COURT OF APPEALS
DECISION
DATED AND FILED

December 3, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP47-CR **Cir. Ct. No. 2008CF2950**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADAMIS FIGUEROA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 BRENNAN, J. Adamis Figueroa appeals from a judgment of conviction, entered upon a jury's verdict, for first-degree sexual assault of a child. On appeal, Figueroa complains both that he received ineffective assistance of trial

counsel and that he deserves a new trial in the interest of justice. His claims are without merit and we affirm.

BACKGROUND

¶2 In November 1993, at the age of twelve, J.R. reported being sexually abused by her then-stepfather Adamis Figueroa since she was seven years old. The matter was investigated by police and reviewed by the district attorney's office. No charges were filed.

¶3 With help from a community advocate, J.R. again contacted authorities in 2008 and asked that the matter be re-opened. She reported that Figueroa had sexual contact with her on multiple occasions from the time she was six or seven years old, until 1993, when she first reported the abuse. The case was re-opened, and following an investigation, Figueroa was charged with two counts of first-degree sexual assault of a child. The complaint alleged that between July 1, 1989, and September 1, 1993, Figueroa had sexual intercourse (penis to mouth) and sexual contact (penis to vagina) with J.R., contrary to WIS. STAT. § 948.02(1) (1991-92).[1]

¶4 A trial was held before a jury.[2] As relevant to Figueroa's appeal, former-Milwaukee Police Department employee Nicole Vele and J.R.'s childhood friend Yolanda Castro each testified. Figueroa did not testify.

[1] All other references to the Wisconsin Statute are to the 2011-12 version unless otherwise noted.

[2] The Honorable Jeffrey A. Conen presided over trial and Figueroa's original sentencing hearing, and entered the order relating to Figueroa's postconviction motion for a new trial and resentencing.

¶5 Vele was an employee in the sensitive crimes unit of the Milwaukee Police Department in 2008 when J.R. asked the police department to re-open her case. Vele assisted police in translating two conversations between J.R. and Figueroa. Both conversations were in Spanish.

¶6 During the first conversation, J.R., while wearing a wire, approached Figueroa while he was at work, and asked him why he had assaulted her as a child. Vele testified that she heard Figueroa respond by saying that "he didn't want to talk about it and he didn't want any trouble or problems."

¶7 The second conversation was a one-party consent call placed by J.R. to Figueroa, in the presence of police, the afternoon after she approached him at work. Vele testified that she was with J.R. during the telephone call and heard J.R. repeatedly ask Figueroa about the sexual abuse, specifically referencing him making her put her mouth on his penis, and attempting to have penis-to-vagina intercourse with her. Vele told the jury that there were long pauses between questions, and Figueroa responded to the questions by saying that "a long time has passed. I don't want any problems. I don't want to talk about this." Vele recalled that Figueroa sometimes responded by saying, "some[]things aren't fair." Vele testified that she did not recall Figueroa denying J.R.'s allegations that he assaulted her during either of the conversations.

¶8 To impeach Vele's testimony regarding her recollections of the conversations between Figueroa and J.R., the defense called Dawn Maldonado, a State-certified court interpreter who was present for the trial, and asked her to translate portions of both recordings. With respect to the first recording, in which J.R. confronted Figueroa with her accusations while Figueroa was at work, Maldonado testified that she heard a female voice asking, "why did you rape me,"

and a male voice responding, "I did not rape you." Maldonado testified that during the recording of the telephone conversation, she heard a female voice stating, "that's not fair," and a male voice replying, "there are many things that weren't fair." Maldonado also testified that, in the portions of the recordings she listened to, she did not hear any specific sexual act referred to, and only heard the terms "sexual relations and rape."

¶9 J.R.'s childhood friend Castro testified that when she was in fourth grade, and J.R. was in second grade, J.R. told her that her stepdad was touching her, but that J.R.'s mom did not believe J.R.'s accusations. Specifically, Castro testified that J.R. told her that Figueroa "was putting his private part into her private part[,]" making her "put [her] mouth on his private part, "and touching her body."

