COURT OF APPEALS
DECISION
DATED AND FILED

July 7, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP340-CR **Cir. Ct. No. 2006CF432**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

COREY A. SADOWSKI,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Neubauer, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Corey A. Sadowski has appealed from judgments convicting him of one count of the repeated sexual assault of the same child in

violation of WIS. STAT. § 948.025(1) (1997-98),[1] and two counts of child abuse in violation of WIS. STAT. § 948.03(2)(b). He has also appealed from an order denying his amended postconviction motion for a new trial. We affirm the judgments and order.

¶2 The sexual assault conviction was based upon evidence that on three occasions between March 1 and October 31, 1999, Sadowski sexually assaulted Holly A.H., the nine-year-old daughter of Sadowski's live-in girlfriend at the time. The physical abuse convictions were based upon evidence that during this same time period, Sadowski struck Holly and her younger sister, Amanda S.H., with a hockey stick.

¶3 At trial, Holly testified regarding three incidents that led to the sexual assault charge. She testified that the first incident occurred in the bedroom Sadowski shared with her mother. She testified that she was clothed and that Sadowski had her get into bed with him, took off his pants, and made her move her hand and then her mouth up and down on his erect penis. She testified that Sadowski also rubbed his penis over her vaginal area.

¶4 Holly also testified regarding another incident (the second incident) in which Sadowski had her sit next to him on the couch while he turned a pornographic show on television, and then rubbed her vaginal area over her

[1] Sadowski was convicted of crimes committed between March 1 and October 31, 1999. The offense dates, the labeling of Sadowski's conviction for the repeated sexual assault of the same child as a Class B felony, and the jury instructions given at trial, are all consistent with Sadowski having been convicted under the 1997-98 version of the Wisconsin Statutes, not the 2007-08 version of WIS. STAT. § 948.025 cited by Sadowski in his appellant's brief. Consequently, all references to the Wisconsin Statutes under which Sadowski was convicted are to the 1997-98 version of the statutes. All other statutory references are to the 2007-08 version of the Wisconsin Statutes.

clothes. Finally, she testified concerning an incident that occurred when Sadowski made her take a shower with him after doing yard work (the third incident), rubbing soap over her body and groping her breasts, vagina and "butt."

¶5 Sadowski's first argument on appeal is that the trial court erred when it allowed the prosecutor to refresh Holly's memory regarding the second incident when she had not testified to insufficient recollection of the incident, and had instead testified that no sexual contact occurred. He relies on WIS. STAT. § 908.03, providing:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> ….
>
> (5) RECORDED RECOLLECTION. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made when the matter was fresh in the witness's memory and to reflect that knowledge correctly.

¶6 In ***Harper, Drake & Assocs., Inc. v. Jewett & Sherman Co.***, 49 Wis. 2d 330, 342, 182 N.W.2d 551 (1971), the Wisconsin Supreme Court explained the difference between the doctrine of present recollection refreshed and the hearsay exception for past recollection recorded:

> Under the doctrine of present recollection refreshed, a witness may look at a writing to refresh his [or her] memory and then testify in his [or her] own words as to the contents of the writing. Before this is allowed, however, the witness must be able to state, after looking at the writing, that he [or she] now recalls the facts therein on the basis of his [or her] own independent (although refreshed) recollection. If a witness can state that he [or she] has such an independent recollection, then he may testify to the facts in the writing and his [or her] testimony—not the writing itself—is admitted to evidence.

> If, on the other hand, a witness looks at a writing and it does not revive or refresh his [or her] memory to the extent that he [or she] can claim an independent recollection of the facts therein—then and only then—the writing itself and not the witness' testimony may come into evidence. This second situation (where he [or she] has no independent recall) is governed by the rule of past recollection recorded. (Footnote omitted.)

