COURT OF APPEALS
DECISION
DATED AND FILED

September 18, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP555-CR **Cir. Ct. No. 2009CF558**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAMEN R. LOWE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: CHARLES H. CONSTANTINE and ALLAN B. TORHORST, Judges. *Affirmed*.

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

¶1 NEUBAUER, P.J. Damen R. Lowe appeals from his conviction for repeated sexual assault of a child, incest, physical abuse of a child, and exposing a child to harmful material, and also from the denial of his motion for

postconviction relief.[1] Lowe's trial counsel sought to introduce messages the victim posted on social media after Lowe's arrest, which, trial counsel argued, would show that the victim was motivated to fabricate her sexual assault story in order to "get out from underneath the very restrictive and overly protective watch" of Lowe, her strict father. The trial court excluded the after-the-fact social media posts and limited cross-examination of the victim regarding post-allegation activity. We conclude that the trial court's exclusion of the proffered after-the-fact material did not violate Lowe's constitutional right to confront his accuser and present a defense because trial counsel was able to fully cross-examine the victim regarding her behavior and motive to fabricate during the relevant period of time—prior to her accusations of sexual assault. Additionally, the court permitted defense counsel to show that the victim's alleged objective of misbehaving without Lowe's oversight was borne out. The trial court appropriately exercised its discretion in excluding the specifics of the post-allegation behavior. We reject Lowe's other arguments and affirm.

BACKGROUND

¶2 *Case overview*. This case is about Lowe's sexual assault of his daughter, V.A.L. Lowe's primary defense was that V.A.L. fabricated a story of sexual assault in order to free herself from Lowe's strict parenting. The following facts were adduced at trial. Lowe married V.A.L.'s mother, Paula, and adopted V.A.L. when V.A.L. was four years old. Lowe and Paula had been in a relationship since V.A.L. was an infant and had lived together since V.A.L. was

[1] The Honorable Charles H. Constantine presided over the trial and heard the postconviction motion. The Honorable Allan B. Torhorst entered the order denying Lowe's motion for postconviction relief.

about two years old. V.A.L. did not have any relationship with her biological father since she was an infant; she knew Lowe as her biological father. Lowe and Paula divorced in 2005. After the divorce, V.A.L. and C.L., Lowe and Paula's son, lived with Lowe.

¶3 Lowe is a strict parent who used physical discipline. Lowe monitored and limited V.A.L.'s social media and cell phone use and allowed her to socialize with only certain boys. The tension surrounding Lowe's control increased when V.A.L. began attending the high school at which Lowe, a City of Racine police officer, moonlighted as a security officer.

¶4 The situation came to a head in April 2009. Lowe took V.A.L. out of class after he found out that she was failing history class and then found out she had been using another student's cell phone to send text messages. V.A.L. testified that Lowe took her into the teachers' lounge, put handcuffs on her, and tried to get her to tell him whom she was texting. That evening at home, Lowe and V.A.L. continued to argue, and Lowe physically assaulted V.A.L. According to Lowe, he hit V.A.L. twice with an open hand on her leg. According to V.A.L., Lowe hit her with a belt on the back of her arm and thigh.

¶5 V.A.L. made a plan to run away. V.A.L.'s friend testified that V.A.L. "didn't like being bossed around and she wanted to live her life and she didn't want to get hit for doing what she does." The day after the incident in the teachers' lounge, V.A.L. left school with her friend Samantha. V.A.L. told Samantha that Lowe had been sexually abusing V.A.L. V.A.L. told Samantha that she wanted to run away because of the abuse. V.A.L. called Child Protective Services (CPS) from Samantha's house and a man and a woman came there to talk to her. V.A.L. told them of the physical abuse, but did not mention sexual abuse.

That same day, V.A.L. also talked with detectives at the Racine County Sheriff's Department. V.A.L. did not tell anyone at the sheriff's department about sexual abuse. V.A.L. went to stay at her mother's house.

¶6 That weekend, there was an investigation of Lowe. On the following Monday, V.A.L. told CPS that Lowe had sexually abused her. That same evening, Lowe was arrested. Testimony regarding the timing differs, but at some point over the weekend or on Monday, May 4, Paula told V.A.L. that she was adopted, that Lowe was not her biological father.

¶7 Lowe was charged with repeated sexual assault of a child, incest, exposing a child to harmful material, and physical abuse of a child—intentionally causing bodily harm.

Lowe's Motive Defense

¶8 *The Admitted Evidence—Pre-Allegation Misbehavior and Conflict*. At trial, Lowe sought to show that V.A.L. fabricated her allegations of sexual assault and exposure to harmful material against Lowe to get away from her overly strict father so that she could do what she wanted. To that end, the trial court gave defense counsel "broad leeway" regarding evidence about events prior to the allegations. Trial counsel cross-examined V.A.L. at length about engaging in activities of which Lowe did not approve and about her refusal to follow Lowe's rules. V.A.L. testified that she would text boys without Lowe's approval, that she knew Lowe thought the boys she chose to hang around with were a bad influence because they engaged in drinking and drug use, and that many of the boys with whom she had contact had criminal records, including burglary, possession of marijuana, and gang ties. V.A.L. admitted that she had a boy over at Lowe's house without Lowe's permission, that she left the house to see a boy at

night when Lowe was working, and that she continued to use MySpace despite Lowe ordering her to stop. V.A.L. testified that she did not want Lowe to be disappointed in her and did not like that he worked as a security guard at her school, constantly watching over her.

