

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 10, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1780-CR

Cir. Ct. No. 2011CF3607

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSE H. REYNOSA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

Before Blanchard, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Jose Reynosa appeals a judgment of conviction for first-degree sexual assault of a child and child enticement. He also appeals an order denying postconviction relief. Reynosa contends that: (1) the circuit court erroneously admitted other acts evidence of uncharged sexual assaults by Reynosa

against the same victim; and (2) Reynosa was denied the effective assistance of counsel because his counsel did not raise the proper objection to the State's expert testimony and did not request a unanimity instruction. We reject these contentions. We affirm the judgment of conviction and order denying postconviction relief.

Background

¶2 Reynosa was charged with one count of first-degree sexual assault of a child and one count of child enticement. The complaint alleged that Reynosa had sexual contact with the minor victim on five to ten occasions, and that the victim recounted one specific occasion of Reynosa carrying her into a bedroom and engaging in penis-to-buttocks contact.

¶3 On the first day of trial, Reynosa moved to exclude evidence of any uncharged sexual assaults by Reynosa against the victim outside the one specific allegation underlying the charges. The State objected, contending that the other assaults were part of the background of the case and established Reynosa's intent and planning. The circuit court determined that the other acts evidence was offered for an acceptable purpose, that it was relevant, and that its probative value was not outweighed by the danger of unfair prejudice.

¶4 Reynosa also objected to expert testimony by a State witness as to common behaviors of child sexual assault victims. Reynosa argued the testimony was inadmissible "nonevidence" that was unfairly prejudicial. The State argued that the expert testimony was relevant to help clarify for the jury the way that children characterize sexual assaults and children's understandings of time relevant to their developmental levels. The circuit court determined that the expert testimony was relevant and admissible.

¶5 The jury returned guilty verdicts as to both charges. Reynosa moved for postconviction relief, arguing that he was denied the effective assistance of counsel at trial. Reynosa argued that his trial counsel was ineffective by failing to object to the State’s expert’s testimony as insufficiently reliable under WIS. STAT. § 907.02 (2011-12)¹ and as improperly vouching for the credibility of the child victim. Reynosa argued that, had trial counsel raised those objections, the circuit court would have been required to exclude the expert testimony. Reynosa also argued that his trial counsel was ineffective by failing to demand the standard jury instruction as to unanimity. He argued that counsel’s failure to request the unanimity instruction denied him his constitutional right to a unanimous verdict.

¶6 The circuit court denied Reynosa’s postconviction motion without a hearing. The court explained that the State’s expert was qualified to provide expert testimony under WIS. STAT. § 907.02, and that, had Reynosa’s counsel demanded a *Daubert*² hearing, the circuit court still would have determined that the testimony was admissible. The court rejected Reynosa’s argument that the State expert gave an opinion as to the victim’s credibility, pointing out that the expert testified that she had not interviewed the victim in this case and could not speculate as to what was in the victim’s mind. The court also rejected Reynosa’s jury instruction argument, explaining that the focus of the complaint and the jury trial was the one act of penis-to-buttocks contact; that the jury was instructed that the term “sexual contact” in this case meant Reynosa’s intentional touching of the victim’s buttocks; that the jury was instructed not to base its verdict on evidence of

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

other occasions of sexual contact; and that the State clarified in closing argument that the charged offenses were based on the single act of penis-to-buttocks contact in the bedroom. Accordingly, the court denied Reynosa's claims of ineffective assistance of counsel. Reynosa appeals.

Discussion

¶7 Reynosa contends that the circuit court erroneously exercised its discretion by admitting other acts evidence of other instances of uncharged sexual assault by Reynosa against the victim. In *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), the supreme court set forth the following three-step analytical framework for determining the admissibility of other acts evidence: (1) whether the other acts evidence is offered for an acceptable purpose; (2) whether the other acts evidence is relevant; and (3) whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. *Id.* at 772-73. We reject Reynosa's arguments under each step of the *Sullivan* test.

¶8 As to the first step, Reynosa argues that the circuit court erred by finding that the other acts evidence was offered for the acceptable purposes of motive, intent, opportunity, and absence of mistake. *See* WIS. STAT. § 904.04(2)(a) (providing that other acts evidence is not prohibited if it is offered for acceptable purposes rather than to show propensity to commit the charged crime). Reynosa's first-step proper-purpose argument is based on his assertion that the evidence of other uncharged sexual assaults was not relevant for the purposes for which it was offered because none of those purposes were material to the outcome of the case. Reynosa contends that motive, intent, opportunity, and absence of mistake were not at issue at trial. This argument fails, however,

because it does not address the correct and very limited first-step question under *Sullivan*.

