**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**December 14, 2010**

**A. John Voelker**
**Acting Clerk of Court of Appeals**



**Appeal No. 2010AP29-CR** **Cir. Ct. No. 2007CF700**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**BRADLEY S. GALLENTINE,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Eau Claire County: MICHAEL A. SCHUMACHER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Bradley Gallentine appeals a judgment of conviction for repeated sexual assault of a child, and an order denying his postconviction motion. Gallentine argues his trial counsel provided ineffective assistance by failing to introduce testimony from his employer limiting the time

frame in which Gallentine had the opportunity to commit the assaults. Gallentine also argues the circuit court erroneously exercised its discretion in admitting hearsay testimony. We reject Gallentine's arguments and affirm.

## BACKGROUND

¶2 Gallentine was charged in September 2007 with repeatedly sexually assaulting his stepdaughter, Alyssa S., between March 1999 and September 2000, when she was three or four years old. Gallentine was also charged with sexually assaulting Alyssa once in the summer of 2007. After a jury trial, Gallentine was convicted of the earlier assaults, but acquitted of the alleged 2007 assault.

¶3 Alyssa testified Gallentine moved in with her mother in 1999, after which he provided childcare for Alyssa during the day. Alyssa stated that on approximately fifteen occasions Gallentine had her lay with him in bed, placed her hand into his pants, and had her masturbate him. Alyssa said the assaults ceased when she started school in the fall of 2000.

¶4 Alyssa further testified she only came to understand that what Gallentine had done was sexual when she completed a fourth grade health unit. At that time, she confronted Gallentine, and asked him "why he did what he did," "why did you put my hand in your pants?" He responded by saying that she "liked it." Alyssa stated that when she was twelve she told her mother what Gallentine had done to her when she was four. She did not recall telling her mother about the incidents before 2007.

¶5 Cassandra Woody, Gallentine's wife and Alyssa's mother, testified Gallentine started working at Countertops Inc. on first shift in March of 1999, and that Countertops was open during the summer of 1999. Woody stated Gallentine

switched shifts at Countertops that summer in order to provide child care for Alyssa after an incident took place establishing that Woody's father was no longer able to safely care for Alyssa. Woody testified Gallentine worked only nights at Countertops for "over a year," watching Alyssa daily until she entered school in the fall of 2000. However, Woody later testified Gallentine only worked at Countertops for "approximately … a year," and acknowledged he initially worked days. Woody stated:

> [Gallentine] did the initial setup at Countertops when he worked during the day. It took a matter of months to set it up and then he switched over and he worked at night for the remainder of the time. They had started rotating shifts when he was just about to quit there.

¶6 During trial, Gallentine's counsel moved to introduce telephone testimony from Gallentine's supervisor at Countertops, Nathan Burgess. The court denied the request because Burgess was not identified on the witness list and his testimony would not establish an alibi. According to an offer of proof, Burgess would have testified that Countertops was setting up equipment from January through March 2000, and began production in April 2000. Gallentine would have started working the night shift when production began, continuing through July or August.

¶7 At a postconviction evidentiary hearing, the State stipulated that Gallentine's Countertop employment records established he began employment in January 2000. Burgess testified that all Countertop employees worked the first three months of 2000 on twelve-hour day shifts, that half would have then switched to twelve-hour night shifts for three months, and all workers would have switched shifts after three months. Thus, all employees would have worked the day shift for six out of the first nine months of 2000. Burgess also testified that he

did not recall Gallentine ever requesting a shift change due to a child care need, and that any such request would have needed to come through him.

¶8 Woody also testified at trial, over a hearsay objection, that Alyssa had reported sexual contact with Gallentine in late summer 1999, when Alyssa was four. Woody testified she did not, however, believe Alyssa at the time. Woody explained that Alyssa came home from a cousin's house where she had seen part of a movie that the older kids were watching. Alyssa told Woody "that there was a person in the movie who pulls down his pants and asks people to touch him." Alyssa then told Woody that Gallentine had done the same thing to her. Woody testified she immediately confronted Gallentine, who denied the accusation. Woody also stated that she told several other people about Alyssa's accusation, but that no one believed it because Woody told them it was untrue.

¶9 Following the jury's guilty verdict, Gallentine filed a postconviction motion arguing his trial counsel was ineffective. The court denied Gallentine's motion after an evidentiary hearing. Gallentine now appeals.

