consistency Testimony

¶13 Social worker Tingo testified that Susan had been "consistent" in her narratives of the incident with Vermaat. Vermaat argues counsel should have objected because such testimony is improper under ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984). In ***Haseltine***, we held inadmissible a psychiatrist's expert testimony that he had "no doubt whatsoever" the defendant's daughter was an incest victim. ***Id.*** at 95-96. Experts are not permitted to testify that another competent witness is telling the truth. ***Id.*** at 96. Vermaat asserts that by testifying Susan's stories were consistent, Tingo was essentially telling the jury Susan was being truthful. We disagree.

¶14 To determine whether certain testimony is contrary to ***Haseltine***, we examine the testimony's purpose and effect. ***State v. Tutlewski***, 231 Wis. 2d 379, 388, 605 N.W.2d 561 (Ct. App. 1999). Ordinarily, witness credibility is something lay jurors can determine without the aid of expert testimony. ***Haseltine***, 120 Wis. 2d at 96. But courts often admit expert testimony to help juries avoid making their decisions on misconceptions. *See* ***State v. Jensen***, 147 Wis. 2d 240, 252, 432 N.W.2d 913 (1988).

¶15 Here, the purpose of Tingo's testimony was to explain her interview technique. Tingo was trained in and utilized the "step-wise" method. She indicated the technique is designed to minimize trauma to children by maximizing information obtained in the first interview. It involves asking the interview subject the same question in multiple formats, and the interviewer looks for indicia of both consistency and inconsistency. Tingo also testified that the technique is designed to minimize contamination of the interview—that is, to minimize the chance that the interviewer will somehow suggest answers.

¶16 It is true that Tingo stated the technique involves looking for verbal and physical cues that a child may or may not be truthful. But Tingo only testified that, in her opinion, Susan's statements were consistent. Consistent is not the same as truthful, and counsel highlighted this on cross-examination. Susan consistently maintained that Samantha had gone to sleep in Darla's room even though both Samantha and Darla insisted Samantha remained in the room with Susan. Tingo admitted that knowing this information might have caused her to rethink her conclusion about the interview.

¶17 Ultimately, Tingo's opinion was not one of truthfulness, and it was therefore not a ***Haseltine*** violation.[2] The jury was still charged with determining

[2] Tingo had also testified Susan's interview was consistent with that of other sexual assault victims. Vermaat attacks the State's questioning—asking about the interview, not Susan's behavior—but Tingo's answer was about Susan's behavior and its consistency with that of other victims. That type of testimony is admissible under ***State v. Jensen***, 147 Wis. 2d 240, 432 N.W.2d 913 (1988).

Vermaat also complains about Tingo's testimony that some of Susan's statements were corroborated by information from others, who Tingo never identified. Vermaat contends this improperly bolstered Susan's credibility. The State did not respond to this argument, but Vermaat does not suggest we invoke a concession rule. In any event, it is apparent that Tingo was primarily explaining her interview technique, not offering an opinion on Susan's veracity.

Susan's credibility—whether she was consistent in truthfulness or consistent in deceit was not something Tingo testified about. Because Tingo's testimony was admissible, counsel was not deficient for failing to object to it.

B. Failure to Object—Foundation

¶18 Tingo testified about three telephone conversations with Vermaat's father, Junior. Tingo placed the first two calls to Darla's home, and Junior purportedly called Tingo the third time. As indicated, in the first call, which Vermaat does not challenge, Junior told Tingo that Vermaat sleepwalks. In the second call, Junior reportedly told Tingo that Vermaat admitted touching Susan, but most likely by accident while sleepwalking. In the third call, Junior stated Vermaat admitted putting his finger on Susan's inner thigh. But Junior, who testified before Tingo, denied there was a second or third call.

¶19 Vermaat contends it was "incumbent upon the State to prove that Junior actually made the calls he denied making as a condition precedent to Tingo's testimony about the content of those calls." He asserts the State's failure to produce either phone records of the calls or evidence that Tingo could identify Junior's voice means the calls were unauthenticated and counsel was therefore deficient for failing to object.[3]

¶20 Telephone conversations can be authenticated by circumstantial evidence. WIS. STAT. § 909.015(6)(a); ***Campbell v. Wilson***, 18 Wis. 2d 22, 30 n.1, 117 N.W.2d 620 (1962). "Where the message itself reveals that the speaker has

[3] Vermaat appears to concede that the calls would be admissible under a hearsay exception provided the proper foundation of authentication could be laid.

knowledge of facts which only the person whose name he has used would be likely to know, this is sufficient authentication." ***Campbell***, 18 Wis. 2d at 30 n.1; *see also* 2 MCCORMICK ON EVIDENCE 52 (John W. Strong, et. al., 5th ed. 1999).

