

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 9, 2010**

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 Nos. 2008AP1952-CR  
2008AP1953-CR**

**Cir. Ct. Nos. 2005CF123  
2006CF75**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TODD RICHARD LONDON,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Pierce County: ROBERT W. WING, Judge. *Affirmed.*

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

¶1 PER CURIAM. Todd Richard London appeals a judgment convicting him of two counts of sexually assaulting his daughter. He also appeals an order denying his postconviction motion without a hearing. He argues: (1) his

trial counsel was ineffective for failing to introduce evidence to show why the victim would fabricate sexual assault allegations; (2) counsel failed to challenge the victim's credibility by presenting expert testimony contradicting her claims of physical abuse and injury; (3) counsel failed to call an expert witness to inform the jury of the significance of the delay in reporting the sexual assaults and the victim's initial denial that any assault occurred; (4) counsel failed to offer expert testimony from Dr. Harlan Hienz regarding the interview techniques and family structures that might contribute to false allegations; (5) he was entitled to a hearing on his postconviction motion; and (6) the State presented insufficient evidence to support the verdicts because the victim's testimony was incredible as a matter of law and there was no physical evidence or corroborating evidence to support the allegations. We reject these arguments and affirm the judgment and order.

## **BACKGROUND**

¶2 The allegations came to light when the victim wrote essays in a creative writing class that described inappropriate conduct. When she was initially questioned by a social worker and police, she denied any sexual misconduct occurred. She later described an incident of sexual intercourse with London, but denied any other incidents. In a subsequent interview, she alleged an additional incident of sexual contact with London.

¶3 The victim testified the first incident occurred when her father and stepmother came home from a party. Her stepmother went into the bedroom followed by her father who appeared angry. The victim looked through a crack in the door and saw her father strike her stepmother in the temple knocking her to the floor unconscious. He then found the victim, grabbed her by the hair and dragged her to the bed where he had intercourse with her. She also testified he hit her in

the back with his fist during the incident. After he left the room, the victim revived her stepmother and took her upstairs to the victim's bedroom. The victim then came back downstairs and slept on the couch. On cross-examination, the victim said a lump on her stepmother's head that was visible on the night of the incident "disappeared" the next day. Relatives who saw them the next day did not observe any signs of physical abuse.

¶4 The victim also described the second incident of sexual contact. While she was sitting on a couch watching television, her father and stepmother came home and went into the bedroom. Her father came out of the bedroom and touched the victim's breasts and crotch area. He also slapped her and choked her with one hand. London's wife then came into the room and told him to stop. The victim then ran upstairs.

## DISCUSSION

¶5 London's postconviction motion raised numerous claims of ineffective assistance of counsel. To establish ineffective assistance of trial counsel, London must show deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish prejudice, London must establish a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. A reasonable probability is one that undermines our confidence in the outcome. *Id.* at 694.

¶6 London first argues his attorney should have called a witness to show why the victim would fabricate the allegations of sexual assault. However, London does not provide any reason the victim would lie and does not identify any expert who could provide testimony regarding the reason. London argues his counsel should have "pursued and presented evidence that [the victim] was lying

or that her statement was fabricated as that evidence exists in the form of expert testimony.” Expert testimony that another witness was or was not telling the truth is not admissible. *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984).

¶7 London next faults his attorney for failing to present expert testimony to contradict the victim’s testimony regarding injuries she and her stepmother suffered as a result of London’s physical abuse. He contends visible signs of the abuse would have been present the day after they occurred. London’s trial counsel called three witnesses to establish the lack of bruises or other signs of physical abuse. Expert testimony is not required on this issue because cuts and bruises are within the common experience of the jurors. London established neither deficient performance nor prejudice from his counsel’s reliance on the observations of the lay witnesses.

¶8 London next faults his trial counsel for failing to call an expert witness to discuss the significance of the victim’s delay in reporting the allegations and her initial denial that sexual activity occurred. The purpose of presenting evidence of that sort is to disabuse the jury of commonly held misperceptions that a delay in reporting and initial denials undermine the accuser’s testimony. *See, e.g., State v. Robinson*, 146 Wis. 2d 315, 335, 431 N.W.2d 165 (1988); *State v. Jensen*, 147 Wis. 2d 204, 250, 432 N.W.2d 913 (1988). London’s postconviction motion fails to identify any expert witness who would support his apparent belief that the common misperceptions identified in *Robinson* and *Jensen* are actually legitimate reasons for doubting the accusations.

¶9 London next argues his attorney was ineffective for failing to call an expert witness such as Dr. Hienz to discuss problematic effects of multiple

interviews and that the victim's empathy with her stepmother following incidents of physical abuse might explain the allegations of sexual abuse. The trial court properly concluded Hienz's report was based on speculation and would not be helpful to the jury. Hienz noted that multiple interviews might become problematic if the earlier interviews were improperly suggestive. Because the first interview was not taped, Hienz offered no opinion regarding suggestibility. Hienz did not fault the interviewing technique for the remaining interviews.

¶10 Hienz's report also expressed concern about any conversations the victim may have had with others and the possible effects of the victim's feelings toward her stepmother. In each instance, the report referred to activities that "may have" occurred. The final paragraph of Hienz's report concluded there were "too many questions left unanswered," and "due to the multiple interviews with periods of long delay between, interviews may cause a child's responses to be contaminated and a valid assessment at this point would be difficult, if not impossible." Hienz's conclusion that he is unable to assess whether the victim's account of the incidents may have been contaminated supports the trial court's conclusion that his testimony would not have aided the jury. Therefore, London did not establish deficient performance or prejudice from his counsel's failure to present that evidence.

¶11 The court denied London's postconviction motion without a hearing. The court may deny a motion without a hearing if the motion is conclusory, or if the facts alleged in the motion, if true, would not warrant relief, or if the record conclusively demonstrates that the moving party is not entitled to relief. *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). The material facts contained in the motion must include the details of who, what, where, when, why and how the alleged facts entitle him to relief. *State v. Allen*, 2004 WI 106, ¶2,

274 Wis. 2d 568, 682 N.W.2d 433. The trial court properly denied London's postconviction motion without a hearing because the motion is in part conclusory, in part fails to establish the availability of expert witnesses to support London's claims, and in part relies on a report by Dr. Hienz that engaged in speculation. The report describes the significance of facts that are not established in this case and recites the general principles that would not be helpful to the jury in resolving the credibility issues presented in this case.

¶12 Finally, the State presented sufficient evidence to support the convictions. The victim's testimony, if believed by the jury, was sufficient to establish all of the elements of two counts of sexual assault of a child. It is the jury's province to consider the credibility of witnesses and determine the weight given their testimony. *Wheeler v. State*, 87 Wis. 2d 626, 634, 275 N.W.2d 651 (1979). Neither physical nor corroborating evidence is necessary to support the conviction. London contends the victim's testimony regarding physical abuse could not have occurred because of the absence of cuts or bruises the next day. The victim's testimony is not incredible as a matter of law because it is not in conflict with the laws of nature or conceded facts. *See Chapman v. State*, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975). It was the jury's function to determine the severity of the injuries and the ability of witnesses to observe and recall any cuts or bruises. In addition, the physical injuries are not elements of the offenses charged. Even if the jury doubted aspects of the victim's testimony, it could believe the parts of the testimony that relate to the crimes charged. *See State v. Toy*, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985).

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

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