¶7 Based upon these standards and the testimony at trial, it is clear that Holly's testimony was properly admitted under the doctrine of present recollection refreshed. In response to the prosecutor's question as to whether a second incident occurred between March and October 1999, Holly testified that Sadowski put pornography on the television and told her to sit next to him on the couch. The prosecutor asked Holly whether anything happened while she sat next to Sadowski on the couch and Holly said "no." The prosecutor then asked: "Did you report previous to today anything happening while the porn was on the television?" and Holly replied, "I don't remember." The prosecutor then asked Holly whether she recalled testifying previously in this matter and she said, "Yes." Holly also replied affirmatively when the prosecutor asked her whether it would be fair to say that her memory at that hearing would have been more recent and more fresh than it was at present, and whether it would help refresh her recollection if the prosecutor showed her a transcript of her testimony at that hearing.

¶8 The trial court overruled Sadowski's objection that there was no foundation for refreshing Holly's recollection. The prosecutor then again asked Holly whether she remembered "anything else happening during that incident besides the pornography on the television," and Holly replied that she did not remember. Holly then testified that she remembered testifying about this incident previously, and that it would help refresh her recollection regarding the incident if she was shown her testimony from the previous hearing. The prosecutor then gave

Holly a page to review from the preliminary hearing transcript. Holly stated that she remembered giving that testimony. When asked whether reviewing the testimony now had refreshed her recollection as to her prior testimony, Holly answered "yes." She also testified that she had no reason to be lying at that hearing, and that based upon refreshing her recollection with the transcript, she now recalled what she had told them had happened during the pornography incident. When asked what happened, Holly replied that Sadowski touched and rubbed her vagina over her clothes while watching the television.

¶9 This record establishes that the prosecutor did not give Holly the transcript for review until Holly testified that she did not remember whether anything else had happened during the pornography-viewing incident and that reviewing her prior testimony would help refresh her recollection. The record also establishes that, after reviewing her prior testimony, Holly testified from her refreshed memory and independent recollection of what happened when she sat next to Sadowski on the couch while watching the pornographic movie. Consequently, the trial court properly exercised its discretion when it admitted the testimony.[2] *See* ***State v. Wind***, 60 Wis. 2d 267, 274-75, 208 N.W.2d 357 (1973).

¶10 Sadowski's next argument on appeal is that he was entitled to dismissal of the charge under WIS. STAT. § 948.025(1) because the evidence was insufficient to establish that the three sexual assault incidents discussed by Holly occurred between March 1 and October 31, 1999, the time frame alleged in the information. The test for the sufficiency of the evidence on a motion to dismiss in

[2] The transcript of the preliminary hearing testimony was not admitted into evidence, nor was the preliminary hearing testimony read into the record. WISCONSIN STAT. § 908.03(5) therefore is not implicated.

the trial court is the same as the test for the sufficiency of the evidence on appeal. ***State v. Scott***, 2000 WI App 51, ¶12, 234 Wis. 2d 129, 608 N.W.2d 753. The test is whether, considering the State's evidence in the most favorable light, the evidence adduced, believed and rationally considered, was sufficient to prove the defendant's guilt beyond a reasonable doubt. ***Id.***

¶11 Pursuant to WIS. STAT. § 948.025(1), whoever commits three or more violations under WIS. STAT. § 948.02(1) or (2) within a specified period of time involving the same child is guilty of a Class B felony. Sadowski contends that the jury could not find that the three incidents described by Holly occurred during the requisite time period because Holly testified on cross-examination that one of the three incidents could have occurred outside the time frame in question. Sadowski also contends that, even though Holly's testimony indicated that he committed three separate acts of sexual assault during the first incident in his bedroom, this was insufficient to support a conviction under § 948.025(1) because all three acts occurred during the same single incident.

¶12 We reject both of Sadowski's arguments. When deciding whether a defendant has committed three or more violations of WIS. STAT. § 948.02(1) or (2) for purposes of convicting under WIS. STAT. § 948.025(1), a jury is required to unanimously agree that at least three violations occurred within the requisite time period, but does not have to agree on which acts constitute the required number. Sec. 948.025(2).

