COURT OF APPEALS
DECISION
DATED AND FILED

August 11, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP469-CR **Cir. Ct. No. 2005CF664**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MANUEL SALGADO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Manuel Salgado appeals from a judgment of conviction of eight counts of first-degree sexual assault of a child and from an order denying his postconviction motion for a new trial. He argues that he was denied the effective assistance of trial counsel when counsel failed to object to

certain testimony, that the real controversy was not fully tried because of improper testimony about the credibility of the victims, that the trial court erred in denying his motion to depose witnesses in Mexico, and that the prosecutor's closing argument infected the trial with unfairness. We reject his arguments and affirm the judgment and order.

¶2 Salgado was charged with twelve counts of first-degree sexual assault of a child against the three daughters of his sister-in-law. The assaults were reported to the police in June 2005. Scarlet M. reported that when she was six years old, between December 1, 1994, and July 30, 1995, Salgado engaged her in various sexual acts every time they were alone in the house. Martha M. reported that just before her ninth birthday, between June and July 30, 1999, Salgado had sexual contact with her while they were swimming. She also reported at least three other instances between December 31, 2001, and January 1, 2003, when Salgado touched her sexually. Atziri M. reported that when she was five years old, between December 1, 2001, and March 31, 2002, Salgado began kissing her and made her put her hand on his penis. She also reported that in August 2004, when she was nine years old, Salgado put his fingers in her vagina as they were driving home in his car.

¶3 At Salgado's trial, police Detective Gregory testified that he had read a report by a crisis social worker who spoke with the victim's mother in November 2004 about possible sexual abuse of the children. Gregory indicated that he read the report at the beginning of his investigation to see if it was consistent with the information reported to the police. He was asked whether, in his opinion, the information in the social worker's report was consistent with the information he was investigating. He answered, "yes." Salgado's postconviction

motion claimed that his trial counsel was ineffective for not objecting to this part of Gregory's testimony.

¶4 In order to find that trial counsel was ineffective, the defendant must show that counsel's representation was deficient and prejudicial. ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***Id.***, ¶21. The trial court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. ***Id.*** However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. ***Id.***

¶5 Salgado argues that Gregory's testimony was hearsay and violated his right to confrontation because it was evidence relating to the credibility of the victims. An objection based on those grounds would have failed. Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3) (2007-08).[1] Gregory's testimony did not reveal an out-of-court statement because he did not tell the jury the contents of the crisis report or relate the information of the report he compared the crisis report to. His testimony that the crisis report was consistent with what he had been told was not offered to prove the truth of the statements made to the crisis social worker or information told to him. It was offered to explain what he did as an investigating officer. An objection based on hearsay or the confrontation clause would have been

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

overruled.[2] *See* ***State v. Hines***, 173 Wis. 2d 850, 859, 496 N.W.2d 720 (Ct. App. 1993). Trial counsel's failure to make a meritless objection does not constitute deficient performance. *See* ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441.

¶6 Detective Bentz testified at trial that he had conducted approximately 1300 interviews of children about sexual assault allegations. In response to cross-examination eliciting his acknowledgement that not every child he interviewed told the truth, Bentz was asked on redirect an estimate of what percentage of those 1300 interviews involved a false accusation. Bentz testified that less than two percent involved a false accusation. He then acknowledged his familiarity with research and statistics regarding interviews of children for sexual assault allegations and confirmed that his personal experience is consistent with the research and statistics. Salgado's postconviction motion claimed that his trial counsel was ineffective for not cross-examining Bentz regarding his personal knowledge or his review of research that only two percent of children lie about sexual abuse. He argues that this unchallenged testimony bolstered the victims' credibility.

¶7 Bentz had not been involved in the investigation of the allegations against Salgado and had not reviewed the police files in Salgado's case. He testified in generalities about whether it was common for a perpetrator to be a close friend or family member, reasons children are reluctant to disclose assaults

[2] There was no confrontation clause violation for the additional reason that both the victim's mother and social worker testified at trial and were available for cross-examination. *See* ***Crawford v. Washington***, 541 U.S. 36, 59 n.9 (2004). Neither was asked about the content of the crisis report.

or make only partial disclosure, techniques for good forensic interviews of children, and problems children have identifying times and dates of incidents. His testimony did not specifically relate to the credibility of the children victims in Salgado's case. The detective's testimony was not objectionable.[3] Moreover, Salgado fails to demonstrate what cross-examination or other evidence would have contradicted Bentz's testimony that only two percent of children make false accusations. To show prejudice the defendant must show what the cross-examination would have revealed and how it would have altered the outcome of the case. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994). Salgado has not established prejudice and was not denied the effective assistance of trial counsel.