¶10 Castro testified that on one occasion, when she was nine years old and J.R. was six years old, she went into J.R.'s room, and J.R. said to her, "do you know that I have a little hole down there[?]" J.R. then asked Castro to go into the closet with her so she could show her something, and when Castro opened up the door she saw that the pink toothbrush that had been in J.R.'s hand was now in her vagina. Castro said that she could only talk to J.R.'s brother about these things because "he believed [J.R.] too, but he was afraid to say anything."

¶11 Castro testified that she thought she stopped going to J.R.'s house when she was in the sixth grade. She said that one day she asked for and received money from Figueroa for ice cream, and the next day, J.R.'s mother called Castro and told her it was wrong to ask other people for money. Castro testified that during the same conversation, J.R.'s mother said to her, "your body's a little too developed already and men already look at you . . . don't come to my house

anymore." When Castro told her mother about the conversation, Castro's mother said, "there is something funny going on in that house," and Castro's mother prohibited her from going to J.R.'s house anymore.

¶12 The jury found Figueroa not guilty of count one, penis-to-mouth sexual intercourse, but guilty of count two, penis-to-vagina sexual contact. Figueroa was sentenced to eighteen years in prison.

¶13 Figueroa filed a postconviction motion asking for a new trial, based on ineffective assistance of trial counsel and in the interest of justice,[3] and for resentencing. The trial court denied Figueroa's request for a new trial without a hearing, adopting the State's brief *in toto*.[4] However, after the State stipulated that Figueroa should be resentenced because the parties erroneously believed that the maximum penalty for Figueroa's crime was forty years, as opposed to twenty, the trial court granted Figueroa's request for resentencing. Figueroa was resentenced

[3] Figueroa raised other issues in his postconviction motion that he does not raise on appeal. As such, we deem those issues abandoned. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).

[4] Once again we caution trial courts against adopting a party's brief *in toto*, as the trial court did here. In denying the postconviction motion, the trial court merely stated that it "agree[d] with the State with regard to each issue raised and addressed for the specific reasons set forth in the State's brief." A trial court is not prohibited from adopting the brief of one of the parties as its decision in the case. ***Trieschmann v. Trieschmann***, 178 Wis. 2d 538, 544, 504 N.W.2d 433 (Ct. App. 1993). However, if a trial court chooses to adopt a party's brief, it is required to indicate the factors on which it relied when making its decision and state those on the record. ***Id.*** Here, the trial court failed to state the factors. But because we review the deficiency and prejudice prongs of an ineffective-assistance case independently of the trial court, the trial court's failure is ultimately of no consequence here. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶27, 246 Wis. 2d 648, 630 N.W.2d 752. However, we note that the practice should be avoided.

to sixteen years in prison and a new judgment of conviction was entered.[5] Figueroa appeals from that judgment.

DISCUSSION

I. Ineffective Assistance of Trial Counsel.

¶14 Figueroa asserts that his trial counsel was ineffective on a multitude of grounds. His primary complaints surround his trial counsel's failure to properly object to two specific pieces of evidence at trial: (1) the recorded telephone conversation between J.R. and Figueroa; and (2) portions of Castro's testimony. We address each in turn.

¶15 The right to the effective assistance of counsel derives from the Sixth Amendment to the United States Constitution, made applicable here by the Fourteenth Amendment, and article 1, section 7 of the Wisconsin Constitution. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 225-26, 548 N.W.2d 69 (1996). In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced as a result of his attorney's deficient conduct. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must identify specific acts or omissions of his attorney that fall "outside the wide range of professionally competent assistance." ***Id.*** at 690. To show prejudice, the defendant must demonstrate that the result of the proceeding was unreliable. ***Id.*** at 687. If the defendant fails on either prong—deficient performance or prejudice—his

[5] Upon Judge Conen's decision to deny Figueroa's request for a new trial but to grant his request for resentencing, the case was transferred to the Honorable David L. Borowski. Judge Borowski presided over the second sentencing hearing and entered the second judgment of conviction.

ineffective-assistance-of-counsel claim fails. ***Id.*** at 697. We strongly presume counsel has rendered adequate assistance. ***Id.*** at 690.