¶13 Based on Holly's testimony, the jurors could have found that the bedroom, pornography, and shower incidents all occurred between March 1 and October 31, 1999. Holly testified on direct examination that all three incidents occurred between March 1 and October 31, 1999. It was only during cross-

examination that she testified that the shower incident could have been in October or November.[3] On redirect, she clarified that the shower incident had to be "summer, spring, or fall because it wasn't cold outside, because [they] were … working outside."

¶14 Holly's testimony on cross-examination indicating that the shower incident could have occurred in October or November was evidence for the jury to consider. However, based on Holly's other testimony indicating that all three incidents occurred between March 1 and October 31, 1999, her testimony on cross-examination did not compel a finding that the shower incident occurred after October 31, 1999. It was the jury's function to decide issues of credibility, weigh the evidence, and resolve conflicts in the testimony, including inconsistencies and contradictions in an individual witness's testimony. ***State v. Poellinger***, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (1990); ***Kohlhoff v. State***, 85 Wis. 2d 148, 154, 270 N.W.2d 63 (1978). In addition, the jury was clearly instructed that, in order to convict Sadowski of the sexual assault charge, it had to find that at least three sexual assaults took place with the specific time period of March 1, 1999 through October 31, 1999. Based upon the testimony, the jurors could reasonably conclude that the bedroom, shower, and pornography incidents all occurred between March 1 and October 31, 1999.

[3] On cross-examination, Sadowski's attorney referred to the shower incident as the "second incident" and said "so it would have been in October or November." After expressing confusion, Holly ultimately responded that it "could have been October or November." Sadowski's attorney then asked Holly about her preliminary hearing testimony, in which the pornography incident was the third incident to which she testified. However, on redirect Holly indicated that she had not meant her preliminary hearing testimony about the three incidents to be in any specific order, even though it came out that way.

¶15 In any event, even if the jurors did not believe that the bedroom, shower, and pornography incidents all happened by October 31, 1999, they could still convict Sadowski of violating WIS. STAT. § 948.025(1). As noted by the trial court, Holly testified to three separate acts of sexual intercourse and sexual contact during the first incident alone. She testified that while she was in Sadowski's bedroom, he rubbed his penis over her vaginal area, and made her move both her hand and her mouth up and down on his erect penis. The latter act constituted sexual intercourse as proscribed by WIS. STAT. §§ 948.01(6) and 948.02(2). The other two acts constituted sexual contact as proscribed by §§ 948.01(5) and 948.02(2).

¶16 "[U]nder Wisconsin law the allegation of substitute facts, all of which furnish the same legal element of the crime, does not result in multiplicitous charges if these facts are either separated in time or are of a significantly different nature in fact." ***State v. Eisch***, 96 Wis. 2d 25, 31, 291 N.W.2d 800 (1980). Acts committed by a defendant that are significantly different in fact may properly be denominated separate crimes even though each would furnish a factual underpinning or a substitute legal element for a violation of the same statute. *See* ***id.*** at 34.

¶17 Although the conduct alleged during the first incident may have taken place within a relatively short period of time, the various acts committed by Sadowski were significantly different in fact. Each alleged act of sexual contact or intercourse—hand to penis, mouth to penis, penis to vagina—was different in nature from the others, involving different body parts of each actor and a separate, volitional act on the part of Sadowski. *See* ***id.*** at 36. Because each of Sadowski's acts was different in nature and required a separate volitional choice, each act constituted a separate violation of WIS. STAT. § 948.02(2). *See* ***Eisch***, 96 Wis. 2d

at 42; ***State v. Bergeron***, 162 Wis. 2d 521, 534-36, 470 N.W.2d 322 (Ct. App. 1991).