¶9 Trial counsel asked V.A.L. about borrowing others' phones because Lowe had taken away her cell phone privileges. V.A.L. testified that Lowe had taken away several cell phones from her for various rule violations, including one instance where a boy had sent her a picture of his penis. Trial counsel elicited testimony that Lowe did not like V.A.L.'s posted MySpace photos and that he thought she looked promiscuous. Trial counsel asked V.A.L. about her plans to run away from home. In sum, trial counsel elicited voluminous testimony from V.A.L. about her refusing to follow Lowe's rules.

¶10 *After-the-Fact Social Media Posts and Police Calls*. Trial counsel also sought to introduce printouts of posts to V.A.L.'s MySpace page after she had alleged Lowe sexually assaulted her and moved out of Lowe's house. The proffered evidence includes apparent images of V.A.L. drinking alcoholic beverages, smoking out of an improvised marijuana pipe, and drinking alcoholic beverages while lying down with an adolescent male. Trial counsel also wanted to introduce V.A.L.'s posts about the great summer she was going to have in 2009, including her summer goal list with references to having sex and getting "wasted." Additionally, trial counsel wanted to introduce calls Paula made to the police in the period after Lowe's arrest when V.A.L. left Paula's house without permission.

¶11 The trial court excluded the after-the-fact posts and police reports. The trial court allowed trial counsel to ask V.A.L. generally about her MySpace account and disapproved-of activities she engaged in after Lowe's arrest, but

limited the cross-examination to prohibit questioning about her drug and alcohol use and sexual activity. Specifically, the trial court allowed cross-examination on V.A.L.'s post-allegation behavior in three broad areas: (1) that V.A.L. resumed use of MySpace in a fashion Lowe prohibited, (2) that V.A.L. behaved in ways of which Lowe disapproved, and (3) that V.A.L. had contact with people of whom Lowe disapproved.

¶12 After a seven-day trial, the jury found Lowe guilty of repeated sexual assault of a child, incest, exposing a child to harmful material (four counts), and physical abuse of a child (one of four charged counts). Lowe filed a motion for postconviction relief, and the court held hearings at which trial counsel and Lowe testified. The court denied the postconviction motion in its entirety. This appeal follows. In addition to his challenge to the trial court's evidentiary rulings discussed above, Lowe raises several other arguments on appeal, which we address in turn. Further facts will be set forth as needed.

DISCUSSION

A. Lowe's Constitutional Right to Confrontation and Compulsory Process Was Not Violated.

1. Confrontation and Compulsory Process Clauses

¶13 Lowe contends that his constitutional right to cross-examination and compulsory process was violated when the trial court prohibited him from introducing printouts of V.A.L.'s MySpace page from various dates after Lowe was arrested and police reports, also dated after Lowe was arrested, indicating that Paula called the police on V.A.L. several times. The United States and Wisconsin Constitutions guarantee a criminal defendant the right to confront the witnesses against him or her and to "have compulsory process" to compel the attendance of

witnesses in his or her favor. U.S. CONST. amend. VI; WIS. CONST. art. I, § 7. The right to confront witnesses grants defendants the right to effective cross-examination of adverse witnesses, *see* ***Davis v. Alaska***, 415 U.S. 308, 318 (1974), while the compulsory process clause grants defendants the right to admit favorable testimony, *see* ***Chambers v. Mississippi***, 410 U.S. 284, 302 (1973). The confrontation and compulsory process rights have been described as "opposite sides of the same coin," and they are "fundamental and essential to achieving the constitutional objective of a fair trial." ***State v. Pulizzano***, 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990). The two rights work together to guarantee the constitutional right to present evidence. ***Id.*** This right, however, is not absolute; the constitutional guarantee only extends to grant the right to present relevant evidence not substantially outweighed by its prejudicial effect. ***Id.*** at 646. Thus, even when evidence is introduced to confront an accuser, the admissibility of that evidence must still be determined by the trial court by weighing probative value against risk of prejudice. *See* ***State v. McCall***, 202 Wis. 2d 29, 42, 549 N.W.2d 418 (1996) (noting that trial court had properly limited cross-examination pursuant to WIS. STAT. § 904.03 (2011-12)[2]). "There is no abridgement on the accused's right to present a defense, so long as the rules of evidence used to exclude the evidence offered are not arbitrary or disproportionate to the purposes for which they are designed." ***State v. Muckerheide***, 2007 WI 5, ¶41, 298 Wis. 2d 553, 725 N.W.2d 930.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

2. Standard of Review

¶14 The trial court's decision to limit cross-examination of an adverse witness is an evidentiary ruling, which we review for an erroneous exercise of discretion. ***State v. Rhodes***, 2011 WI 73, ¶22, 336 Wis. 2d 64, 799 N.W.2d 850. It is within the trial court's discretion to exclude evidence that might lead to confusion of the issues for the jury. ***Id.***, ¶48. Even in the context of a constitutional challenge, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." ***Delaware v. Van Arsdall***, 475 U.S. 673, 679 (1986), *quoted in* ***Rhodes***, 336 Wis. 2d 64, ¶23. This discretion, however, is not unfettered. In making its determination, the trial court must apply the appropriate legal standards, including considering the defendant's constitutional rights. ***Rhodes***, 336 Wis. 2d 64, ¶25. Ultimately, whether the trial court's evidentiary decisions violate a defendant's right to confrontation "is a question of law subject to independent review." ***Id.***, ¶24.