¶16 We review an ineffective-assistance claim as a mixed question of law and fact. ***State v. Kimbrough***, 2001 WI App 138, ¶27, 246 Wis. 2d 648, 630 N.W.2d 752. "We will not reverse the trial court's factual findings unless they are clearly erroneous," but we review the deficiency and prejudice questions independently of the trial court. ***Id.***

The Telephone Recording

¶17 Figueroa first faults his trial counsel for the manner in which the telephone conversation between Figueroa and J.R. was introduced into evidence. As set forth above, J.R., while in the presence of police, called Figueroa to confront him with her allegations of sexual abuse. The conversation was in Spanish. At trial, Vele, a former police department employee who was present with J.R. when the telephone call was made, testified to what she heard both J.R. and Figueroa say. On appeal, Figueroa complains that trial counsel should have: (1) objected to Vele's testimony on the specific grounds that Vele's testimony repeating J.R.'s accusations was inadmissible hearsay and did not fall within the adoptive-admission exemption to hearsay under WIS. STAT. § 908.01(4)(b)2.; (2) requested that the tape recordings of the face-to-face conversation and the telephone conversation between Figueroa and J.R. be played under the best-evidence rule; and (3) objected to Vele's entire testimony on the grounds that Vele was not a qualified interpreter. We address each claim in turn.

A. Trial counsel was not ineffective for failing to object to Vele's testimony on hearsay grounds because her testimony is not hearsay pursuant to WIS. STAT. § 908.01(4)(b)2.

¶18 Figueroa argues that his trial counsel provided ineffective assistance of counsel when he failed to object on hearsay grounds to Vele's testimony regarding J.R.'s statements to Figueroa during their telephone conversation.[6] Figueroa rejects the State's contention in its response to his postconviction motion that Vele's testimony regarding what J.R. said was not hearsay pursuant to WIS. STAT. § 908.01(4)(b)2. as an adoptive admission. Because we agree that the testimony was admissible as an adoptive admission, we conclude that Figueroa's trial counsel was not ineffective for failing to object to the testimony on hearsay grounds.

¶19 "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3). As such, Vele's testimony regarding what she heard J.R. and Figueroa say is hearsay unless it falls within an exemption

[6] Figueroa concedes that his trial counsel did object to the State's reference to the telephone call between J.R. and Figueroa during opening statements, but only on grounds that the telephone call was an improper statement on Figueroa's pre-arrest silence. The trial court ultimately denied Figueroa's objection, but in doing so did not address the State's assertion that the statement was otherwise admissible as an adoptive admission under WIS. STAT. § 908.01(4)(b)2. And Figueroa did not ask the trial court to rule on the adoptive-admission grounds.

On appeal, Figueroa raises the adoptive-admission argument in his statement of the issues, but couched in terms of ineffective assistance of counsel, not trial court error. Yet, in the discussion section of his brief, he argues at length (four and one-half pages) that the trial court erroneously exercised its discretion in admitting Vele's testimony regarding the telephone conversation as an adoptive admission. We limit our analysis to Figueroa's ineffective-assistance claim because Figueroa framed the issue on appeal as an ineffective-assistance claim in his statement of the issues, and because the trial court cannot act erroneously for failing to omit evidence on hearsay grounds *sua sponte*. *See* WIS. STAT. RULE 809.19(1)(b).

or exception to the general rule barring hearsay. *See* WIS. STAT. § 908.02 ("Hearsay is not admissible except as provided by these rules or by other rules adopted by the supreme court or by statute.").