¶8 Salgado requests this court to exercise its discretion and grant a new trial in the interests of justice under WIS. STAT. § 752.35 on the ground that Bentz's testimony so infected the trial with unfairness as to make the result a denial of due process. *See* ***State v. Williams***, 2006 WI App 212, ¶17, 296 Wis. 2d 834, 723 N.W.2d 719 (an argument framed under ineffective assistance of counsel may also support a motion for a new trial because the real controversy was not fully tried). He contends that Bentz's testimony violated the rule that no witness, expert or otherwise, should be permitted to given an opinion that another mentally and physically competent witness is telling the truth. ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). As we have already discussed,

[3] Trial counsel testified he did not object to Bentz's testimony on the ground of lack of notice because he had been provided summary of Bentz's testimony before trial. The prosecution is not required to disclose of the details of an expert witness's testimony and only a general summary is required. *See* ***State v. Schroeder***, 2000 WI App 128, ¶9, 237 Wis. 2d 575, 613 N.W.2d 911; WIS. STAT. § 971.23(1)(e).

Bentz's testimony was not direct evidence that he believed Salgado's victims were telling the truth. We are not persuaded that Bentz's testimony had the effect displacing the jury's function of determining credibility such that the real controversy was not fully tried. The request for a new trial in the interests of justice is denied.

¶9 The defense sought to present testimony from two of the victims' cousins who had lived with the victims for a period of time before returning to live in Mexico. The witnesses were seven years old when they lived in the United States. In pretrial hearings Salgado indicated that a police report said Scarlet M. disclosed to her cousins that Salgado was sexually assaulting her and that the witnesses told defense counsel that never happened. The defense encountered difficulties in getting the witnesses to the United States for trial. The defense moved the court under WIS. STAT. § 967.04, to take the witnesses' testimony by a telephonic deposition. In support Salgado filed an affidavit of defense counsel indicating that in a conversation between counsel, his investigator, and the witnesses, the witnesses said Scarlet M. never indicated she was being sexually assaulted by Salgado. When the motion was denied, Salgado moved to declare the two witnesses unavailable and to admit testimony of their statements to the defense investigator under WIS. STAT. § 908.045(5m) and (6). Salgado presented the transcript of interviews with the two witnesses through a Spanish interpreter in which they said the victims never mentioned the sexual assaults committed by Salgado and did not appear to be afraid or wary of Salgado. The trial court denied the motion to use the summary of the witnesses' statements.[4]

[4] Salgado does not challenge that ruling on appeal.

¶10 Under WIS. STAT. § 967.04, depositions of witnesses are allowed in criminal cases. ***Sheehan v. State***, 65 Wis. 2d 757, 765, 223 N.W.2d 600 (1974). However, a proper foundation for taking and using the deposition of a witness must be established. *See* ***id.*** at 766 (recognizing that "[t]he taking of depositions is necessary on occasion and their use permitted, but only after the court makes a finding that one of the conditions for their use has been satisfied"). Section 967.04(1) permits the taking of a deposition "in order to prevent a failure of justice" when the prospective witness may be unable to attend a criminal trial and the prospective witness's testimony is material.

¶11 The unavailability of the two witnesses was not challenged. The trial court found that defense counsel's affidavit of what the witnesses would say did not establish the materiality of the two witnesses' testimony. We agree. Counsel's affidavit did not present sufficient detail as to when counsel spoke with the two witnesses and exactly what their testimony would be. The police report does not reflect that Scarlet M. named the two cousins or whether she had only two cousins. It was not demonstrated that Salgado had correctly identified the right cousins. Counsel's affidavit used the terminology that the victim told her cousins Salgado was sexually assaulting her and the cousins said the victim never indicated that she was being sexually assaulted. As the trial court observed, it is unknown whether the victim would have used the term "sexually assaulted" in reporting the incidents to her same-age cousins.[5]

[5] Even considering the transcripts of the conversations with the two witnesses that were produced with the subsequent motion, the problems with specificity of time, place, and manner and matching of terminology were not corrected.