¶21 Tingo would have been able to lay a foundation for the second and third phone calls. As to the second call, Tingo called Junior's residence and a man answered. Circumstance suggests it was Junior, because he and Vermaat were the only adult male residents of the home. Further, both calls included details about the case that strangers to the situation likely would not have known, but Junior would have.

¶22 Moreover, the defense strategy was to cast doubt on the identity of the assailant, not to deny the assault. Susan had only assumed Vermaat touched her. Counsel testified he did not object to Tingo's testimony because it appeared to bolster the theory that it was actually Junior who committed the assault, and Junior was trying to deflect attention from himself while still exonerating Vermaat.

¶23 Vermaat appears to be asserting the defense would have been stronger if Junior had admitted to the calls, and counsel was therefore deficient for failing to abandon this defense once Junior denied them. However, counsel's strategic choice was reasonable. Tingo's testimony allowed counsel to further impugn Junior's credibility to the jury and argue that, as the guilty party, Junior had a compelling reason for shifting the blame to Vermaat. Because Tingo's testimony assisted counsel's strategy, counsel was not deficient for failing to object.

II. Limitations to Cross-Examination

¶24 Darla indicated that she did not immediately report Susan's accusation because she had previously lost custody of her daughters and feared the same thing could happen again. On cross-examination, Vermaat attempted to ascertain why Darla lost custody. The court sustained the State's relevancy objection. Vermaat asserts this improperly restricted his right to present a defense and denied him the right to confrontation.

¶25 The trial court's decision to admit or exclude evidence is generally a discretionary determination that we will not upset absent an erroneous exercise of discretion. ***State v. Smith***, 2002 WI App 118, ¶7, 254 Wis. 2d 654, 648 N.W.2d 15. Whether the defendant has been denied the right to confrontation is a question of constitutional fact. ***Id.*** While we do not upset the trial court's findings of historical facts, determining whether those facts fulfill constitutional mandates is a question of law we review independently. *See* **id.**, ¶8; *see also* ***State v. Williams***, 2002 WI 58, ¶7, 253 Wis. 2d 99, 644 N.W.2d 919. Whether an evidentiary ruling violated a defendant's right to present a defense is also a question of constitutional fact. *See* ***Williams***, 253 Wis. 2d 99, ¶69.

¶26 The opportunity for effective cross-examination is the crux of the right to confrontation. ***State v. Echols***, 175 Wis. 2d 653, 677, 499 N.W.2d 631 (1993). But the confrontation clause only guarantees the *opportunity* for effective cross-examination, "not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." ***Delaware v. Fensterer***, 474 U.S. 15, 20 (1985) (per curiam). Further, a defendant's right to present relevant evidence is not unfettered. *See* ***United States v. Scheffer***, 523 U.S. 303, 328-30 (1998).

"[T]here is no constitutional right to present irrelevant evidence." ***State v. Cardenas-Hernandez***, 219 Wis. 2d 516, 536, 579 N.W.2d 678 (1998).

¶27 To demonstrate the exclusion of evidence violated his right to present a defense, Vermaat must show the evidence was "essential" to the defense and that, without the proffered evidence, he had "no reasonable means of defending his case." ***Williams***, 253 Wis. 2d 99, ¶70. Here, Vermaat cannot show why the reason Darla lost custody is essential to his defense or that excluding that information deprived him of the opportunity to defend his case. Again, his defense was that Junior assaulted Susan. The reason Darla lost custody sheds no light on the identity of the assailant.

¶28 In any event, Vermaat was given a chance to finish his cross-examination, asking Darla what it was "about the previous incident in which you lost custody of your kids that [made you think] that you would be exposed again to that?" Darla was not able to draw any parallels between the previous situation and the present one; she was only able to answer that she was scared. This permitted Vermaat to argue that Darla had no credible reason for failing to report Susan's assault, unless she was protecting Junior. Thus, the court's decision to exclude the reason Darla previously lost custody neither deprived Vermaat of a defense nor violated his confrontation right.[4]

[4] Vermaat also wanted to argue there was evidence Susan had previously told her mother of another assault. However, this assault was allegedly of Samantha, not Susan, and involved Darla's unidentified ex-husband. This information is irrelevant.

By the Court.—Judgment and order affirmed.

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