¶20 An "adoptive admission" is an out-of-court statement that is not hearsay when it is offered against a party who has manifested his or her adoption or belief in its truth. *See* WIS. STAT. § 908.01(4)(b)2. A statement falls under this rule if it is made in a party's presence and the party does not deny it, even though it is the type of statement that would ordinarily be denied. ***State v. Marshall***, 113 Wis. 2d 643, 651-52, 335 N.W.2d 612 (1983).

¶21 In both his brief-in-chief to this court and in his reply brief, Figueroa fails to point to what *specific* statements made by Vele he believes his trial counsel should have objected to; he only generally complains that Vele's testimony regarding what she heard J.R. say during the telephone conversation was inadmissible hearsay. As best we can tell, Figueroa objects to the following exchange between the State and Vele:

> Q Can you describe for us, please, the general nature of what happened during that phone call?
>
> A [J.R.] repeatedly asked Mr. Figueroa about the abuse that had occurred in the past. She wanted an explanation for why it had occurred and basically she just asked him what he was thinking and wanted to know if he would give her some sort of explanation so she could move on to have a normal life.
>
> Q Did she use specific references, for instance, did she say anything about making her put her mouth on his penis, was she that specific?
>
> A She was specific, yes.
>
> Q Did she also specifically reference him attempting to have penis to vagina intercourse with her?

A Yes.

Q When she was asking him about the abuse and wanting an explanation, what did he say back to her?

A He said, a long time has passed. I don't want any problems. I don't want to talk about this. Often times, long pauses between responses and between her asking additional questions.

Q So he said, a long time has passed. I don't want any problems. I don't want to talk about this?

A Yeah. He repeatedly said, he doesn't want problems and does not want to talk about it.

Q At any point during the phone conversation, did Mr. Figueroa say anything to the effect, I didn't do those things to you?

A Not that I could hear.

Q When [J.R.] was asking him for an explanation, did she ever use language such that it was unfair for him not to give her an explanation?

A Yes. Multiple times they discussed that.

Q What was his response when she would say that it was unfair?

A Sometimes, he would say he didn't want any problems and didn't want to talk about it. Sometimes he said, some[]things aren't fair.

¶22 Figueroa concedes that Vele's testimony regarding *Figueroa's responses* to J.R.'s allegations during the telephone conversation was admissible pursuant to WIS. STAT. § 908.01(4)(b)1.[7] As such, he only objects to Vele's

[7] WISCONSIN STAT. § 908.01(4)(b)1. states:

> STATEMENTS WHICH ARE NOT HEARSAY. A statement is not hearsay if:
>
> ….

(continued)

testimony regarding *J.R.'s allegations of abuse* because those allegations form the basis of the "admissions" that the State asserts that Figueroa "adopted" pursuant to WIS. STAT. § 908.01(4)(b)2. Figueroa disputes that the record shows he adopted any of J.R.'s accusations, and argues that his lack of denial can be explained by the context of his telephone conversation with J.R. He notes that, earlier on the day of the telephone call, J.R. approached him at his workplace and confronted him with her accusations. He contends that he denied J.R.'s accusations at that time, and therefore, that he had no reason to further deny them later in the day when she called him on the telephone. Thus, he claims his trial counsel was deficient for not objecting to Vele's testimony on hearsay grounds.

¶23 We conclude that the statutory exemption for adoptive admissions is applicable here. Thus, trial counsel was not deficient, and even if he was, Figueroa has failed to show prejudice.

¶24 Adoption can be manifested through silence or absence of a denial. *See* ***Marshall***, 113 Wis. 2d at 652. For example, in ***Marshall***, the Wisconsin Supreme Court concluded that Arthur Johnson's testimony was admissible as an adoptive admission. ***Id.*** at 647, 652. Johnson testified that he heard the defendant request payment from Elijah Jackson, to which Jackson replied that he would not pay because the defendant had "hit" the wrong guy. ***Id.*** at 645. Rather than deny the accusations, the defendant "responded that he had put his life on the line anyway[.]" ***Id.*** at 648. The court stated that: "One would certainly expect a

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> (b) *Admission by party opponent.* The statement is offered against a party and is:
>
> 1. The party's own statement, in either the party's individual or a representative capacity[.]

denial from an innocent party accused of something as serious as murder," and that the defendant's failure to deny Jackson's accusations constituted an adoptive admission. ***Id.*** at 652.

