

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**October 13, 2011**

A. John Voelker  
Acting Clerk of Court of Appeals

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**Appeal No. 2010AP1978-CR**

**Cir. Ct. No. 2007CF194**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MICHAEL A. CLEMENTS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for La Crosse County: TODD W. BJERKE, Judge. *Affirmed.*

Before Vergeront, Sherman and Blanchard, JJ.

¶1 BLANCHARD, J. Following a jury trial, Michael A. Clements was convicted of child sexual assault, in violation of WIS. STAT. § 948.02(2)

(2009-10).<sup>1</sup> He appeals the judgment of conviction and the order denying his motion for postconviction relief on two grounds: that his trial attorney provided ineffective assistance of counsel and that the real controversy was not fully tried.

¶2 In making the ineffective assistance argument, Clements contends that his attorney: (1) failed to challenge the credibility of the alleged victim to the degree that he could have, such as by seeking to impeach her based on a prior recorded statement and by objecting on hearsay grounds to testimony of a school counselor who testified that the victim disclosed the assault to her; (2) failed to object to the State's characterization, during argument to the jury, of the testimony of the only witness called by the defense at trial, the alleged victim's grandmother; (3) unnecessarily opened the door to unfairly prejudicial testimony of the alleged victim during her cross-examination; and (4) failed to present the jury with a consistent theory of defense. Clements' arguments in support of his contention that the real controversy was not fully tried depend entirely on the same arguments made in support of the challenge to his conviction based on ineffective assistance.

¶3 For the following reasons we conclude that Clements failed to establish ineffective assistance before the trial court, and also failed to establish that the real controversy was not fully tried. Accordingly, we affirm.

## **BACKGROUND**

¶4 Michael Clements (Clements) is the biological father of the alleged victim, A.M.T. A.M.T. was fourteen at the time of the alleged sexual assault.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2009–10 version unless otherwise noted.

Clements and A.M.T. did not share a residence at that time, but A.M.T. was then making a weekend visit to the home of her grandmother (Clements' mother, Rose Clements, hereinafter "grandmother"), where A.M.T.'s grandmother and Clements then resided.

¶5 At trial, A.M.T. testified that Clements had sexual contact with her in the following manner. At around 9:30 or 9:45 p.m. on a Friday evening, A.M.T. went upstairs to the room in which Clements was staying to use a personal computer located there. Clements was using the computer, but moved to a couch to watch television after A.M.T. asked to use the computer. A.M.T. sat in a chair facing the computer and began to use it. Shortly thereafter, Clements approached A.M.T. from behind and reached under the bathrobe she was wearing. He rubbed her back, then put his hands over a bra built into her tank top and rubbed her breasts with his hands for an extended period. This shocked A.M.T. and she asked him to stop. When he did not stop, she elbowed him and left the room.

¶6 A.M.T. further testified that she ran downstairs and tried to tell her grandmother what had happened, but her grandmother "wouldn't listen." Her grandmother "just told me that I was mistaking it and it meant nothing." Clements left the house later that evening and did not return. A.M.T. stayed with her grandmother for the rest of the weekend, because A.M.T. wanted to attend a family holiday party. A.M.T. thought that she would be "okay" if she remained at the grandmother's house because Clements had left. When A.M.T. was next at school, following the holiday break, she disclosed the sexual contact to a middle school counselor, Melissa Frost.

¶7 The State sought leave of the court to call Frost to testify about A.M.T.'s "prior consistent statement" to Frost disclosing the sexual assault, on the

grounds that the defense had suggested to the jury that A.M.T. was lying about the incident. The defense did not object, and the court allowed Frost to testify.

¶8 Frost testified that A.M.T. appeared at the school counseling office and asked Frost what a child should do when a parent does not “do the right thing.” This led to A.M.T. telling Frost that, over the just completed holiday break, her father had approached her from behind when she was at a computer, put his hand down her shirt, and “touched her chest.”

¶9 The defendant did not testify. The defense called one witness, A.M.T.’s grandmother, who testified in substance as follows. It was “absolutely untrue” that A.M.T. told the grandmother on the day of the alleged assault that Clements had put his hands on her breasts. A.M.T.’s grandmother went with Clements and A.M.T. to a family party starting that Saturday afternoon, and attended another party, with A.M.T. only, on Sunday.