3. The Trial Court Did Not Err In Excluding the Detail of the Post-Allegation Behavior in the MySpace Posts and Police Records.

¶15 In determining to exclude V.A.L's post-allegation MySpace posts and the police reports, the trial court weighed the probative value of the proffered evidence against its prejudicial value, *see* WIS. STAT. § 904.03, expressing concern that the content was irrelevant and that trial counsel was trying to "trash the

victim."[3] As discussed below, the court did not impose a blanket bar from any topic, and trial counsel was able to fully explore V.A.L.'s alleged behavior and motive to fabricate at the relevant time—when she decided to allege Lowe sexually assaulted her. The court also permitted trial counsel to show that V.A.L.'s objective of freeing herself of Lowe's strict oversight was borne out. Thus, the court permitted trial counsel to show bias on the part of the witness while precluding introduction of evidence that tended only to confuse and prejudice the jury against the witness.[4]

a. The Right of Cross-Examination Is Not Absolute.

¶16 The main and essential purpose of cross-examination is to test the credibility of an adverse witness. ***Rhodes***, 336 Wis. 2d 64, ¶29 (citing ***Davis***, 415 U.S. at 315-16 (quoting 5 J. WIGMORE, EVIDENCE § 1395, at 123 (3d ed. 1940))). Because the right is not absolute, cross-examination may be limited when other legitimate interests in the criminal trial process are implicated, so long as there are means to adequately test the witness's credibility. ***Id.***, ¶34. For example, in ***McCall***, 202 Wis. 2d at 36-37, 39, the trial court limited cross-examination of the prosecution's sole eyewitness regarding dismissal of charges that had been

[3] In his trial brief, defense counsel contends that the proffered evidence was not WIS. STAT. § 904.04(2) "other acts" evidence, but did not offer any rule under which the proffered evidence should be admitted. Although the trial court did not explicitly refer to WIS. STAT. § 904.03, it is apparent that it considered the appropriate factors and engaged in the balancing. In any event, where the trial court does not set forth its reasoning, we search the record for a reasonable basis for the decision. ***State v. Lindh***, 161 Wis. 2d 324, 361 n.14, 468 N.W.2d 168 (1991).

[4] We note that neither party argues on appeal that this is a Rape Shield case. WISCONSIN STAT. § 972.11 excludes evidence of the complaining witness's prior sexual conduct when the defendant is accused of certain crimes, including repeated sexual assault of a child and incest. The excluded evidence in this case was not about V.A.L.'s prior sexual conduct.

pending against him prior to trial. In upholding the trial court's balancing the relevancy of the proffered testimony against the danger of unfair prejudice and confusion of the issues, the supreme court noted that "the record is replete with evidence offered by McCall to afford the jury a basis to infer that [the witness's] credibility was such that he would be less likely than the average trustworthy citizen to be truthful in his testimony." ***Id.*** at 41. Thus, even though the trial court limited cross-examination on the witness's alleged bias, defense counsel was able to solicit evidence regarding the witness's truthfulness. ***Id.***

¶17 In contrast, in ***Van Arsdall***, 475 U.S. at 679, the Supreme Court held that Van Arsdall's right to confront was violated when the trial court barred all cross-examination of a State's witness regarding the witness's agreement with the prosecution to drop a charge in exchange for the witness's promise to talk to the prosecutor. ***State v. Echols***, 2013 WI App 58, 348 Wis. 2d 81, 831 N.W.2d 768, provides similar guidance. Although decided under WIS. STAT. § 904.04, we determined that the trial court improperly excluded "other acts" evidence of the victim's prior disciplinary records at school, which arguably provided a motive to fabricate. ***Echols***, 348 Wis. 2d 81, ¶¶17-18. In that case, a school bus driver was on trial for sexually assaulting a fifteen-year-old student. ***Id.***, ¶¶2-3. Echols's theory of defense was that the girl was repeatedly in trouble at school, had thrown a snowball at Echols, and made up the assault story to avoid expulsion and garner sympathy. ***Id.***, ¶4. The court of appeals found that the victim's prior disciplinary records were relevant to her motive, and the exclusion was not harmless error because the jury was not given the opportunity to hear *any pre-allegation* evidence on whether the student had a motive to fabricate the assault. ***Id.***, ¶21.

b. Trial Counsel Was Able to Fully Solicit Evidence of Motive at the Time the Victim Alleged Lowe Sexually Assaulted Her and to Show that Her Objective Was Borne Out.