¶25 Similarly here, Figueroa adopted J.R.'s serious accusations by failing to deny them. J.R.'s questions to Figueroa, asking him why he sexually abused her as a young child, particularly those questions asking why he engaged in specific sex acts, were made directly to him and are certainly the types of statements that a person would ordinarily deny if they were not true. *See* ***id.*** Even if Figueroa had heard the accusations before, accusations of child sexual abuse are so serious, it is reasonable to conclude that a person would ordinarily continue to deny them, if not true. *See* ***id.*** Figueroa "manifested [his] … adoption or belief" in the truth of the statements, for purposes of admissibility under § 908.01(4)(b)2., by his silence and his non-responses to J.R.'s inquiries. *See* ***id.***; *see also* ***United States v. Jinadu***, 98 F.3d 239, 244 (6th Cir. 1996) ("Adoption can be manifested by any appropriate means, such as language, conduct, or silence."). Figueroa's trial counsel could not have acted deficiently for failing to object to testimony on hearsay grounds when the testimony was not hearsay. *See* ***Strickland***, 466 U.S. at 690.

¶26 Even if we were to accept Figueroa's deficiency argument here as persuasive, he has not shown that admission of Vele's recollection of what J.R. said prejudiced him. J.R.'s allegations against Figueroa were already abundantly clear to the jury. She testified to them at length and in detail at trial. Vele's testimony regarding those allegations is merely cumulative and does not convince us that the outcome of the trial is unreliable. *See* ***Strickland***, 466 U.S. at 687.

B. Trial counsel was not ineffective for failing to request that both tape recordings be played for the jury as the "best evidence" under WIS. STAT. § 910.02.

¶27 Figueroa also argues that, even if Vele's testimony was admissible as an adoptive admission, both Vele's testimony and the actual tape recording should have been presented to the jury as the best evidence, along with a jury instruction, so that the jury could decide if Figueroa actually adopted J.R.'s accusations. The best-evidence rule is set forth in WIS. STAT. § 910.02, which states: "**Requirement of original.** To prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, except as otherwise provided in chs. 901 to 911, s. 137.21, or by other statute."

¶28 Figueroa fails to develop his ineffective-assistance argument. While arguing that his trial counsel should have requested that the actual tape recordings be played during the trial, he follows with only one short conclusory paragraph stating it was deficient for trial counsel to fail to make the request. He does not show what would have been gained from an objection and request for the recordings or how the absence of the recordings prejudiced him. Furthermore, Figueroa cites to only one specific statement from the tape recording that he claims differs from Vele's testimony, but he does not address how this difference would prompt the trial court to admit the tape recordings into evidence in their entirety or indeed how the recordings could be redacted to exclude statements arguably irrelevant or harmful to Figueroa. Nor does he argue how admission of the recordings would have led to a different result in the case. In fact, a different result is unlikely because, as we show below, Figueroa called a witness to impeach Vele's translation by having the other witness testify to what she heard in the recordings. Figueroa fails to show what more the actual recordings would have added to his case. We need not address underdeveloped arguments. *See* ***Madely***

v. RadioShack Corp., 2007 WI App 244, ¶22 n.8, 306 Wis. 2d 312, 742 N.W.2d 559.

¶29 Additionally, the purpose of the best-evidence rule is to "require[] that the most reliable evidence addressing a particular issue be produced." RALPH ADAM FINE, FINE'S WISCONSIN EVIDENCE 481 (2008). Here, the recording was in Spanish and the trial was conducted in English. Requiring a jury to listen to a tape recording in a language they do not speak does not serve the purpose of the best-evidence rule and results in an absurd interpretation of WIS. STAT. § 910.02. We are to avoid absurd results when interpreting statutes. *See* ***State v. Buchanan***, 2013 WI 31, ¶23, 346 Wis. 2d 735, 828 N.W.2d 847.