¶10 The primary defense theory was that Clements had likely had some form of physical contact with A.M.T. at the time she alleged, but that she probably misinterpreted Clements’ intent when he gave her a mere “fatherly hug”:

What I think happened, and it’s a reasonable hypothesis, is that clumsy old dad came up behind the girl, put his arms around her, and she misinterpreted what was a hug from behind.... I know the only person I can hug from behind is my wife, because when you hug from behind, your hands get in a place where they shouldn’t be. That’s why I guess we dance facing each other, but the reasonable hypothesis is that a hug occurred, not with [sexual] intent, but to show fatherly love. That’s what I think probably happened here, and I think that’s what she’s misinterpreting, but I don’t even know if there was a hug. I can’t tell from these circumstances if there was.

¶11 After the jury returned a verdict of guilty, Clements filed a postconviction motion seeking a new trial based on ineffective assistance of trial

counsel or in the alternative a new trial in the interest of justice. In response, the court held an evidentiary hearing, in accordance with *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), to address whether trial counsel provided ineffective assistance. Following this hearing, the court issued a detailed written decision denying the postconviction motion in its entirety.

¶12 Additional background is provided as relevant to the discussion that follows.

## DISCUSSION

### I. Ineffective Assistance of Counsel

¶13 To prevail on a claim of ineffective assistance of counsel, Clements must prove that his attorney's performance was both deficient and that the deficient performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance requires a showing that acts or omissions of counsel fell below the objective standard of reasonableness under prevailing professional norms. *State v. Hubert*, 181 Wis. 2d 333, 339, 510 N.W.2d 799 (Ct. App. 1993); *see also Strickland*, 466 U.S. at 690 (identified acts or omissions must be "outside the wide range of professionally competent assistance."). Courts assess a trial attorney's actions or inactions based on the information available to counsel at the time of trial, trying to avoid the distorting effects of hindsight. *See State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The burden is on the defendant to "overcome the strong presumption that counsel acted reasonably within professional norms." *State v. Brunette*, 220 Wis. 2d 431, 446, 583 N.W.2d 174 (Ct. App. 1998).

¶14 Turning to the prejudice prong, prejudice occurs when there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the trial would have been different. *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* If we find multiple deficiencies, we are to look at their cumulative effect to make a final determination whether, considered together, they undermine our confidence in the outcome of the trial. *State v. Thiel*, 2003 WI 111, ¶¶58-61, 264 Wis. 2d 571, 665 N.W.2d 305.

¶15 Regarding our standard of review, whether trial counsel provided ineffective assistance is a mixed question of fact and law. *Johnson*, 153 Wis. 2d at 127. We uphold factual determinations by the trial court as to what trial counsel did or did not do, unless we conclude that they are clearly erroneous. *Id.* However, ultimate determinations of whether trial counsel’s performance was deficient and prejudicial are questions of law, which this court reviews de novo. *Id.* at 128. Since a defendant must show both deficient performance and prejudice, we resolve a claim against a defendant if he or she fails to establish either. *Id.*

**A. Alleged Failure to Effectively Challenge Credibility of A.M.T.**

¶16 Clements argues that his attorney was ineffective in failing to challenge A.M.T.’s credibility in the following two ways: (1) the attorney should have used statements that A.M.T. made in a prior recorded statement taken soon after the incident to impeach A.M.T. during cross-examination at trial on two topics, discussed below; and (2) the attorney should have objected to the trial testimony of school counselor Frost.

## 1. Prior Recorded Statement

¶17 A.M.T.'s prior recorded statement, captured on a digital video disc, was taken ten days after the incident. The State stipulated in advance of trial that it would not be presenting the statement in its case-in-chief, but reserved the option of offering it in rebuttal. In the end, neither the DVD nor a transcript of it was presented to the jury.

¶18 Clements argues that his trial attorney was ineffective in failing to use the prior recorded statement to impeach A.M.T. at trial on two topics: (1) whether A.M.T. disclosed the allegation of sexual contact to her grandmother immediately after the incident, and (2) her account of Clements' whereabouts over the course of the weekend following the alleged assault.