¶9 The first *Sullivan* step is easily met because it merely requires a theoretically proper purpose. See *State v. Marinez*, 2011 WI 12, ¶25, 331 Wis. 2d 568, 797 N.W.2d 399 (“As long as the State and circuit court have articulated at least *one* permissible purpose for which the other-acts evidence was offered and accepted, the first prong of the *Sullivan* analysis is met.”). Our supreme court has observed that “[t]his first step in the *Sullivan* analysis is not demanding.” *Id.* Here, because motive, intent, opportunity, and absence of mistake are all undeniably proper purposes, the first *Sullivan* prong is satisfied.³

¶10 Turning to the second *Sullivan* step, relevance, we address Reynosa’s argument that the evidence was not relevant because none of the identified purposes were material to the outcome of the case. Reynosa contends that motive, intent, opportunity, and absence of mistake were not at issue at trial because his defense was that the sexual assault had been fabricated and, thus, the sole issue was credibility. Regardless of the merit of this argument, we note that the other acts evidence was offered for an additional purpose, namely, to provide context and background. Indeed, the court instructed the jury that evidence that

³ Reynosa may mean to make an additional first-step argument under *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). He seems to contend that the circuit court admitted the evidence for an improper purpose, namely, propensity. In support, Reynosa points to the circuit court’s statement that the evidence “certainly furthers the assessment about whether or not this occurred.” We disagree with Reynosa’s interpretation of the meaning of the circuit court’s statement. In context, it is apparent that the court made that statement while analyzing the second prong of the *Sullivan* analysis, that is, whether the evidence was relevant. Moreover, once the other acts evidence was offered for “at least *one* permissible purpose,” something plainly true here, the first step of *Sullivan* was satisfied. See *State v. Marinez*, 2011 WI 12, ¶25, 331 Wis. 2d 568, 797 N.W.2d 399.

Reynosa sexually assaulted the victim on other occasions was to be considered only as to context and background. Accordingly, the correct second-step question is whether the other acts evidence provided relevant context and background. We conclude that it did. The victim's testimony that Reynosa sexually assaulted her multiple times over a six-month period provided an explanation of the relationship between Reynosa and the victim, including why the victim might delay reporting. Additionally, we agree with the State that the evidence of multiple other contacts helped explain why the child victim had trouble recalling the details of the charged assault. As the State explains, "the details of one incident merged with the details of the other incidents."

¶11 Under the third *Sullivan* step, Reynosa contends that the probative value of the other acts evidence was substantially outweighed by the danger of unfair prejudice. Our discussion above shows why the other acts evidence had significant probative value. Regarding the danger of unfair prejudice, it was not significant. The other acts evidence in this case involved similar, but less egregious, allegations by the same victim. Thus, Reynosa did not face the more common and much more daunting other acts scenario in which an accused is faced with two or more accusers who effectively corroborate each other. Moreover, the danger of unfair prejudice here was mitigated by the court's cautionary instruction to the jury to consider the other acts evidence only as to context and background, not for purposes of determining whether Reynosa committed the offenses charged.

¶12 In sum, we discern no error in the circuit court's exercise of discretion to admit the other acts evidence in this case.

¶13 Next, Reynosa contends that his trial counsel was ineffective by failing to raise the proper objection to the State's expert witness and failing to

request a *Daubert* hearing as to the admissibility of the testimony.⁴ Reynosa asserts that, had counsel properly objected to the State's expert testimony, the circuit court would have been required to exclude that testimony. We disagree.

¶14 An ineffective assistance of counsel claim must establish both deficient performance by counsel and prejudice to the defense. *State v. Winters*, 2009 WI App 48, ¶26, 317 Wis. 2d 401, 766 N.W.2d 754. If the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may deny the motion without a hearing. *State v. Love*, 2005 WI 116, ¶26, 284 Wis. 2d 111, 700 N.W.2d 62.

¶15 Reynosa argues that his postconviction motion was sufficient to entitle him to a hearing on his claim of ineffective assistance of counsel for failing to properly object to the State's expert testimony. He asserts that he set forth facts showing that his trial counsel was deficient by failing to raise the proper objections, and that Reynosa was prejudiced because, had counsel raised those objections, the circuit court would have been required to exclude the testimony.

¶16 We reject Reynosa's underlying argument that the objections he identifies would have resulted in exclusion of the testimony. We therefore conclude that Reynosa has not established that he was prejudiced by his counsel's

⁴ As noted above, Reynosa's trial counsel did object to the State's expert testimony, although not on the grounds Reynosa now argues counsel should have raised. We agree with Reynosa that his counsel's objection was difficult to understand, and that it did not preserve the admissibility arguments Reynosa raised after trial. Additionally, Reynosa does not develop an argument that the circuit court erroneously exercised its discretion in ruling on the objection as raised by his counsel. Accordingly, we limit our discussion on this issue to whether trial counsel was ineffective by failing to make the arguments Reynosa raised for the first time in postconviction proceedings.

failing to raise those objections, and that the circuit court properly denied Reynosa's motion without a hearing.