## DISCUSSION

¶10 Gallentine argues his trial counsel was ineffective for failing to introduce the evidence demonstrating his employment history at Countertops. To establish ineffective assistance of counsel, Gallentine must demonstrate both deficient performance and prejudice. *See* ***State v. Evans***, 187 Wis. 2d 66, 93, 522 N.W.2d 554 (Ct. App. 1994). If a defendant fails to demonstrate one prong, we need not address the other. ***Id.*** Prejudice exists if, absent counsel's error, there is a reasonable probability of a different outcome. ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶11 Gallentine contends the work history evidence was critical for three reasons. First, he asserts Woody's "statements to what [Alyssa] told her during the summer of 1999 could not possibly be true because, even if any abuse occurred, it could not have taken place until the summer of 2000!" Second, Gallentine argues "this evidence means that [Woody's] anecdotal story to why Gallentine switched shifts, while sounding plausible, could not possibly have been true!" Third, he observes that "the time frame for the alleged assaults has to be reduced from the [S]tate's trial version of well over a year to the much smaller time period of 2 1/2 to 3 months."

¶12 Exclamation points aside, we do not find Gallentine's arguments persuasive. Regarding his first two points, the work history evidence would simply demonstrate Woody had an imperfect memory. That she recalled at a trial eight years later that events occurred in 1999 rather than 2000 would not seriously undermine her credibility. Also, Burgess's failure to recall a shift change request by a former employee eight years prior would not negate Woody's testimony that Gallentine requested a shift change. As to Gallentine's third point, we are left asking: So what? Three months is more than sufficient time in which Gallentine could have committed the fifteen alleged assaults. Moreover, the jury was instructed that the State only needed to prove Gallentine committed three assaults and that the jurors need not agree on which acts constituted the required three. *See* WIS. STAT. § 948.025(1), (2) (1999-00).

¶13 Additionally, the jury was aware at trial that Woody's recollection about Gallentine's work history was imperfect. At one point she testified Gallentine worked nights at Countertop for over a year. Later, she testified he only worked at Countertops for a total of one year, the first few months of which he would have been working the day shift. Further, when Gallentine's trial

counsel suggested to Woody the correct dates of Gallentine's employment, Woody did not testify those suggested dates were absolutely incorrect. Finally, both Gallentine's and the State's closing arguments emphasized the precise time frame was unimportant. Thus, the issue at trial was not *when* the assaults occurred, but *whether* they occurred.[1] Gallentine's trial counsel's failure to introduce the employment history evidence does not undermine our confidence in the outcome of the trial.

¶14 We also reject Gallentine's argument that the trial court erroneously admitted hearsay evidence by permitting Woody to testify about Alyssa's statements to her when Alyssa was four. Under the residual exception to the hearsay rule, hearsay is admissible if its proponent can establish "'circumstantial guarantees of trustworthiness' comparable to those existing for enumerated exceptions." ***State v. Sorenson***, 143 Wis. 2d 226, 243, 421 N.W.2d 77 (1988) (quoting WIS. STAT. § 908.045(6)). ***Sorenson*** recognized a special rule of admissibility under the residual exception for child victims of sexual abuse. *See* ***id.*** at 243, 245-46. ***Sorenson*** identified several factors that a court must weigh when deciding whether to admit the testimony. ***Id.*** at 245-46. "[N]o single factor [is] dispositive of a statement's trustworthiness. Instead, the court must evaluate the force and totality of all these factors to determine if the statement possesses the

[1] Indeed, Gallentine's counsel argued to the jury:

> Does it really make a lot of difference if we're talking about a time period here in March up to May or up to December or after? Does it make any difference? No. Why not? Mr. Gallentine watched [Alyssa]. That's not an issue. ... We know that at some point in time he worked a nightshift and that during that time he watched [Alyssa]. … There was kind of limited time during which this could have occurred. … The real fundamental question is did it happen.

requisite 'circumstantial guarantees of trustworthiness' required by WIS. STAT. § 908.045(6)." A circuit court's decision to admit hearsay is reviewed for the erroneous exercise of discretion. *See* ***Sorenson***, 143 Wis. 2d at 240. Thus, we will uphold the decision if the court applied the proper legal standard to the facts of record and there is some reasonable basis for the determination. ***Id.***

¶15 Here, the circuit court properly set forth and applied each of the ***Sorenson*** factors.[2] Although it observed Woody had motivation to fabricate because she was in the process of divorcing Gallentine, upon weighing all of the factors, the court concluded the testimony was admissible. Gallentine argues the motivation to fabricate is determinative because there was not a single countervailing factor. Gallentine's minimally developed argument, however, simply ignores the other factors and the trial court's discussion of them. The court properly exercised its discretion in admitting Woody's testimony.

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

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

[2] A court should weigh the following factors in deciding whether to admit the testimony: the attributes of the child; the child's relationship with the person to whom the statement was made and that person's motivation to fabricate; the circumstances under which the statement was made; the contents of the statement; and other corroborating evidence. ***State v. Sorenson***, 143 Wis. 2d 226, 245-46, 421 N.W.2d 77 (1988).