¶18 In this case, unlike in ***Van Arsdall*** and ***Echols***, trial counsel was able to fully explore V.A.L.'s pre-allegation behavior, including intense conflict with Lowe. Among other things, trial counsel asked V.A.L about her MySpace page and the fact that Lowe did not approve of it. Trial counsel elicited V.A.L.'s testimony that Lowe had repeatedly taken away her cell phone privileges. V.A.L. testified that when Lowe pulled her out of class she lied to him about whom she was texting to avoid getting into trouble. V.A.L. described how Lowe handcuffed her when they were in the teachers' lounge. Trial counsel asked V.A.L. about Lowe's prohibitions on boys with whom she had contact, and who had engaged in drinking and drug use, and who had criminal records. V.A.L. testified that the situation was so bad that she packed clothes and planned to leave home. Trial counsel was able to lay ample foundation for the theory that, at the time of the allegations, V.A.L. was in the habit of breaking Lowe's rules and arguably had reason to want to get out from under Lowe's control.

¶19 Moreover, the trial court did not make a blanket preclusion of evidence of V.A.L.'s post-allegation behavior. Trial counsel was permitted to support the defense theory by asking V.A.L. whether she resumed using MySpace in a manner that her father prohibited, whether she was behaving in ways of which her father would not approve, and whether she was contacting people he would have forbidden her to contact. Trial counsel elicited V.A.L.'s testimony that she was able to resume use of her cell phone.

4. The Trial Court Properly Weighed the Probative Value of the Post-Allegation Posts and Police Reports and Guarded Against the Potential for Confusion and Misleading the Jury.

¶20 The trial court properly guarded against confusion of the issues for the jury, excluding evidence that might turn the trial into one about the character of the victim, rather than the commission of sexual assault. Regarding the probative value of the post-allegation posts and police reports, the trial court noted that the key time frame for the defense theory on motive was before Lowe's arrest and that "once she's achieved what she wants and the shackles are off … I'm a little bit troubled as to what the actual relevance is." As discussed above, trial counsel thoroughly developed Lowe's theory that V.A.L. had reason to fabricate the sexual assault at the relevant time—when she alleged sexual assault. As the trial court squarely recognized, the motive-to-lie defense was based on Lowe's pre-allegation control, not V.A.L.'s post-allegation MySpace posts.

¶21 That said, the court did permit defense counsel to establish that the victim's alleged motive *was* in fact borne out, that V.A.L. misbehaved in ways of which Lowe would not have approved. Beyond that, the specifics as to *how* V.A.L. subsequently misbehaved would have been cumulative. Indeed, given all the testimony about V.A.L.'s breaking rules prior to Lowe's arrest, the MySpace material would only have shown that she continued to break the rules after Lowe was gone. And, precisely *how* V.A.L. subsequently misbehaved would lend to confusion of the jury by placing undue emphasis on collateral matters—such as whether the misbehavior depicted in the posts was in fact worse or whether V.A.L.

acted on her wish list.[5] In an argument that appears to completely undermine Lowe's suggestion that V.A.L. sought the less restrictive oversight of Paula, Lowe now contends that he should have been able to show that V.A.L. constantly violated Paula's rules—and thus undermine V.A.L.'s credibility. V.A.L.'s conflict and defiance with Paula after Lowe's arrest are irrelevant to the issue of whether Lowe sexually assaulted V.A.L., or her motive to rid herself of Lowe, other than to impugn her character. Moreover, trial counsel's attempt to challenge V.A.L.'s credibility by exploring whether she was truthful about her post-arrest behavior would divert the trial to extraneous matters and confuse the jury by placing undue emphasis on collateral issues.[6] The court properly excluded the evidence because any probative value of the after-the-fact evidence was substantially outweighed by the potential for confusion and misleading the jury.

¶22 Regarding prejudicial effect, the trial court expressed concern that purported attacks on credibility were really character assassination: "What does

[5] We further note that many of the MySpace statements are so ambiguous that they show nothing about the motive. For example, on May 28, just before Lowe's trial, V.A.L. posts "FUCK THE COURT SYSTEM," a comment that defies interpretation vis à vis the defense theory on motive. On what appears to be a June 21, 2009 log in, about two weeks after the verdict in Lowe's trial, V.A.L. says "im 0ne to live life to the fullest n0w that have a sense 0f freedom." Then on a page that indicates "last login: 7/1/2009," V.A.L. posts "this summer is going to be one ill never forget." These posts are subject to conflicting inferences, including that she is happy that she is no longer subject to Lowe's abuse. As the trial court noted, there is nothing in these or the other MySpace materials that indicate the victim would deliberately falsify information, nor is there any reference to Lowe. These posts do not make it more or less likely that Lowe assaulted V.A.L., or for that matter, that she had a motive to fabricate.

[6] While Lowe argues on appeal that the trial court "apparently excluded the evidence under WIS. STAT. § 906.08(2)—Evidence of Character and Conduct of Witness" without doing any analysis, "[§] 906.08(2) is delimited to cross-examination about *prior* specific instances of untruthful behavior." DANIEL D. BLINKA, 7 WISCONSIN PRACTICE SERIES, WISCONSIN EVIDENCE § 608.2, at 481 (3d ed. 2008). In any event, the WIS. STAT. § 904.03 analysis is equally applicable to evidence proffered under § 906.08(2). BLINKA, *supra*, § 608.2, at 480-81.

this have to do as far as her credibility as to whether or not the sexual assaults took place other than … bringing her character into question." The MySpace posts and police reports were likely to focus the jury's attention on V.A.L.'s subsequent misbehavior itself, not as demonstrating her motive to fabricate.