¶18 Sadowski argues that, even if the acts committed by him during the first incident in the bedroom could constitute three violations under WIS. STAT. § 948.02(2), WIS. STAT. § 948.025(1) does not apply to multiple separate acts committed during the same incident. We disagree.

¶19 In construing a statute, this court is not at liberty to disregard the plain, clear words of the statute. ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. WISCONSIN STAT. § 948.025(1) plainly provides that "[w]hoever commits 3 or more violations under s. 948.02(1) or (2) within a specified period of time involving the same child" is guilty of violating § 948.025(1). Nothing in the plain language of § 948.025(1) requires that the acts of sexual assault be separated by any particular length of time. Because the evidence indicated that Sadowski committed three acts of sexual assault of Holly under § 948.02(2) during the first incident in his bedroom, the evidence was sufficient to convict him of violating § 948.025(1).

¶20 Sadowski's final challenge to his conviction under WIS. STAT. § 948.025(1) pertains to the testimony of Julie McGuire, a social worker who was called as an expert witness by the State. Sadowski contends that "the trial court erred when it qualified Julie McGuire as an expert witness who could testify as to commonalities among child sexual assault victims thereby testifying in a manner that was tantamount to vouching as to the veracity of the alleged victim's story."

¶21 Although Sadowski's argument heading appears to challenge McGuire's qualifications as an expert witness, he develops no argument concerning her qualifications. This court is not required to consider arguments

that are undeveloped on appeal. ***Truttschel v. Martin***, 208 Wis. 2d 361, 369, 560 N.W.2d 315 (Ct. App. 1997). We therefore decline to consider Sadowski's contention that McGuire was not qualified to testify as an expert witness in this case. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (arguments that are not supported by legal authority will not be considered by the court).[4]

¶22 In his brief on appeal, Sadowski contends that McGuire's testimony was tantamount to testifying that Holly was telling the truth in violation of ***State v Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984). The record does not support this contention.[5]

¶23 No witness, expert or otherwise, is entitled to testify or opine that another mentally and physically competent witness is telling the truth. ***Id.*** at 96. However, if qualified under WIS. STAT. § 907.02, the testimony of an expert witness may include opinions regarding the symptomatology common to child sexual assault victims, including a description of the symptoms exhibited by the

[4] In any event, the admissibility of expert opinion testimony lies in the discretion of the trial court. ***State v. St. George***, 2002 WI 50, ¶37, 252 Wis. 2d 499, 643 N.W.2d 777. McGuire testified that she had a master's degree in social work, had been a forensic interviewer at the Children's Hospital of Wisconsin in Kenosha for five years, and had conducted over 900 forensic interviews of children when there was a concern about abuse or neglect, or the child had witnessed a crime. McGuire also testified that she had attended many continuing education programs. Under these circumstances, no basis exists to conclude that McGuire was unqualified to testify as an expert or that the trial court erroneously exercised its discretion by allowing her to testify as an expert witness in this case under WIS. STAT. § 907.02.

[5] The State argues that Sadowski waived his claim that McGuire improperly vouched for Holly's truthfulness by failing to object to McGuire's testimony based on ***State v Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984). Because we conclude that McGuire's testimony was proper, we need not address whether Sadowski's objection to the testimony was waived. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1993) (if this court determines that there is at least one sufficient ground to support a ruling, it need not address other potential grounds for supporting it).

victims and the expert's opinion as to whether the victim's behavior is consistent with the behavior of sexual assault victims. ***State v. Delgado***, 2002 WI App 38, ¶8, 250 Wis. 2d 689, 641 N.W.2d 490. Such testimony is not tantamount to vouching for the credibility of a victim. ***Id.***

¶24 Applying these standards here, no basis exists to conclude that McGuire improperly vouched for Holly's credibility. McGuire did not testify concerning Holly.[6] Instead, she testified about common characteristics of children who reported being sexually abused, including delayed reporting. She discussed causes of delayed reporting, the manner in which children remember and disclose information about sexual assaults, children's difficulties in recalling exact times and dates, the range of differences in the demeanor of children she had interviewed, and variances in whether perpetrators treat siblings differently from the children they assault. This testimony was admissible because it assisted the jury in understanding the evidence and determining whether a sexual assault occurred. *See* ***id.***, ¶¶7-8; ***Haseltine***, 120 Wis. 2d at 96-97. However, McGuire did not cross the line of permissible testimony by vouching for Holly's credibility.