¶12 Salgado complains that the trial court required him to produce an affidavit from each prospective witness as proof of materiality when the statute makes no such requirement. The expectation that Salgado would, at a minimum, produce affidavits of the witnesses was not unreasonable. When Salgado asked for an adjournment of the January 9, 2006 trial date because he was having difficulty getting visa problems for the two witnesses and their mother straightened out, reports were made from both sides of possible pressure being put on the witnesses to come or not come for the trial. Thus, the court was aware that the witnesses were subject to influence. At a February 24, 2006 hearing Salgado's counsel indicated that the witnesses may be afraid to come for the trial and counsel might request permission to go to Mexico to take their testimony. The court indicated counsel was free to file whatever motion he felt necessary with the support of legal authority and supporting affidavits. When the prosecutor raised questions about the validity of the possible testimony, the court reiterated that defense was going to "make certain assurances what they're going to testify, are they even material. He's going to have [to] explain to me why even if they are reluctant to come, they haven't put something in writing maybe under affidavit and sent to them." The court signaled that it was looking for substantiating documentation. When Salgado requested adjournment of the April 24, 2006 trial date because, in part, of continuing problems in securing the attendance of the two witnesses, the trial court indicated that it had not "seen one iota of documentation to show the materiality of these witnesses…."

¶13 Salgado was advised that he would have to produce witnesses' affidavits. In light of the possibility that the two witnesses were subject to

influence from both sides of the family[6] and the vagaries in terminology that young children might use in revealing and understanding such things, it was not unreasonable to expect affidavits that would pin down the testimony of the two witnesses. A foundation for the evidentiary materiality of the proposed deposition testimony did not exist and it was not error to deny the request to take the depositions.

¶14 Salgado highlights two portions of the prosecutor's closing arguments and contends that they infected the trial with such unfairness as to deprive him of due process. The first was made in the final words of the prosecutor's closing argument: "And we have saints in our society like Detective Bentz and Detective Gregory who will go the mile to protect children. I've done my duty in this case, ladies and gentlemen. You do yours." The second came at the conclusion of rebuttal argument:

> Ladies and gentlemen, there is a winner in these cases and the winner has to do with children. Not necessarily these children. This is a criminal case. There is no cash bonus at the end of this for anyone. But society wins and children win when we do our jobs and when we identify individuals who have put children at risk, who have betrayed their trust, who have abused them in a way they will never get over, and we hold those offenders accountable. And that's all I'm asking of you.

Salgado contends that these comments have no place in a criminal trial because they ask jurors to be a "saint" and to perform the job of protecting children.

[6] This possibility was confirmed at the postconviction hearing. Trial counsel testified that he did not ask the two witnesses to sign affidavits because of concern that they were being directed to give the statements in a certain way and he did not want to participate in what might be a fraud upon the court. For this reason, Salgado cannot claim that his trial counsel was ineffective for not obtaining affidavits from the two witnesses.

¶15 No objection was made to the comments and the issue of whether they were improper argument is waived. ***State v. Seeley***, 212 Wis. 2d 75, 81, 567 N.W.2d 897 (Ct. App. 1997). "Nevertheless, this court may independently consider alleged constitutional errors not raised in a timely fashion in the trial court, if there are no unresolved factual issues, and it is in the interest of justice to do so." ***Id.***

> The line between permissible and impermissible argument is drawn where the prosecutor goes beyond reasoning from the evidence and suggests that the jury should arrive at a verdict by considering factors other than the evidence. The constitutional test is whether the prosecutor's remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Whether the prosecutor's conduct affected the fairness of the trial is determined by viewing the statements in context. Thus, we examine the prosecutor's arguments in the context of the entire trial.

State v. Neuser, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995) (citations omitted).

¶16 The remarks did not state any facts that were untrue. They reflected commentary on the evidence. Calling the police detectives "saints" was hyperbole and did not cross the line into impermissible argument. The rebutted argument was in response to defense counsel's argument that there would be no winners in this case. We are not persuaded the two remarks singled out by Salgado were improper or deprived Salgado of a fair trial.

By the Court.—Judgment and order affirmed.

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