¶30 Consequently, we conclude that trial counsel did not perform deficiently for failing to request that the recordings be played for the jury, and therefore, that trial counsel was not ineffective.[8] *See* ***Strickland***, 466 U.S. at 687.

C. Trial counsel was not ineffective for failing to object to Vele's testimony on the grounds that she was not a qualified interpreter pursuant to WIS. STAT. § 906.04.

¶31 Figueroa also asserts that Vele's testimony regarding the telephone conversation violated WIS. STAT. § 906.04 because, according to Figueroa, Vele was testifying as an unqualified interpreter. That is simply not the case.

[8] In conjunction with Figueroa's argument that his trial counsel should have requested the tape recordings be played for the jury, he argues that his trial counsel acted deficiently when he failed to request that the trial court instruct the jury on how much weight, if any, Figueroa's statements on the tape recordings should be given. However, Figueroa's argument in this regard is raised for the first time on appeal. As such, we will not address it. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), *superseded on other grounds by* WIS. STAT. § 895.52.

¶32 WISCONSIN STAT. § 906.04 states that "[a]n interpreter is subject to the provisions of chs. 901 to 911 relating to qualification as an expert and the administration of an oath or affirmation that the interpreter will make a true translation." Nothing in § 906.04 requires that only a State-certified interpreter may testify to things he or she originally heard in a language other than English, assuming the witness's testimony is otherwise admissible. Certainly, a proper foundation would have to be laid establishing the witness's competence in English and the other language. But there is no requirement that the witness be a State-certified interpreter. As such, trial counsel did not act deficiently for failing to object on those grounds. *See* ***Strickland***, 466 U.S. at 690.

¶33 Furthermore, Figueroa has failed to demonstrate that, even if trial counsel should have objected to Vele's testimony pursuant to WIS. STAT. § 906.04, that her testimony was prejudicial. Immediately following Vele's testimony, Maldonado, a State-certified translator who sat in on the trial, testified "not as a specific witness, but as a translator." Figueroa's trial counsel used Maldonado's testimony to impeach Vele's recollection of the conversations between Figueroa and J.R.

¶34 Maldonado testified that she had listened to portions of both the tape recording taken when J.R. approached Figueroa at work and the recording of the telephone conversation between J.R. and Figueroa later that same day. Among other things, Maldonado testified that, in the recording from the face-to-face confrontation, "[t]he female said, why did you rape me. The male voice responded, I did not rape you." With respect to the second recording, among other things, Maldonado testified that she heard the female voice say, "that's not fair. That's not fair," to which the male voice responded "there are many things that weren't fair." Maldonado also told the jury that while she did not listen to either

recording in its entirety, she did not hear any references to specific sexual acts, only general references to "sexual relations and rape."

¶35 Figueroa argues that transcripts of the two recordings, prepared by certified court interpreters post-trial, demonstrate that Vele's translations of the conversations between J.R. and Figueroa were inaccurate. However, to the extent that there may have been differences between the way Vele and a certified interpreter would translate the recordings, those differences were brought to the jury's attention through Maldonado's testimony. It was within the province of the jury to use that information to judge Vele's credibility as a fact witness accordingly.

¶36 In sum, Figueroa has not demonstrated either deficient performance or prejudice by his trial counsel for failing to object to Vele's testimony on grounds that she was not a qualified interpreter under WIS. STAT. § 906.04.

