

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 26, 2010

A. John Voelker
Acting Clerk of Court of Appeals

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Appeal No. 2009AP2030-CR

Cir. Ct. No. 2007CF134

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

NICK J. W.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Monroe County: TODD L. ZIEGLER, Judge. *Affirmed.*

Before Vergeront, P.J., Lundsten and Fitzpatrick, JJ.¹

¹ Rock County Circuit Court Judge Michael R. Fitzpatrick is sitting by special assignment pursuant to the Judicial Exchange Program.

¶1 LUNDSTEN, J. Nick J.W. was tried and convicted of incest. The victim was his biological daughter, Delores, who was sixteen years old at the time of the assaults. Nick asserts that the evidence was insufficient to support his conviction, that newly discovered evidence warrants a new trial, and that his trial counsel rendered ineffective assistance. We reject all of these arguments and affirm.

Background

¶2 Nick J.W. was charged with one count of incest. The victim was his biological daughter, Delores. Near the time Delores turned sixteen, she moved in with Nick in a “little” two-bedroom house. Nick was a “[s]emi driver over the road.” Nick testified that Delores came to live with him because her mother abandoned her. Nick and Delores had never lived together before that time. As it turned out, Delores’s stay with Nick was for a “very short period of time.” From there, Delores moved in with her grandmother.

¶3 Delores testified that, while she lived with Nick, she was in her bedroom “going to sleep” when her father entered and lay down behind her. She said she knew it was her father because they were the only people in the house. He touched her legs and inner thighs. She “kind of froze” and pretended to be asleep. He put his fingers in her vagina and then had penis-to-vagina intercourse with her for about five or ten minutes. After that, he got up and left.

¶4 During her direct examination, Delores denied remembering whether this occurred on other occasions. She said she has trouble remembering what her father did to her. She testified:

I have a very – have a mental problem, I guess, if you want to call it. And they say that I, like I just have a lot of bad

things happen to me, so I kind of try to block them out, to block things out that I don't understand or can't figure out like. Because otherwise I would get very scared or, you know, when I remember the bad things, I have what's called anxiety attacks.

¶5 On cross-examination, Delores agreed that, when she reported her father to the police, she said he had intercourse with her on three occasions.

¶6 Delores told the jury about a telephone call that took place about two years later when she was eighteen. She said she called her father and asked him “why he did what he did.” Delores said that Nick responded, “All I can say is I'm sorry.” According to Delores, she said to him: “You think sorry fixes everything?” Delores said that was the only time she spoke with Nick about him assaulting her. Delores denied that the conversation was about her having been in a hospital. She also denied having been in a hospital during that time period.

¶7 Delores was also asked about a long-distance trip she took with Nick when he was driving a semi. Delores testified that, during the trip, at a truck-stop shower, Nick decided they would use the same shower to save money. She said they both were naked in the shower room at the same time, taking turns in the shower.

¶8 Delores was asked whether she had ever asked Nick for money. She said that she had asked him for \$300 for a car, and that he gave her that money, but that she did not ask him for money on any other occasion.

¶9 Delores reported the sexual assaults when she was eighteen years old. After this report, Detective Michael Jamesson questioned Nick. The detective told the jury that he asked Nick about showering at the truck stop, and Nick admitted that he shared a shower with Delores and that they were naked at

the same time. Nick told the officer he did that to save money. When confronted with Delores's allegation that he sexually assaulted her, Nick asked: "What does she want, money?" But Nick did not mention any conversation in which Delores allegedly asked him for \$1,000.

¶10 The detective testified that Delores told him that before her father had intercourse with her she heard the sound of a wrapper and that she believed he had opened a condom wrapper. She told the detective there was no talking during the incident.

¶11 Nick testified in his defense. He denied ever having sexual contact with Delores. Nick acknowledged that he had shared a pay-shower with Delores one time on a road trip to save \$9. He said after that, he had enough "credits" from purchasing fuel so that they could shower separately. Nick agreed that he could have avoided sharing a shower with Delores by skipping a shower or using a sink to clean himself. He did not think about how sharing the shower would make Delores feel.