¶23 Avoiding the introduction of inflammatory material about the witness's character is a legitimate concern. For example, in ***State v. Lindh***, 161 Wis. 2d 324, 341, 468 N.W.2d 168 (1991), Lindh sought to cross-examine the State's forensic psychiatrist about his pending misconduct allegations, arguing that the allegations presented "serious questions relating to the bias, motive and interest" of the doctor. The supreme court noted that there were no pending charges against the doctor, and thus Lindh did not expose a "prototypical form of bias." ***Id.*** at 357 (quoting ***Van Arsdall***, 475 U.S. at 679-80). Regarding Lindh's attempt to use the evidence to show that the doctor was not "pure as the driven snow," the supreme court had this to say:

> The character of a witness may be impeached only in regard to matters which go directly to his reputation for truth and veracity. We have long considered that on cross-examination into the character of a witness, use of irrelevancies, insinuating that a person is of bad moral character, tending to degrade him [or her] in the eyes of the jury, is not a proper impeachment device. Virtually by definition, such evidence is not relevant, tending only to prejudice the jury against the witness.

Id. at 357-58 (citations omitted). The court further noted:

> [B]ias evidence which is only marginally relevant or which may confuse the issues is excludable…. [E]vidence which is relevant to provide bias, like evidence offered to prove other facts, "must also satisfy [WIS. STAT. §] 904.03, requiring the trial court to weigh the probative effect of the evidence against its prejudicial effect."

Lindh, 161 Wis. 2d at 362 (citation omitted). "Evidence is unfairly prejudicial if it … causes a jury 'to base its decision on something other the established propositions of the case.'" ***Id.*** (citations omitted).

> One factor is whether the evidence would divert the trial to an extraneous issue. A court can and should exclude bias evidence which has little bearing on the witness's credibility, but which would impugn the witness's character because such evidence "opens the door to improper considerations and lends to the confusion of the jury by placing undue emphasis on collateral matters."

Id. at 363 (citations omitted). In ***Lindh***, the trial court did not erroneously exercise its discretion in concluding that any relevance of the proffered evidence was outweighed by potential unfair prejudice and confusion, including that the evidence "would serve no purpose except to 'trash' [the doctor], that it would distract the jury from the real issue." ***Id.*** at 364.

¶24 As in ***Lindh***, the trial court here properly weighed the evidence and excluded evidence whose "probative value [was] substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury," including that the evidence could serve no purpose except to "trash" the victim and distract the jury from the real issue. WIS. STAT. § 904.03; ***Lindh***, 161 Wis. 2d at 364. Lowe was able to present V.A.L.'s bias and there was no violation of Lowe's constitutional rights to confrontation and compulsory process. *See, e.g.*, ***McCall***, 202 Wis. 2d at 44 & n.11 (right to confront one's accusers is not violated when court excludes irrelevant or immaterial evidence); ***State v. Evans***, 187 Wis. 2d 66, 84, 522 N.W.2d 554 (Ct. App. 1994) (right to confrontation and compulsory process only allow the defendant to present relevant evidence that is not substantially outweighed by its prejudicial effect). There was no error.

5. The Trial Court Properly Limited Cross-Examination of Paula About the Post-Allegation Posts and Police Reports.

¶25 Lowe also argues that the trial court's limitations on cross-examination prevented trial counsel from exposing Paula's alleged lack of credibility. Lowe claims that the State opened the door for questioning on the social media and police report evidence when the prosecution asked Paula about V.A.L.'s character, and Paula responded that V.A.L. was "a typical teenager" and not "defiant." Paula further testified that she was aware of and did not disapprove of V.A.L.'s MySpace page and its content. Lowe argues that a meaningful impeachment would have included the MySpace material to show that Paula was either lying about having seen the MySpace material or that she thought the explicit content was normal. Regarding the police reports, trial counsel sought to introduce them to impeach Paula's testimony that V.A.L. was not "defiant." Additionally, trial counsel sought to impeach Paula regarding "what kind of a kid [V.A.L.] is" by asking Paula about V.A.L.'s MySpace material and the police reports.

¶26 The trial court allowed trial counsel to ask Paula "if she approves of [V.A.L.'s] use of MySpace or if she's seen it. But as far as the content and specific statements … it's not coming in." The trial court went on: "To me it goes to character. It's character assassination." The trial court noted that it had already been established that Lowe was the disciplinarian and that V.A.L.'s relationship with Paula was such that V.A.L. only went to Paula's house once or twice a month.

¶27 The trial court did not erroneously exercise its discretion in limiting Lowe's cross-examination of Paula. First, Paula's credibility had already been undermined by her own and V.A.L.'s testimony. Paula had testified that V.A.L.

was "a typical teenager" and not "defiant," but V.A.L. had already testified she violated many rules. Second, trial counsel's attempt to challenge Paula's credibility by exploring whether she was truthful about reviewing V.A.L.'s post-allegation MySpace material would divert the trial to extraneous matters and confuse the jury by emphasizing collateral issues. Third, what Paula thought of V.A.L. and her opinion as to what "kind of kid" she was goes only to V.A.L.'s character, and is wholly irrelevant to V.A.L.'s motive. Fourth, V.A.L. was the witness whose credibility, or lack thereof, was critical to Lowe's fabrication defense, not Paula. Paula's testimony did not corroborate V.A.L.'s accusations of sexual abuse. Confrontation clause challenges are to individual witnesses; Paula was not the witness whose motive to fabricate was at issue. *See* ***Rhodes***, 336 Wis. 2d 64, ¶31 (quoting ***Van Arsdall***, 475 U.S. at 680) (focus in confrontation clause challenge is on particular witness).