### *Disclosure to Grandmother*

¶19 Regarding the first topic, as referenced above, at trial A.M.T. testified that she tried to tell her grandmother about the alleged assault immediately after it occurred, but her grandmother belittled the allegation. In contrast, in the prior recorded statement A.M.T. said that she had not told her grandmother about the sexual contact, because her grandmother "wouldn't believe me anyway. Why waste my breath?"

¶20 During cross-examination of A.M.T. at trial, Clements' attorney did not attempt to impeach A.M.T. using the prior recorded statement, but instead merely raised the possibility of an inconsistency:

Q Now, you indicated that you talked to Grandma Rose when you got downstairs?<sup>2</sup>

A Yes.

Q I—did you make that statement when you talked initially to the investigator [in] that [recorded statement]?

A. I think so.

Q You don't remember, though?

A No.

Q And if it's not there, it's not there; is that right?

A I guess.

¶21 Clements argues that this approach was deficient, and that his attorney should have affirmatively impeached A.M.T. with her prior inconsistent statement.<sup>3</sup> Clements contends that impeaching A.M.T. on this topic would have bolstered A.M.T.'s grandmother's credibility in testifying that it was "absolutely untrue" that A.M.T. said anything to her about sexual contact after the incident, casting doubt on A.M.T.'s account altogether.

¶22 Clements' trial counsel testified at the *Machner* hearing that he could not recall why he did not attempt to impeach A.M.T. using her prior

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<sup>2</sup> Read in isolation this question does not expressly refer to the alleged sexual assault. However, considered in context of A.M.T.'s direct testimony and the flow of cross-examination, the jury would reasonably have understood that it was intended to elicit from A.M.T. whether she talked to her grandmother specifically regarding the alleged sexual contact immediately after the incident.

<sup>3</sup> Clements implicitly relies on WIS. STAT. § 908.01(4)(a)1., which provides that a prior statement by a witness is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... [i]nconsistent with the declarant's testimony ...." The State does not dispute that, as a matter of law on the facts in the record, impeachment was an option that could have been pursued by the defense.



recorded statement on this topic.<sup>4</sup> The trial court did not make any factual finding on point.

¶23 In considering the objective quality of Clements' attorney's performance on this issue, we are obligated to recognize the special dangers inherent in attempting to impeach child witnesses. A defense strategy that avoids an attempt to impeach a child witness with a prior inconsistent statement may be the most effective course, because of the risk that attempted impeachment might cast "both the defendant and defense counsel in a negative light." *State v. DeLeon*, 127 Wis. 2d 74, 85, 377 N.W.2d 635 (Ct. App. 1985).

¶24 We conclude that Clements has failed to carry his burden in showing deficient performance on this topic for three reasons: the value of the impeachment was sharply limited by the primary theory of defense, A.M.T.'s grandmother's testimony on this point was of minimal value due to her admittedly poor memory of the night of the alleged assault, and the claim of ineffectiveness is fatally inconsistent.

¶25 On the first point, under the primary theory of defense A.M.T.'s grandmother's testimony was largely irrelevant. This theory implicitly conceded that A.M.T. *believed* she had been assaulted, but posited that this was only a misinterpretation of an innocent touching. Thus, the question for the jury was whether the State proved beyond a reasonable doubt that Clements intentionally touched A.M.T.'s breasts "for the purpose of sexually degrading or sexually

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<sup>4</sup> Defense counsel testified at the *Machner* hearing that, at the time of the hearing, he had difficulty concentrating and recalling the trial because he was taking painkillers for an ailment.

humiliating” A.M.T., “or sexually arousing or gratifying” Clements. *See* WIS JI—CRIMINAL 2101A; *see also* WIS. STAT. §§ 948.02(2), 948.01(5). A.M.T.’s grandmother’s testimony that A.M.T. did not disclose sexual contact to her would have added little to the primary theory of defense because, given A.M.T.’s purported misinterpretation, A.M.T.’s motives to report or not report immediately to her grandmother would be the same as if Clements had the requisite intent. It is true that there could have remained some potential impeachment value in the mere fact that A.M.T. gave inconsistent accounts, but without a clear nexus between the inconsistency and a viable theory of defense, that value would likely have been small. Clements fails to provide such a nexus.