¶25 Sadowski's final argument relates to his convictions for child abuse under WIS. STAT. § 948.03(2)(b). He relies on the testimony of Holly and Amanda indicating that Sadowski struck them both with a hockey stick in 1999, when they lived in an apartment on Seventh Avenue in Kenosha. Holly testified that she and Amanda had "walked to school because we saw a different bus, and we walked to school really early, and we came home. And Corey, the defendant,

[6] The only victim McGuire discussed was Amanda. McGuire testified that she interviewed Amanda, who reported being hit with a hockey stick. McGuire's testimony did not indicate that she ever had any contact with Holly.

was mad at us because he didn't know where we were. And he took us into Amanda's bedroom and hit us both with a hockey stick."

¶26 Amanda similarly testified that she and Holly walked to school on the day of the hockey stick incident because they thought they had missed the bus. She testified that she normally took the bus to school at that time, but that she and Holly saw a bus pass that day and thought it was theirs, and therefore walked to school. Amanda testified that Sadowski then came to school and told her and Holly to get in his car. According to Amanda, they then returned to the apartment, went into her bedroom, and Sadowski struck her with a hockey stick.

¶27 In his postconviction motion and on appeal, Sadowski contends that his trial counsel rendered ineffective assistance by failing to present evidence that the girls were not bussed to school from the Seventh Avenue apartment. He contends that such evidence would have undermined the girls' story about being hit with a hockey stick, including evidence that he had a motive for striking the girls because he was angry that they had walked to school.[7]

¶28 To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must establish that counsel's conduct fell below an objective standard of reasonableness. ***Id.*** at 687-88; ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. To prove prejudice, "the defendant must

[7] Sadowski contends that by undermining the girls' credibility on the child abuse charges, this evidence would also have undermined Holly's credibility concerning the sexual assault charge.

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.'" ***Thiel***, 264 Wis. 2d 571, ¶20. The critical focus is not on the outcome of the trial but on "the reliability of the proceedings." ***Id.*** We view the case from counsel's perspective at the time of trial. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

¶29 Appellate review of an ineffective assistance of counsel claim presents a mixed question of law and fact. ***State v. McDowell***, 2004 WI 70, ¶31, 272 Wis. 2d 488, 681 N.W.2d 500. The trial court is the ultimate arbiter of witness credibility. *See* ***State v. Marty***, 137 Wis. 2d 352, 359, 404 N.W.2d 120 (Ct. App. 1987), *overruled on other grounds by* ***State v. Sanchez***, 201 Wis. 2d 219, 548 N.W.2d 69 (1996). An appellate court will not overturn a trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy unless the findings are clearly erroneous. ***State v. Knight***, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540 (1992). However, the ultimate determination of whether counsel's performance satisfies the constitutional standard for ineffective assistance of counsel presents a question of law. ***Thiel***, 264 Wis. 2d 571, ¶21.