6. Lowe's New Argument for Admission of the Police Reports Was Waived.

¶28 Lowe argues for the first time on appeal that the trial court's exclusion of the police reports deprived trial counsel of an opportunity to expose V.A.L.'s motive to lie and to testify favorably for the State. The argument is that trial counsel could have asked why V.A.L. "was able to run away, break curfew, cause disturbances, and drink without being arrested or cited." This is not a case like ***Van Arsdall***, where pending charges against a witness were dropped. ***Van Arsdall***, 475 U.S. at 676. Lowe has made no showing that there were any pending charges against V.A.L. that the State could use to coerce her testimony. Furthermore, trial counsel did not make this argument in seeking introduction of the police records or pursue this line of questioning. Issues not raised in the trial court will not be considered for the first time on appeal. ***Wirth v. Ehly***, 93 Wis. 2d

433, 443, 287 N.W.2d 140 (1980). The failure of trial counsel to ask questions does not violate the defendant's right to confrontation. ***State v. Barreau***, 2002 WI App 198, ¶56, 257 Wis. 2d 203, 651 N.W.2d 12 ("[T]he right of confrontation guarantees only an *opportunity* for effective cross-examination. The right is not violated when counsel chooses not to ask a question.").

7. Any Error Was Harmless.

¶29 A violation of the confrontation and compulsory process rights does not result in an automatic reversal; the harmless error test applies to confrontation clause cases. ***Rhodes***, 336 Wis. 2d 64, ¶32 (citing ***Van Arsdall***, 475 U.S. at 680, 684). Under the harmless error test, the focus is on "whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." ***Id.*** (quoting ***Van Arsdall***, 475 U.S. at 684). The factors to be considered in this analysis are the importance of the excluded evidence, whether it was cumulative, whether other evidence corroborated or contradicted the evidence, the extent of cross-examination allowed, and the overall strength of the prosecution's case against the defendant. ***Id.***

¶30 As indicated above, the exclusion of Lowe's proffered evidence was not error. However, even if it were, it was harmless error. The excluded evidence was cumulative of other evidence introduced to support the defense's theory. There was abundant evidence that Lowe was a strict disciplinarian and that V.A.L. was a defiant child, lending credence to the defense theory that V.A.L. wanted more freedom. Trial counsel was able to cross-examine V.A.L. about her post-allegation behavior and use of MySpace. Exhibits depicting V.A.L.'s actual MySpace posts would have been cumulative of other undisputed evidence that

supported the defense's theory of the case. Given the evidence before the jury, we are confident that the introduction of the excluded evidence would not have changed the outcome of the trial.

B. Lowe Failed to Demonstrate Ineffective Assistance of Counsel.

¶31 To succeed on a claim of ineffective assistance of counsel, a defendant must prove both deficient performance and prejudice. *See* ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. We examine trial counsel's performance with great deference; the defendant must overcome a strong presumption that trial counsel's performance was reasonable. ***State v. Trawitzki***, 2001 WI 77, ¶40, 244 Wis. 2d 523, 628 N.W.2d 801. To prove prejudice, a defendant must show that counsel's errors were so serious as to deprive the defendant of a fair trial and a reliable outcome. ***Strickland***, 466 U.S. at 687. We need not address both the deficiency and prejudice prongs if the defendant has failed to establish one of them. ***State v. Mayo***, 2007 WI 78, ¶61, 301 Wis. 2d 642, 734 N.W.2d 115. On appeal, we uphold the trial court's findings of fact unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether those facts constitute prejudicially deficient performance is a question of law we review de novo. ***Id.***

¶32 Lowe contends that his trial counsel was ineffective for the following: failure to turn over various documents to the State pursuant to the State's discovery demand, filing the trial brief too late (at 4:12 p.m. on the Friday before Memorial Day weekend when trial was set to start on the following Tuesday), failure to obtain phone records of calls between Paula and Lowe, failure

to call Lowe's former live-in girlfriend as a witness, failure to prepare Lowe for his trial testimony, and failure to make a discovery demand. Lowe argues that each of these deficiencies was also prejudicial and that the cumulative effect constituted prejudice. We address each argument in turn.

1. Failure to Comply with Discovery

¶33 The State filed a discovery demand for any physical evidence Lowe planned to introduce. The State later filed a motion in limine to exclude those items that had not been turned over pursuant to the discovery demand. Trial counsel sought to introduce items he had not turned over to the State pursuant to the discovery demand. One, he tried to introduce printed pages of V.A.L.'s MySpace account to impeach V.A.L. and Paula. Two, he tried to introduce police call log records showing that Paula had called the police on V.A.L. several times. Three, he tried to introduce letters V.A.L. wrote about meeting up with boys and running away. Four, he tried to introduce a defense-prepared transcript of V.A.L.'s interview with CPS. We address each in turn.