¶26 Second, A.M.T.’s grandmother testified in part as follows: Q.: “You really don’t have a recollection of December 29th, 2006? A.: “No, I don’t.” Given this acknowledgement that she had virtually no memory of the day on which the alleged assault took place, A.M.T.’s grandmother’s testimony that it was “absolutely untrue” that A.M.T. tried to make reference to the sexual assault carried less weight than it otherwise would have.

¶27 Third, further undermining his claim of deficient performance, Clements’ argument is fatally inconsistent. As discussed further in connection with a separate argument below, and as Clements now acknowledges on appeal, aspects of the prior recorded statement carried “the risk of opening the door to objectionable [to Clements’ defense] contextual material.” Clements cannot overcome the strong presumption that counsel acted reasonably within professional norms when he: (1) won at least a mild concession from A.M.T. in cross-examination that she might not have said in the recorded statement that she told her grandmother about the sexual contact, and in doing so (2) avoided

exposing the jury to the full impact of what Clements admits was “objectionable material.”

¶28 Viewed in an objective manner, defense counsel’s failure to address this issue in a more aggressive manner was justified as a legitimate trial tactic, both to avoid prejudicial evidence and also to limit the risk that the jury would perceive the attorney as a bully, Clements as more culpable, and A.M.T. as more sympathetic. We conclude that the strategy that defense counsel pursued on this issue was not deficient, because it struck a reasonable middle ground, given the dangers to his client of the recorded statement being highlighted to a greater degree and the risk of alienating the jury—all in an attempt to establish an inconsistency that would not have been significant, particularly in the context of the primary defense.

#### *Clements’ Whereabouts*

¶29 Turning to a second alleged missed impeachment opportunity based on A.M.T.’s prior recorded statement, Clements calls attention to alleged inconsistencies between what A.M.T. said in the prior statement and what she testified to at trial about Clements’ whereabouts during the course of the weekend after the incident. However, we conclude that, on their face, the discrepancies alleged by Clements are so trivial that they are difficult to discern. While there are a number of arguable ambiguities in what A.M.T. said in response to questions posed on this topic, we find no clear inconsistencies, and therefore Clements fails to point to meaningful impeachment that his attorney failed to take advantage of, and so this could not have been deficient performance.

¶30 In sum, we conclude that Clements’ attorney was not deficient in failing to rely on portions of the prior recorded statement to impeach A.M.T. at trial, and therefore do not need to reach the question of prejudice.

## 2. Testimony of School Counselor Frost

¶31 In a separate ineffective-assistance-of-counsel argument, Clements contends that his trial attorney was ineffective in failing to object to the State’s proposal to call school counselor Frost to relate A.M.T.’s disclosure to Frost of the alleged sexual contact. Clements argues that if an objection had been made, Frost’s testimony would not have been admitted because it included a hearsay statement of A.M.T., and that Frost’s testimony was sufficiently damaging to his case to be prejudicial.<sup>5</sup>

¶32 Frost’s testimony was admitted under authority of WIS. STAT. § 908.01(4)(a)2. as a prior consistent statement of A.M.T.,<sup>6</sup> but the State

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<sup>5</sup> In one sentence, Clements also asserts that “defense counsel should have moved to sequester” Frost during A.M.T.’s testimony, but fails to develop this argument and therefore we do not address it. See *State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

<sup>6</sup> WISCONSIN STAT. § 908.01 provides in relevant part:

(4) STATEMENTS WHICH ARE NOT HEARSAY. A statement is not hearsay if:

(a) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

....

2. Consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive,

....

effectively concedes on appeal that, as Clements contends, this hearsay exception does not apply to permit this testimony. This is because under the “pre-motive rule,” admission of a prior consistent statement is generally limited to those statements that precede an alleged fabrication, *State v. Sharp*, 180 Wis. 2d 640, 650 & n.4, 511 N.W.2d 316 (Ct. App. 1993), which is not the case here.