Castro's Testimony

¶37 Figueroa also contends that his trial counsel performed ineffectively by failing to object to various portions of Castro's testimony. Specifically, Figueroa complains that his trial counsel should have objected to: (1) Castro's testimony regarding the "toothbrush incident" on grounds that it violated WIS. STAT. § 972.11(2)(b), Wisconsin's rape-shield law; (2) Castro's testimony that J.R.'s brother "believed her too" on grounds that it is improper for one witness to testify to the veracity of another pursuant to ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984); and (3) Castro's testimony regarding why she stopped going to J.R.'s home on hearsay grounds. We look to each in turn.

A. Trial counsel was not ineffective for failing to object to Castro's testimony pursuant to Wisconsin's rape-shield law, WIS. STAT. § 972.11(2)(b).

¶38 Figueroa argues that his trial counsel was ineffective for failing to object to Castro's testimony regarding an incident during which J.R., at the age of six, asked Castro "do you know that I have a little hole down there[?]" and then inserted a toothbrush into her vagina.[9] Figueroa contends, in an underdeveloped argument, that the testimony violated WIS. STAT. § 972.11(2)(b), Wisconsin's rape-shield law.

¶39 WISCONSIN STAT. § 972.11(2)(b) generally prohibits admission at trial of evidence concerning the complainant's prior sexual conduct. ***State v. Ringer***, 2010 WI 69, ¶25, 326 Wis. 2d 351, 785 N.W.2d 448. Here, however, Figueroa makes no effort to argue that the insertion of a toothbrush into one's vagina by a six-year-old child is sexual conduct. *See* ***id.*** But even if he had, we conclude the testimony here was not prejudicial.

¶40 Throughout the course of the trial, the jury heard hours of graphic testimony from J.R. regarding what she alleged Figueroa did to her. Castro's testimony was incredibly brief within the scope of the trial. We are unpersuaded that Castro's testimony regarding the toothbrush incident could have so affected the minds of the jurors so as to render the result of the trial unreliable. *See* ***Strickland***, 466 U.S. at 687. As such, trial counsel was not ineffective.

[9] With respect to this testimony, Figueroa also conclusorily states that "Evidence of statements by [J.R.] indicating particular knowledge of her body was irrelevant hearsay." That is the entirety of Figueroa's argument that his trial counsel should have, presumably, objected to that testimony on hearsay grounds. Because the argument is undeveloped, we will not address it. *See* ***Madely v. RadioShack Corp.***, 2007 WI App 244, ¶22 n.8, 306 Wis. 2d 312, 742 N.W.2d 559 (noting that this court need not consider undeveloped arguments).

B. Trial counsel was not ineffective for failing to object to Castro's testimony pursuant to ***Haseltine****.*

¶41 Next, Figueroa contends that trial counsel should have objected on the grounds that Castro's testimony violated ***Haseltine*** because she gave her opinion that J.R. was a truthful witness when she testified that she only discussed J.R.'s allegations with J.R.'s brother because he "believed her too." ***Haseltine*** provides that "[n]o witness . . . should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." ***Id.***, 120 Wis. 2d at 96. Figueroa's argument is not persuasive.

¶42 To begin, Castro was never asked nor did she ever explicitly state that she thought J.R. was telling the truth. Moreover, the fact that Castro believed J.R.'s accusations appears self-evident from her testimony prior to any comments regarding that belief. As such, and given the fact that the jurors had heard hours of testimony from J.R. herself from which they could draw their own conclusions as to J.R.'s credibility, we conclude that Figueroa was not prejudiced by Castro's testimony that J.R.'s brother "believed her too." This offhanded remark by Castro does not undermine our confidence in the result of the trial. *See* ***Strickland***, 466 U.S. at 687. Consequently, trial counsel was not ineffective for failing to object to it.