¶12 Consistent with Delores's testimony, Nick said that he gave Delores \$300 for a car. But, contrary to Delores's testimony, Nick asserted that on a separate occasion Delores asked for "a little over 1,000 some dollars" to "pay fines and bail Jesse, her boyfriend, out of jail." Nick testified that he thought the money was going to be used for drugs, and he refused to give it to her. Nick first testified that he was contacted by the police "[w]ithin a few months" of the time Delores asked for money. He later said it was "probably a month, month and a half." Nick did not assert that there was any threat associated with the request for money.

¶13 Nick testified that he did have a telephone conversation with Delores in which he used the words "I'm sorry." According to Nick, he was telling

Delores he was sorry about her situation, that is, sorry that she was in a mental hospital because she had tried to kill herself after her boyfriend left her. He said he was sorry in the sense that he felt sorry for her.

¶14 At the postconviction hearing, Nick presented four witnesses. Delores testified, and she agreed that she was hospitalized for two weeks the summer she turned eighteen in 2005. She did not recall why, at trial, she denied having been in the hospital. Nick’s trial counsel testified, but nothing he said is necessary to the resolution of this appeal. Finally, Nick called two of Delores’s relatives to attest to the fact that Delores had been in the hospital around the time of the “I’m sorry” telephone call and that they would have testified to this fact if they had been called as witnesses at trial. The circuit court rejected the postconviction claims, and this appeal followed.

Discussion

A. Sufficiency Of The Evidence

¶15 We first address Nick’s claim that the trial evidence is insufficient to support his conviction. We deal with this issue first because, if Nick were to prevail on this topic, the remedy would be dismissal without the possibility of retrial and it would be unnecessary to address his other alleged errors. *See State v. Schutte*, 2006 WI App 135, ¶13, 295 Wis. 2d 256, 720 N.W.2d 469.

¶16 “[I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *State v. Poellinger*, 153 Wis.

2d 493, 507, 451 N.W.2d 752 (1990). Additionally, we consider the reasonable inferences the jury could draw from the evidence presented. See *State v. Toliver*, 104 Wis. 2d 289, 293-94, 311 N.W.2d 591 (1981).

¶17 Nick argues that, assuming Delores was sexually assaulted, there was insufficient evidence that Nick was the perpetrator. Nick points out that Delores did not look at the perpetrator and did not hear anything that identified the perpetrator as Nick. Nick asserts that Delores's assumption about his identity was based solely on her speculation that she and Nick were the only people in the house and because Nick apologized on the telephone. Nick asserts that the evidence here is similar to the ambiguous testimony that was insufficient to support a conviction in *State v. Turnpaugh*, 2007 WI App 222, 305 Wis. 2d 722, 741 N.W.2d 488. Nick does not dispute that the evidence supported a finding that Delores was assaulted, but he apparently contends that an intruder could have committed the charged assault and the other two assaults Delores told the police about.

¶18 Nick's argument is meritless. It hinges on the unlikely possibility that some unknown person entered Nick's small house without Nick realizing it and assaulted his daughter three times.

¶19 The testimony is clear that Nick was home at the time of the charged assault based on Delores's testimony that she believed that she and Nick were the only persons in the house. Thus, assuming that it believed Delores's testimony about how she was sexually assaulted, the jury was faced with two alternatives: (1) that Nick was the offender, or (2) that some unknown person, undetected by Nick, entered the home while Nick was present and assaulted his daughter, risking that Delores would call for help and that Nick would come to her assistance.

Indeed, under Nick’s intruder theory, this happened three times because it was revealed at trial that Delores alleged that Nick committed two similar sexual assaults. Thus, the evidence was easily sufficient to support the finding that Nick was the perpetrator.

¶20 Moreover, this case is not comparable to *Turnpaugh*. In that case, the words used by the defendant to proposition a female police officer posing as a prostitute were ambiguous. It was unclear whether he was seeking the particular type of sexual encounter required by the specific charge. *Id.*, ¶¶6-7. Here, there is nothing ambiguous about what Delores described.