¶33 However, the State asks us to conclude that A.M.T.’s statements to Frost were admissible on a different basis, namely, under the residual hearsay exception found at WIS. STAT. § 908.03(24).<sup>7</sup> The State submits that these statements are admissible under this exception as applied in *State v. Sorenson*, 143 Wis. 2d 226, 240, 421 N.W.2d 77 (1988), and *State v. Huntington*, 216 Wis. 2d 671, 575 N.W.2d 268 (1998), because A.M.T.’s statements are those of a child victim of sexual assault and have “guarantees of trustworthiness” that are “comparable” to the other hearsay exceptions contained in § 908.03. Clements contends that *Sorenson* does not apply.

¶34 We conclude that Clements has failed to demonstrate prejudice, because even assuming without deciding that Frost’s testimony should have been objected to by the defense and that such an objection would likely have been sustained, Clements fails to demonstrate that Frost’s testimony was likely to have

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<sup>7</sup> WISCONSIN STAT. § 908.03 provides in relevant part:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

....

**(24) OTHER EXCEPTIONS.** A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

had a significant impact on the jury. The impact of Frost's testimony was likely small because, as discussed above, the primary theory of defense was that A.M.T. misinterpreted a "clumsy," "fatherly hug." Under this theory, from the time of the alleged hug and continuing through disclosure to the counselor and testimony at trial, A.M.T. always misunderstood Clements' intentions. Therefore, disclosure to the counselor of the same allegation does not detract from the defense theory. For this reason, Clements fails to demonstrate that the Frost testimony would likely have been a significant factor in the jury's deliberations, and therefore fails to carry his burden of proving prejudice.<sup>8</sup>

**B. Failure to Object to State's Characterization of Grandmother's Testimony.**

¶35 Clements contends that his trial attorney was ineffective in failing to object to the way in which the State characterized A.M.T.'s grandmother's testimony during rebuttal closing argument. The State asserted in argument that A.M.T.'s grandmother "says she really has no general recollection of the weekend at all." In fact, the grandmother testified that she had no real recollection of Friday, the day of the alleged incident. Specifically, she testified as follows: Q.: "You really don't have a recollection of December 29th, 2006? A.: "No, I

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<sup>8</sup> Clements also asserts in a minimally developed argument that his attorney's brief cross-examination of Frost was "problematic" in that it served to establish only that Frost believed that sexual assault is generally underreported, which Clements submits undercut his attorney's argument to the jury in closing that A.M.T. might have falsely reported a sexual assault to Frost in order to "get lots of attention." We agree with the trial court, which concluded that counsel's performance in this regard was not especially artful but was not deficient. The court observed that this cross-examination could have been structured "a lot better," but it was part of a cognizable strategy for Clements' attorney to have posed "low key" questions to Frost, and then to have made his point in closing as he did.

don't.” We conclude for the following reasons that Clements has failed to carry his burden of showing prejudice from failure to object to this statement.

¶36 It is true that the prosecutor inaccurately characterized this aspect of A.M.T.'s grandmother's testimony. However, in these circumstances the most likely ruling by the trial court in response to an objection would have been to have invited the jury to consult its collective memory on the issue, and then invited the prosecutor to move on to another topic. This would have gained Clements little, particularly because, as noted above, A.M.T.'s grandmother's testimony in general could have had no significant bearing, either way, on the viability of the primary “fatherly” “hug” defense.

¶37 For these reasons, failure to make this particular objection could not have been prejudicial.

### **C. Opening the Door to Prejudicial Evidence**

¶38 Clements contends that his trial counsel was ineffective in making reference during cross-examination to A.M.T.'s prior assertion, one not made during her direct examination at trial, that Clements routinely slapped her on the buttocks. Clements argues that the decision of his attorney to open up this topic to the jury was needlessly damaging to his defense.

¶39 In the prior recorded statement, A.M.T. said that on occasion, Clements would “slap[] on my butt, and ... I don't like it, and I [would] tell him to stop and ... it bugs the heck out of me.” At another point in the statement, she referred to this physical contact as being “[I]like a smack on the butt sometimes,” and when she would complain in response, Clements would “yell” at her words to the effect of, “[D]on't yell at me. I didn't do nothing wrong.” A.M.T. said in

the recorded statement that this would occur every time she visited her grandmother's house, where Clements was residing, "a number of times a day. A number of times a weekend[,] the whole weekend."