¶34 *Printed Pages of MySpace Account*. Trial counsel's failure to turn over print-outs of V.A.L.'s MySpace pages was neither deficient nor prejudicial. Trial counsel testified that he did not turn the MySpace materials over earlier because he did not want to "stop the flow of information." This is a reasonable explanation. Further, the trial court stated that trial counsel's failure to turn these materials over was not the reason they were excluded, so there was no prejudice.

¶35 *Police Call Log Records*. As with the MySpace material, the trial court indicated that trial counsel's failure to comply with the State's discovery demand did not influence the exclusion of this evidence. If trial counsel's failure to turn the records over was deficient, it was not prejudicial.

¶36 *Copies of V.A.L.'s Letters*. Trial counsel did not turn over to the State three handwritten letters or notes from V.A.L., one to Lowe and the others to a friend or friends. These letters were admitted to the extent defense counsel sought, so failure to turn them over to the State did not prejudice Lowe's defense.

¶37 *Defense-Prepared Transcript of V.A.L.'s Interview with CPS*. Trial counsel did not provide the State with a defense-prepared transcript of V.A.L.'s interview with CPS, but then used it while cross-examining V.A.L. Trial counsel was able to use the interview transcript, which he said he had forgotten to copy and turn over to the State as a hard copy because he had sent it to the State via email. Any error in not turning it over was not prejudicial.

2. Late Brief

¶38 The trial court indicated at the ***Machner***[7] hearing that the decisions to exclude certain evidence were not influenced by the late filing of the trial brief. Lowe argues on appeal, without specificity, that the failure to comply with the court's procedural orders "affected Lowe's Compulsory Process rights." This bare-bones allegation falls short of showing deficiency or prejudice. There is no showing of ineffective assistance of counsel regarding the late brief.

3. Failure to Obtain Phone Records

¶39 Lowe argues that trial counsel should have obtained Paula's phone records because the "time line" of Paula's calls supports the defense theory surrounding the events leading up to V.A.L.'s decision to report Lowe for abuse.

[7] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Further, argues Lowe, the phone records would have confirmed witnesses' testimony that V.A.L. found out that Lowe was not her biological father over the weekend following her initial report of physical abuse. The phone records only show the times of calls, not the content. Given the minimal probative value of a list of which numbers were called when, we conclude that trial counsel's failure to obtain them was not deficient and did not prejudice the defense. Moreover, Lowe did not call Paula to testify at the postconviction hearing. Thus, he failed to show that cross-examination of Paula with the phone records would have changed her testimony, much less the result of the trial. *See* ***State v. Reed***, 2002 WI App 209, ¶17, 256 Wis. 2d 1019, 650 N.W.2d 885 (to establish prejudice, a conceivable effect on the outcome is insufficient; the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense). http://web2.westlaw.com/find/default.wl?mt=205&db=595&tc=-1&rp=%2ffind%2fdefault.wl&findtype=Y&ordoc=2030965424&serialnum=2002413685&vr=2.0&fn=_top&sv=Split&tf=-1&pbc=BAAD7797&rs=WLW13.07

4. Decision Not to Call Girlfriend

¶40 Trial counsel decided not to call Crystal Cruz, Lowe's former live-in girlfriend, as a witness. Trial counsel indicated that Cruz had attended the school where Lowe worked as a security officer. According to trial counsel, Lowe started publicly dating her soon after she left the school. Trial counsel testified that Cruz was young and pretty and, he thought, resembled V.A.L. In this sexual assault of a teen daughter case, trial counsel thought it wise to keep the young girlfriend off the witness stand. This was a reasonable decision. There was no deficient performance here.

5. Failure to Prepare Lowe and Failure to File Discovery Demand

¶41 Lowe alleges that trial counsel failed to prepare him for his testimony. Additionally, Lowe argues that trial counsel was ineffective for failing to make a discovery demand that may have allowed him to see a statement V.A.L. made to the prosecution about a call to the police to report Lowe's physical abuse. Neither of these contentions was raised in Lowe's postconviction motion and supporting brief. Although both were briefly touched upon at the ***Machner*** hearing, they were not presented in Lowe's trial briefing as instances of deficient performance. We decline to address these issues. *See* ***State v. Giebel***, 198 Wis. 2d 207, 218, 541 N.W.2d 815 (Ct. App. 1995) (declining to review allegations of ineffective assistance of counsel that were not presented in postconviction motion).

6. Cumulative Effect

¶42 Lowe argues that the cumulative effect of trial counsel's individual deficiencies constitutes ineffective assistance of counsel. To find cumulative prejudice, we must find that the effect of multiple deficiencies prejudiced the defendant and undermined confidence in the outcome of the trial. ***State v. Thiel***, 2003 WI 111, ¶58, 264 Wis. 2d 571, 665 N.W.2d 305. The only arguable deficiency here was trial counsel's failure to turn over some documentary evidence to the State pursuant to the discovery demand. If this was an error, it was de minimus; it had no effect on the trial. There can be no cumulative effect when there are no real individual instances of deficient performance to accumulate. ***Id.***, ¶59 (court must calculate cumulative effect by taking together individual deficiencies).