B. Newly Discovered Evidence

¶21 Nick argues that he is entitled to a new trial because of newly discovered evidence. The “new” evidence is Delores’s post-trial admission that she testified falsely at the trial when she denied that she had ever been in the hospital.

¶22 Whether evidence is “newly discovered evidence” is determined under a four-pronged test: (1) the evidence was discovered after the trial, (2) the defendant was not negligent in finding the evidence, (3) the evidence is material to an issue in the case, and (4) the evidence is not merely cumulative. *State v. Plude*, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42. If a defendant demonstrates the existence of newly discovered evidence under this four-pronged test, the court must then determine “whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant’s guilt.” *Id.* The question is “whether a jury would find that the newly-discovered evidence had a sufficient impact on other evidence presented at

trial that a jury would have a reasonable doubt as to the defendant's guilt." *Id.*, ¶33.

¶23 We will assume without deciding that Delores's post-trial admission is newly discovered evidence.² We turn our attention to whether the jury would have had a reasonable doubt about Nick's guilt if it had learned about this evidence.

¶24 During her direct examination, Delores told the jury about a telephone conversation in which she asked her father "why he did what he did." She asserted that Nick knew she was referring to the sexual assaults and that he said he was sorry. During Nick's subsequent testimony, he asserted that the telephone conversation concerned Delores's hospital stay for mental problems, and that he was saying he was sorry in the sense that he was sorry she had such problems. In anticipation of Nick's testimony, his attorney asked Delores if it was possible that Nick was referring to her mental problems and her hospital stay. Delores denied that the conversation was about her having been in a hospital and, pertinent here, denied she had been in a hospital during that time period. At the postconviction hearing, however, Delores agreed that she had been hospitalized. She did not recall why, at trial, she denied having been in the hospital.

¶25 Nick argues that "it would be frivolous for anyone to deny the great benefit [his] defense would receive for a jury to have become aware that [Delores]

² We note that there is a substantial question as to whether Delores's admission fits the definition of newly discovered evidence. As the State points out, Nick knew at the time of trial that Delores was mistaken or intentionally lying when she said she had not been in the hospital. Thus, the fact that Delores was untruthful on this topic was not newly discovered. What is *arguably* newly discovered evidence is her admission that she was wrong at trial when she answered the hospital question.

lied under oath.” Nick reasons that this was a “he said, she said” case and that evidence showing that Delores lied under oath would have destroyed Delores’s credibility and, therefore, led to Nick’s acquittal. Nick asserts that “a critical aspect of the newly discovered evidence is the specific evidence of a jury becoming aware that [Delores] was capable of lying to the jury pointblank and then persisting in her lie.”

¶26 We disagree. It is readily apparent from a review of the entire trial transcript that Delores’s false denial, if exposed, would not have made a difference here.

¶27 First, as the State points out, Delores’s mental health issue was a double-edged sword for Nick. If the jury had learned more definitively that Delores had been in the hospital because of a suicide attempt, that fact would have fit the State’s narrative that Delores was emotionally damaged and an easy target for Nick’s depraved conduct. Further, it would have fit the proposition that Nick’s abuse of Delores contributed to her mental problems.

¶28 Second, Nick does not suggest how this evidence would have come out at the first trial or, for that matter, how the new evidence might play out at a second trial. What is known is that the jury already had reason to question Delores’s credibility. On direct examination, Delores testified about a single sexual assault and denied recalling other incidents. But it was later brought out that she had reported to the police that Nick assaulted her three times. Furthermore, Delores told the jury that she had a “mental problem” and she had been told that she “blocks” bad things out that have happened to her, including, presumably, a hospital stay prompted by a suicide attempt. And, the jury learned that the then-twenty-year-old Delores had been convicted of a crime. Thus, even

without learning that Delores falsely denied having been in the hospital, it would have been clear to the jury that Delores was a seriously troubled young woman whose words needed to be weighed carefully.