¶40 In his opening statement, defense counsel said in part:

[A.M.T.] will tell you her father was not drinking that night or using any type of drugs that she was aware of. *She will tell you that her father had never previously touched her inappropriately and never exposed himself or misbehaved with her in any manner. She will say that Mike sometimes hugged her too hard and slapped her on the butt too often, I assume in the manner we see in watching games on television.*

(Emphasis added.)

¶41 A.M.T. made no reference to "butt slapping" in her direct testimony, but during cross-examination by defense counsel, the following exchange occurred:

Q Now, you indicated that your dad[,] the best you could tell[,] hadn't been drinking [on the night of the charged sexual contact]; is that right?

A Yes.

Q Okay. And you don't know of any illegal drug use, do you?

A. No.

Q. *And except for [the charged sexual contact] and the butt slapping, he treated you with respect; is that correct?*

A *Yeah.*

(Emphasis added.)



¶42 The State returned to the “butt slapping” reference on redirect examination. The following, in its entirety, is the text of the redirect:

Q. [A.M.T.], since it’s been asked, can you tell me about this butt slapping?

A. Yes, um, just like on rare—out of the blue he’d come and just slap it and just make rude remarks and that.

Q. What kind of rude remarks would he make?

A. Just say, hey, sweetie, and it’s just, you know, normal I guess.

Q. Did it make you feel uncomfortable?

A. Yes, it did.

Q. How often would he do that?

A. I don’t know. Quite a bit.

Q. And was that before [the alleged sexual assault] happened?

A. Um, yes.

Q. Okay. Did you always see him—was it always at Grandma Rose’s usually that you saw him?

A. That’d be the only way, yes.

¶43 During its principal closing argument, the State did not allude to this testimony. In the defense closing argument, Clements’ attorney also did not allude to the “butt slapping” testimony. Instead, defense counsel suggested that the jury consider carefully whether A.M.T. was telling the truth about all aspects of the incident, but, as discussed above, primarily argued that A.M.T. misinterpreted Clements’ intent in giving her a “fatherly hug.”

¶44 The State’s rebuttal closing included the following, in addressing the defense theory that this case involved only a “fatherly hug”:

She also told you, incidentally, that her dad used to slap her on the butt all the time and that made her feel uncomfortable, that he would make comments to her like you're—hey, sweetie. [A.M.T.] is a fairly intelligent young woman, and I think she knows what she's talking about.

¶45 Turning to the arguments of the parties on this issue, Clements argues that his attorney provided ineffective assistance in opening up the topic of “butt slapping,” because there was no positive value to the defense in doing so and the subsequent references to this topic left the jury with the overall impression that Clements is “a bad person.”

¶46 The State submits that the trial court correctly determined, in addressing the postconviction motion that, while it was “a little troublesome” and “a bad decision” for defense counsel to raise this topic, it was merely a misstep that was part of an overall acceptable strategy directed at establishing that Clements was “normally respectful to his daughter.” The State takes this position further, arguing that defense counsel, in qualifying the question about Clements being “normally respectful” to explicitly exclude “butt slapping,” “minimized the risk that A.M.T. would bring up the butt slapping in her answer, as she might have done had counsel simply asked her whether Clements generally treated her with respect. By framing the question as he did, counsel maximized the likelihood that he would get a simple ‘yes’ answer, which is the answer that A.M.T. provided.”

¶47 We agree with the State's analysis, and the trial court's overall conclusion, and conclude that trial counsel's overall strategy for handling the “butt slapping” evidence was not deficient performance. Due to the nature of the evidence in the case, defense counsel was forced to operate from a tight tactical position. While the State had agreed not to play the DVD of A.M.T.'s statement in its case-in-chief, the “butt slapping” testimony was potentially available as

evidence throughout the trial, including during A.M.T.'s responses to various questions during cross-examination or during redirect examination. The only limitation was that the State stipulated that it would not play the DVD as part of its case-in-chief. Thus, the prosecutor was free to attempt to elicit this testimony at any time, and A.M.T. could have been expected to bring up "butt slapping" in response to a broad range of questions. This evidence could have been seen by the jury as inculpatory (suggesting that Clements had a sexual interest in his daughter) or exculpatory (suggesting that he was socially awkward but not sexually interested in her). Therefore, viewed in an objective manner, defense counsel could be seen as having made a reasonable choice to try to pre-empt the inculpatory potential of the evidence and steer the jurors toward its exculpatory value.