¶43 Taking together trial counsel's explanations at the ***Machner*** hearing, the evidence introduced at trial, including the witnesses' testimony, and the court's

rulings, we conclude that trial counsel did not provide ineffective assistance of counsel.

C. Disclosure of Exculpatory Evidence

¶44 ***Brady v. Maryland***, 373 U.S. 83 (1963), requires the State to turn over to the defendant any exculpatory evidence. To establish a ***Brady*** violation, the defendant must show: (1) the State suppressed evidence (2) that was favorable to the defense and (3) material to the determination of guilt. ***Id.*** at 87. Evidence is material if there is a reasonable probability its disclosure would have changed the outcome of the proceeding**.** ***State v. Garrity***, 161 Wis. 2d 842, 850, 469 N.W.2d 219 (Ct. App. 1991). The duty to disclose extends to impeachment evidence as well as exculpatory evidence. ***State v. Nerison***, 136 Wis. 2d 37, 54, 401 N.W.2d 1 (1987). We apply ***Brady*** independently to the undisputed facts. ***State v. Rockette***, 2006 WI App 103, ¶39, 294 Wis. 2d 611, 718 N.W.2d 269. The State's obligation to turn exculpatory evidence over to the defense is codified at WIS. STAT. § 971.23.

¶45 Lowe argues that the State failed in its duty to disclose V.A.L.'s pretrial statement to the prosecution that she once called the police on Lowe. At trial, the prosecution asked V.A.L. why she had not told anyone about an incident when Lowe hit her. Trial counsel objected, indicating that he anticipated V.A.L. was going to testify about a prior call to the police regarding Lowe's abuse, and trial counsel had not been given pretrial notice about this testimony. The trial court asked the State whether it had corroboration of the police call, and the prosecutor responded that he did not. The trial court sustained Lowe's objection on the grounds that there was no independent corroboration of the report.

¶46 Lowe fails to establish a ***Brady*** violation. The trial court sustained trial counsel's objection and did not allow the State to elicit the testimony from V.A.L. The remedy for a ***Brady*** violation is exclusion, *see* WIS. STAT. § 971.23(7m), so Lowe's ***Brady*** argument is moot. We further note that the anticipated testimony was that the police came to the house and left after Lowe talked to them. This is hardly exculpatory. Lowe contends that the evidence could be exculpatory if he had been able to able to use the absence of independent corroboration of the report to show that V.A.L. lied about the incident. However, Lowe objected to the admission at the time of trial and, in any event, failed to take steps postconviction to sufficiently establish, one way or another, whether there had been any record of such a call.

D. Constitutionality of WIS. STAT. § 948.025

¶47 Lowe argues that WIS. STAT. § 948.025, repeated sexual assault of a child, is unconstitutional because it does not require jury unanimity on which three individual acts comprise the crime or require the jury to decide if each individual act was a violation of subsection WIS. STAT. § 948.02(1) or (2), first- or second-degree sexual assault. ***State v. Johnson***, 2001 WI 52, 243 Wis. 2d 365, 627 N.W.2d 455, squarely addressed and rejected this same challenge to § 948.025. "[W]hile jury unanimity is required on the essential elements of the offense, when the statute in question establishes different modes or means by which the offense may be committed, unanimity is generally not required on the alternate modes or means of commission." ***Johnson***, 243 Wis. 2d 365, ¶11. We reject Lowe's constitutional challenge.

E. Jury Instruction Challenge

¶48 Lowe challenges the jury instructions on two alternate grounds: that they were not legally accurate, or that they were accurate but unconstitutionally misled the jury. *See* ***State v. Gonzalez***, 2011 WI 63, ¶21, 335 Wis. 2d 270, 802 N.W.2d 454. Lowe argues that modifications were made to the standard instruction that were inaccurate and misleading.

¶49 Lowe waived his ability to object to the jury instructions by failing to object at the jury instruction conference. *See* WIS. STAT. § 805.13(3). Lowe replies that he submitted written objections to the instructions. But written submissions do not remove the requirement that objections be made on the record at the conference. *See* ***Frayer v. Lovell***, 190 Wis. 2d 794, 809, 529 N.W.2d 236 (Ct. App. 1995) (proposed list of jury instructions submitted to court does not obviate need to object on the record at the conference). Furthermore, the instruction Lowe objects to on appeal was discussed at the conference, with trial counsel ultimately agreeing that the instruction was acceptable as modified. Trial counsel's waiver deprives this court of its power to consider the objection. *See* ***State v. Ward***, 228 Wis. 2d 301, 305, 596 N.W.2d 887 (Ct. App. 1999).

CONCLUSION

¶50 Lowe's challenge to his conviction based on the confrontation and compulsory process clauses fails. Trial counsel was permitted to introduce abundant evidence that Lowe was a strict disciplinarian, that Lowe and V.A.L. had serious disputes, and that she was persistently defiant. The defense wanted to show that V.A.L. sought to rid herself of Lowe so that she could misbehave in ways of which he would have severely disapproved. Her misbehavior was admitted; the details of her after-the-fact misbehavior are prejudicial, irrelevant,

and liable to confuse and mislead the jury. Lowe's other various challenges are likewise without merit.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.