¶29 Third, there is no reason to suppose that, if Delores had been confronted at the first trial with evidence that she had in fact been in the hospital, that she would not, as she did at the postconviction hearing, simply admit to the hospital stay and remain at a loss as to why she insisted otherwise. There was no readily apparent reason for Delores to deny the hospital stay. It did not conflict with her version of the events. In Delores's account of the telephone conversation with her father, there was no mention of the hospital stay or her mental illness and, thus, no reason to think that Nick was expressing sympathy, rather than apologizing.

¶30 Fourth, the hospital evidence would not have assisted Nick in the area that was most problematic for him at trial—motive. Why would his daughter falsely accuse him of such a serious crime? Nick testified, but he did not identify any motive for a false accusation. The suggestion of a money motive raised by Nick's trial counsel does not find support in the evidence. Nick asserted that Delores asked him for a little over \$1,000 and that he suspected she wanted the money for drugs. But he did not say that Delores threatened him or in any way suggested that, if he did not give her the money, she would retaliate. Thus, even if the jury had believed Nick's assertion that Delores asked for the \$1,000—and questioned Delores's denial of that same fact—there was still nothing to connect her alleged request for money with the sexual assault accusation. This case was, as Nick suggests, primarily a "he said, she said" case, but Nick's motive for the crime and for lying about it at trial were obvious. On the other hand, there was no evidence that Delores had a motive to falsely accuse Nick.

¶31 In sum, there is no reasonable probability that, if the jury had heard the newly discovered evidence, it would have had a reasonable doubt about Nick's guilt.

C. Ineffective Assistance Of Counsel

¶32 Nick makes two claims of ineffective assistance of counsel. First, he complains about his trial counsel's failure to rebut Delores's assertion that she had not been in a hospital at the time of the telephone call. Second, Nick asserts that counsel deficiently failed to object to evidence that Nick was naked with Delores when sharing a truck-stop shower room. We address and reject each claim below.

¶33 A defendant alleging ineffective assistance of counsel has the burden of showing that his counsel's performance was deficient and that he suffered prejudice as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Showing prejudice means showing that defense counsel's alleged errors actually had some adverse effect on the defense. *Strickland*, 466 U.S. at 693. The defendant cannot meet this burden by simply showing that an error had some conceivable effect on the outcome. *Id.* Instead, the 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.

¶34 Nick's contention that his trial counsel should have been prepared to rebut Delores's testimony that she had not been in a hospital has no merit. Nick argues that his trial counsel "should not have been completely [caught] off guard in light of [Nick's] insistence on his innocence." But Nick does not explain why his counsel could have or should have anticipated that Delores would deny having

been in the hospital around the time of the disputed phone call. We address the matter no further.

¶35 Nick's second ineffective assistance claim is his assertion that trial counsel failed to object to testimony about Delores and Nick both being naked at the same time when using a truck-stop shower. Nick argues that under other acts analysis, this evidence was "irrelevant and unduly prejudicial." Nick contends that the sole purpose of the evidence was to "create for the jury a sense of utter disdain" for Nick. In essence, Nick argues that, had trial counsel objected, the circuit court would have been compelled to exclude the evidence under a proper other acts analysis. We disagree.

¶36 The decision to admit other acts evidence requires a three-step inquiry: (1) is the other acts evidence offered for an acceptable purpose; (2) is the other acts evidence relevant; and (3) is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues, or delay. *State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). Thus, other acts evidence is admissible "if its relevance does not hinge on an accused's propensity to commit the act charged." *Id.* at 783.

¶37 The shower evidence was relevant for a purpose apart from propensity. It was relevant to show the submissive relationship Delores had with Nick. As recounted by Delores, she passively allowed Nick to have intercourse with her. She told the jury that she did not resist physically and did not even complain, either before the incident or after during the time she lived with Nick. She said nothing to Nick until the phone call approximately two years later. The shower incident supports the proposition that the relationship between Nick and Delores was such that she would submit to the assault without resistance. Indeed,

when the prosecutor questioned Nick about the shower incident, her focus was on how this incident exemplified Nick's control over Delores.

¶38 Accordingly, we agree with the circuit court that the shower incident was admissible under the *Sullivan* analysis to show the context of the alleged assault.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