¶48 Seen in this light, this evidence was not inconsistent with the primary theory of defense. Under this theory, the same "clumsy old dad" whose non-sexual hug was misinterpreted as sexual by his daughter could be the same "clumsy old dad" who awkwardly pats his daughter's bottom too hard with no sexual intention. As already noted, this is how defense counsel framed it in opening statement: "She will say that Mike sometimes hugged her too hard and slapped her on the butt too often, I assume in the manner we see in watching games on television." This was a reasonable strategy, given that trial counsel was not in a position to predict with certainty whether or when the evidence might come out at trial.

¶49 For these reasons, we conclude that Clements' attorney was not deficient in raising the "butt slapping" during opening statements and making brief reference at trial during cross-examination of A.M.T. to the "butt slapping" described in the recorded statement.

#### **D. Theory of Defense**

¶50 Clements contends that trial counsel “undercut the persuasive force” of any theory of defense by failing to present a consistent theory to the jury. On this issue, the trial court implicitly assumed deficient performance but concluded that Clements failed to demonstrate prejudice.

¶51 Clements’ argument starts by focusing on the defense opening argument, in which trial counsel predicted that the jury would learn that: (1) A.M.T.’s testimony regarding the alleged sexual contact would be “close to physically impossible”; (2) Clements and A.M.T. did not act as though anything unusual had happened after the incident; and (3) trial testimony would give the jury “some reasons why [A.M.T.] has given the account that she’s given.”

¶52 Clements contrasts those themes with the “fatherly hug” theme from the defense closing argument, which we quote above in paragraph ten of this opinion. Clements submits that this was an incoherent and ineffective approach.

¶53 However, as we have already had occasion to note, the opening argument in fact foreshadowed this “fatherly hug” defense, woven into a prediction that the jury would hear from A.M.T. that her father was clumsy in displaying affection. Moreover, as the trial court noted in concluding that Clements failed to demonstrate prejudice on this point, the defense closing argument also included references to each of the three themes from the opening argument.

¶54 We note that these themes were not mutually exclusive. In essence, from the beginning of trial to the end, defense counsel attempted to paint a picture of a confused situation, one in which a father who is habitually awkward in

displaying affection bent over his daughter to express his affection, producing an embrace of some sort that might not have qualified as a conventional hug but was in any case not sexual contact.

¶55 Defense counsel began closing argument with this core idea, highlighting the difference between sexual contact with a child’s breast and touching of the breast with no sexual intent. As for Clements’ argument that it was inconsistent for his attorney both to suggest that A.M.T.’s account was either “close to physically impossible” (opening) or “highly unlikely” (closing), this concept was not necessarily inconsistent with the “clumsy” father defense. Clements was not prejudiced by his attorney’s apparent attempts to give jurors reasons to conclude that A.M.T., out of confusion and anger over what she inaccurately *thought* had been sexual contact, might have given testimony that was inaccurate in various respects.

¶56 For these reasons, we conclude that the trial court was correct in deciding that Clements fails to show prejudice regarding defense theories, even assuming without deciding that his attorney was deficient.

### **E. Cumulative Effect of Deficiencies**

¶57 The trial court implicitly concluded that, to the extent that the performance of Clements’ attorney was deficient, the cumulative effect of any deficiencies was not prejudicial. For reasons that are evident from the above discussion, we agree.

## **II. New Trial in the Interests of Justice**

¶58 Clements argues that this was a close case that depended entirely on the credibility of A.M.T., so that each error complained of above that served to

unfairly bolster the credibility of A.M.T. was critical. On this basis, he submits that he is entitled to a new trial in the interest of justice because the real controversy was not fully tried. However, we conclude that this is not the case, for reasons that are evident from the above discussion.

### CONCLUSION

¶59 For these reasons, we affirm the judgment and order.

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

Not recommended for publication in the official reports.