¶30 In analyzing an ineffective assistance claim, we may choose to address either the deficient performance prong or the prejudice prong. ***State v. Williams***, 2000 WI App 123, ¶22, 237 Wis. 2d 591, 614 N.W.2d 11. Because Sadowski has failed to establish that his trial counsel's representation was deficient, we do not address the prejudice prong. *See* ***id.***

¶31 In postconviction proceedings, Sadowski presented evidence that the Seventh Avenue apartment was less than one mile from the elementary school the

girls attended in 1999, and that school district policy at that time was to bus children only if they resided two or more miles from school, or under other special circumstances not present here. Sadowski testified at the postconviction hearing that in 1999 the girls walked to school if he or their mother did not give them a ride. At the postconviction hearing, Sadowski and his current wife also testified that they watched the videotaped interview of Amanda with trial counsel in counsel's office before trial, and that while doing so, Sadowski told his trial counsel that the girls never took the bus to school. Sadowski testified that he raised the subject with trial counsel again after the meeting by telephone, and once during the trial. Sadowski contends that his trial counsel therefore rendered ineffective assistance when he did not investigate whether the girls took a bus to school, and present evidence indicating that they did not do so.

¶32 A trial attorney has a duty to make either a reasonable investigation or a reasonable decision that an investigation is unnecessary. ***Strickland***, 466 U.S. at 691. A particular decision not to investigate must be directly assessed for reasonableness in all of the circumstances, applying a heavy measure of deference to counsel's judgment. ***Id.*** However, an attorney's failure to investigate potential evidence known to the defendant does not constitute ineffective assistance if the defendant himself did not inform counsel of the existence of such evidence. *Cf.* ***State v. Hubanks***, 173 Wis. 2d 1, 26-27, 496 N.W.2d 96 (Ct. App. 1992).

¶33 Sadowski's trial counsel testified at the postconviction hearing as required by ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Trial counsel testified that he did not recall Sadowski telling him that Holly and Amanda did not take the bus to school. He also explained that when he is retained by a client, he has the client write out the client's version of what happened and all of the facts the client thinks are important for counsel to know.

Counsel testified that he uses this information in determining what to investigate. He testified that if a client brings something to his attention later in his representation, he again tells the client to write it out. Counsel explained that he always tells clients to write down information that they want counsel to consider and give it to counsel, and that he does so to avoid arguments about what he was told by a client.

¶34 Trial counsel testified that it was "possible, but not likely" that Sadowski said something to him about the bus and he did not recall. He testified that this was unlikely because he would have told Sadowski to write it in the notes. Counsel testified that Sadowski wrote notes for him in a steno book, including statements about the child abuse, but did not mention bussing.

¶35 Counsel also did not recall Sadowski saying anything about the bus during the trial, although he acknowledged that it was a possibility because "[a]s the trial was going on, Mr. Sadowski was coming up with more things at trial that I hadn't heard prior to trial." However, counsel also testified that he had a note from Sadowski from the jury trial, and it did not mention anything about the bus.

¶36 At the conclusion of the ***Machner*** hearing, the trial court denied Sadowski's motion, concluding that he had not been denied effective assistance of counsel. In doing so, it relied upon trial counsel's testimony that he did not recall Sadowski telling him that the girls did not take the bus to school, and found that counsel's testimony was "corroborate[d]" by the fact that neither Sadowski's notebook nor his trial note mentioned that the girls did not take the bus to school.

¶37 Although the trial court did not explicitly find that Sadowski never told his trial counsel that the girls did not take the bus to school, it implicitly made this finding when it discussed trial counsel's testimony that he did not recall

Sadowski telling him about the bus, and the fact that the written notes did not mention the bus. *See* ***Hubanks***, 173 Wis. 2d at 27 (although the trial court did not make specific findings of fact, this court may assume that such findings of fact were implicitly made in support of its conclusion that the defendant received effective assistance of counsel).

¶38 Credibility determinations were for the trial court. ***Id.*** The trial court's finding that Sadowski did not tell his trial counsel that the girls did not take the bus to school is supported by the testimony of trial counsel and the evidence regarding the notes written by Sadowski. The finding therefore is not clearly erroneous. Because trial counsel had no duty to investigate the matter if Sadowski did not tell him that the girls did not take the bus, no basis exists to conclude that trial counsel rendered ineffective assistance, and the trial court properly denied Sadowski's postconviction motion for a new trial.

By the Court.—Judgments and order affirmed.

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