C. Trial counsel was not ineffective for failing to object to portions of Castro's testimony as hearsay.

¶43 Figueroa also argues that his trial counsel was ineffective for failing to object to certain portions of Castro's testimony on hearsay grounds. Specifically, he argues that trial counsel should have objected when the State asked Castro at what age she stopped going to J.R.'s house, and Castro, in a rambling and somewhat non-responsive answer, told the jury that one day she

asked Figueroa for a quarter to buy some ice-cream and the next day received a telephone call from J.R.'s mother:

> And she said, unfortunately, you cannot come to my house any more, because what you did is wrong; and anyways, your body's a little too developed already and men already look at you and don't come to my house any more. Do not call up my house anymore. She hunged [sic] up the phone.
>
> I started crying. My mom asked me what happened. I had to tell the truth. And my mom said, I told you, there is something funny going on in that house. And if there is something going on in the house, I don't want you there anymore. If that lady told you that your body is too developed already and that men already look at you, that means there is--there is something going on in the house and you should not go to houses with so much problems like that. And I said, it's not my fault.

¶44 While Figueroa admits that his trial counsel objected to the testimony as other-acts evidence, he argues that his trial counsel should also have objected, both to Castro's testimony regarding what J.R.'s mother said and what Castro's mother said in response, on hearsay grounds. *See* WIS. STAT. § 908.01(3) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); *see also* WIS. STAT. § 908.02 ("Hearsay is not admissible except as provided by these rules or by other rules adopted by the supreme court or by statute."). Figueroa also argues that the problem was compounded on cross-examination because trial counsel emphasized the erroneously admitted evidence by asking Castro to repeat and explain the statements from J.R.'s mother. In its response to

Figueroa's postconviction motion, the State agreed that both statements were hearsay but argued that there was no prejudice.[10] We agree with the State.

¶45 To the extent that trial counsel may have erred in not objecting to the testimony on hearsay grounds, we conclude that the error did not result in any prejudice. *See* ***Strickland***, 466 U.S. at 687 (To show prejudice, the defendant must demonstrate that the result of the proceeding was unreliable.). This case ultimately came down to whether the jury believed J.R.'s accusations of abuse. Prior to Castro's testimony, which comprises only thirteen pages of transcript, J.R. had spent an entire day testifying before the jury regarding her various allegations against Figueroa. We cannot conclude that Castro's rambling and unsolicited testimony regarding comments J.R.'s mother and her own mother had made to her as a young child make the jury's verdict unreliable. *See* ***id.*** As such, we cannot conclude that trial counsel was ineffective for failing to object to her testimony on hearsay grounds.

II. Interest of Justice.

¶46 In the alternative, Figueroa seeks a new trial in the interest of justice pursuant to WIS. STAT. § 752.35. Relying upon the combined weight of his arguments above, Figueroa contends that the admission at trial of inadmissible evidence improperly bolstered J.R.'s credibility. However, as we set forth above, Figueroa has not convinced us that his trial counsel erred by failing to object to the evidence of which he complains. Furthermore, we are unconvinced that the

[10] On appeal, the State fails to address Figueroa's argument in this regard, stating only that because Figueroa's trial attorney *did* object, he could not have performed deficiently. However, Figueroa admits in his brief that his trial counsel objected to Castro's testimony as improper other-acts evidence. Figueroa's argument in both his postconviction motion and on appeal is that his trial counsel objected on the wrong grounds, not that he failed to object at all.

weight of that evidence affected the outcome of the trial such that he is entitled to a new trial in the interest of justice. *See* ***State v. Bannister***, 2007 WI 86, ¶42, 302 Wis. 2d 158, 734 N.W.2d 892 (we exercise our power of discretionary reversal only in exceptional cases).

CONCLUSION

¶47 The parties all agree that the crux of this case was whether the jury believed J.R.'s testimony that Figueroa sexually assaulted her as a young girl. Admittedly, the case was a close one, with the jury ultimately finding Figueroa not guilty of one of the two charges. However, we conclude that the evidence that Figueroa attempts to challenge on appeal through his ineffective-assistance-of-counsel claim, even if improperly admitted, is not of sufficient quantity and persuasiveness, either individually or cumulatively, to put into question the reliability of the jury's verdict on the charge on which Figueroa was found guilty. In sum, we must affirm the trial court.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.