

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 9, 2011

A. John Voelker
Acting 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 No. 2010AP2277-CR

Cir. Ct. No. 2008CF153

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TOMAS PASQUAL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dunn County: ROD W. SMELTZER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Tomas Pasqual appeals a judgment convicting him of sexually assaulting Monica L. and an order denying his motion for a new trial. At trial, after Monica testified, social worker Tammy Miller read from a transcript of an interview she conducted with Monica the day after Monica reported the

incident. Pasqual contends this testimony constituted hearsay and violated his right to confront witnesses. To the extent these issues were not properly preserved, he argues that his trial counsel was ineffective. He also requests a new trial in the interest of justice. We conclude that the issues were not properly preserved by specific, contemporaneous objection and Pasqual has not established ineffective assistance of counsel or grounds for granting a new trial in the interest of justice. Therefore, we affirm the judgment and order.

BACKGROUND

¶2 Sixteen-year-old Monica, who was described as “a little slow,” alleged that Pasqual forcibly raped her four times in a single day. The jury acquitted him of three of the charges, convicting him only of one count in which Monica alleged anal intercourse. Monica testified that the anal intercourse, which lasted approximately twenty seconds, hurt her. Her testimony was corroborated by a nurse’s testimony that Monica suffered a small tear on her anus. Pasqual testified that Monica consented to the intercourse. His claim of consent was supported by other witnesses who testified to Monica’s demeanor during the day. He also denied anal penetration and stated that any anal contact was unintentional. However, when asked whether he put his penis in her anus, he replied, “Not all the way in” and he said he stopped when she said it hurt.

¶3 When asked whether Pasqual said anything before he commenced the anal intercourse, Monica replied, “Yeah-No.” When asked whether she was sure he said nothing she responded, “I can’t remember.” When asked whether Pasqual said what he was going to do when he told her to roll over, Monica responded, “No.” Asked again whether she remembered anything Pasqual said when he had her roll over, she again responded, “No.”

¶4 After Monica completed her testimony and was allowed to return home, Miller testified over a general objection, reading an excerpt of a transcript of a videotaped interview she conducted with Monica the morning after the assaults. The prosecutor argued admissibility as a prior inconsistent statement or a recorded recollection and under the residual hearsay rule. Defense counsel objected, stating “I do think it is being offered as a substitute for testimony and I disagree that the statutes allow for it.” Counsel then clarified “I object on grounds it’s a substitute for testimony and she can testify to what happened.” The court allowed Miller to read from the transcript: “He said he was going to put [h]is penis inside. ... In my ass.” That statement was relevant because it refutes Pasqual’s testimony that any anal contact was accidental.

DISCUSSION

¶5 Pasqual’s arguments regarding hearsay and his right to confront witnesses was not properly preserved because his trial counsel never objected on these grounds nor did she bring pertinent cases to the trial court’s attention. *See State v. Nelis*, 2007 WI 58, ¶31, 300 Wis. 2d 415, 733 N.W.2d 619. Therefore, these issues must be addressed under the rubric of ineffective assistance of counsel. *State v. Erickson*, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999).

¶6 To establish ineffective assistance of his trial counsel, Pasqual must show deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). When assessing whether counsel’s challenged acts or omissions were reasonable, the reviewing court is not limited to the strategies and explanations articulated by counsel. Rather, the question is whether, under the circumstances of the case as they existed at the time of trial, the challenged conduct or failure to act could have been justified by an attorney exercising

reasonable professional judgment. *See State v. Koller*, 2001 WI. App 253, ¶8, 248 Wis. 2d 259, 635 N.W.2d 838. To establish prejudice, Pasqual must show a reasonable probability that the verdict would have been different but for counsel's errors. A reasonable probability is one that undermines this court's confidence in the outcome. *Strickland*, 466 U.S. at 694.

¶7 Pasqual has not established deficient performance or prejudice from his counsel's failure to make a contemporaneous, specific hearsay objection. Pasqual argues that the statement is not admissible as a recorded recollection under WIS. STAT. § 908.03(5)¹ because Monica was not first asked to view the videotaped interview or transcript to see if it would refresh her recollection as required by *State v. Keith*, 216 Wis. 2d 61, 75, 573 N.W.2d 888 (Ct. App. 1997). If counsel had raised that objection, the prosecutor could have recalled Monica to see if it would refresh her recollection. Counsel conceded at the postconviction hearing that Monica could have been recalled. If Monica's recollection was not refreshed, the prosecutor could put the excerpt of the transcript into evidence as he did. If her recollection was refreshed, there would be no hearsay issue. Therefore, Pasqual was not prejudiced by his counsel's failure to make that specific objection.

¶8 The statement was also admissible over a hearsay objection as a prior inconsistent statement under WIS. STAT. § 908.01(4)(a)1. and under the residual hearsay exception. At trial, Monica specifically answered "No" when asked, "Did he say what he was going to do when he told you to roll over?"

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Monica's recorded statement the day after the incident is clearly inconsistent with that answer. The statement was also admissible under the residual hearsay exception because at the time Monica made the statement, she had no reason to believe Pasqual would claim the anal intercourse was accidental. Given Monica's age and mental abilities and the nature and the focus of the interview, Monica's recitation of what Pasqual said has sufficient circumstantial guarantees of trustworthiness comparable to the past-recollection-recorded exception under WIS. STAT. § 908.03(5).²

¶19 Pasqual's counsel was not ineffective for failing to specifically argue that Miller's testimony violated his right to confront witnesses. Although Pasqual did not make a confrontation objection, the State did argue that the testimony would not violate the Confrontation Clause. Defense counsel had been informed of the videotaped interview before the trial. She was free to cross-examine Monica about that statement. Even after Monica was allowed to return home, counsel acknowledged that she could have recalled Monica to cross-examine her about the videotaped interview statements. Just as in *Nelis*, the State did not violate the Confrontation Clause by presenting the statement through another witness without first questioning Monica about the statement. *Nelis*, 300 Wis. 2d 415, ¶45. The Confrontation Clause guarantees only "an opportunity for effective cross-examination ... not cross-examination that is effective." *Delaware v.*

² Pasqual argues that Miller's testimony was "double hearsay," contending that Miller's reading from the transcript constitutes an additional layer of hearsay. While the term "double hearsay" was used at the postconviction hearing, counsel had not previously identified the second layer of hearsay. Therefore, the issue is not properly preserved for appeal. In addition, the extra layer of hearsay is inconsequential because the State could have easily remedied the problem had an appropriate objection been made.

Fensterer, 474 U.S. 15, 20 (1985). Pasqual was not denied his constitutional right to confront witnesses.

¶10 Finally, Pasqual does not establish grounds for retrial in the interest of justice. His argument merely reasserts other arguments raised in his brief that this court rejects.

By the Court.—Judgment and order affirmed.

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