¶17 To establish prejudice, a defendant must establish that there is a reasonable probability that, but for counsel's errors, the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

¶18 Here, Reynosa's claim of prejudice is premised on his assertion that, had counsel properly objected to the State's expert witness, that testimony would have been excluded. Reynosa contends first that, had counsel objected to the expert testimony under WIS. STAT. § 907.02 and demanded a *Daubert* hearing, the circuit court would have been required to exclude the testimony. He asserts that the expert's opinion as to common behaviors and delays in reporting by child sexual assault victims was insufficient under § 907.02, which limits admissible expert testimony to that which "is based upon sufficient facts or data [and] is the product of reliable principles and methods," and where "the witness has applied the principles and methods reliably to the facts of the case." WIS. STAT. § 907.02(1). Reynosa contends that the expert's theories cannot be objectively tested and, thus, the circuit court would have been required to exclude that testimony based on its gatekeeping function under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93 (1993) (explaining the gatekeeping function of the trial court in assessing proffered expert testimony and that: "Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested.").

¶19 The circuit court explained in its order denying Reynosa’s postconviction motion that the court would have allowed the State’s expert to testify even if Reynosa had challenged the testimony under WIS. STAT. § 907.02. The court explained that it would have determined that the expert’s testimony was supported by other indicia of reliability, such as the expert’s professional experience, education, training, and observations. As the State points out, federal courts have interpreted *Daubert* to permit expert testimony that is based in the social sciences that is not capable of exact testing methods but that bears other indicia of reliability. *See United States v. Simmons*, 470 F.3d 1115, 1121-23 (5th Cir. 2006) (holding that the trial court properly admitted expert testimony as to the typical behavior of sexual assault victims even though the expert’s theories had not been empirically tested because, “[i]n such instances, other indicia of reliability are considered under *Daubert*, including professional experience, education, training, and observations”; and that “there are areas of expertise, such as the ‘social sciences in which the research, theories and opinions cannot have the exactness of hard science methodologies,’” and, thus, “trial judges are given broad discretion to determine ‘whether *Daubert*’s specific factors are, or are not, reasonable measures of reliability in a particular case” (quoted sources omitted)). We conclude that the record conclusively establishes that the circuit court would have properly exercised its discretion in admitting the evidence even if Reynosa’s trial counsel had demanded a *Daubert* hearing.

¶20 Reynosa also contends that his trial counsel was ineffective by failing to object to the State’s expert testimony as impermissibly vouching for the victim’s credibility. *See State v. Friedrich*, 135 Wis. 2d 1, 16, 398 N.W.2d 763 (1987) (“The credibility of witnesses and the weight given to their testimony are matters left to the jury’s judgment. The credibility of a witness is ordinarily

something a lay juror can knowledgeably determine without the help of expert opinion.” (citations omitted)). However, contrary to Reynosa’s contention, the State’s expert did not invade the province of the jury by purporting to assess the victim’s credibility. Rather, the State’s expert provided testimony as to common behaviors of child sexual assault victims, including delays in reporting. The expert specifically testified that she had never met or evaluated the victim in this case. The type of expert testimony in this case—describing common victim behavior, rather than assessing the victim’s credibility—has been held admissible to assist the jury in its fact-finding role, to explain the context in which the child victim reported the sexual assault, and to rebut the defense that the victim fabricated the crime. *See State v. Dunlap*, 2002 WI 19, ¶¶36-40, 250 Wis. 2d 466, 640 N.W.2d 112. Accordingly, Reynosa was not prejudiced by his counsel’s failure to object on this basis.

¶21 Finally, Reynosa contends that his trial counsel was ineffective by failing to request a jury instruction on unanimity.⁵ Reynosa contends that a

⁵ In his initial brief, Reynosa also argued that this court should address the jury instruction issue as a stand-alone issue of structural error. Reynosa argued that he was denied his constitutional right to a unanimous verdict when the court allowed the State to introduce evidence of more than one sexual assault but did not give the unanimity instruction. Reynosa argued that he did not waive that issue by failing to request the instruction, citing *State v. Gustafson*, 119 Wis. 2d 676, 693, 350 N.W.2d 653 (1984). The State responded that, in *State v. Schumacher*, 144 Wis. 2d 388, 424 N.W.2d 672 (1988), the supreme court modified *Gustafson*, explaining that “[t]he court of appeals does not have the power to find that unobjected-to errors go to the integrity of the fact-finding process, and therefore may properly be reviewed by the court of appeals.” *See Schumacher*, 144 Wis. 2d at 409. Rather, the *Schumacher* court explained, only the supreme court may address unobjected-to jury instruction errors. *See id.* at 409-10. In reply, Reynosa acknowledges that *Schumacher* limits review of the jury instruction error as a stand-alone issue to the supreme court, and states that he raises the issue to preserve it for review by the supreme court.

To the extent Reynosa also argues that this court may nonetheless address the jury instruction issue as a stand-alone issue within our error-correcting function, we reject that argument as contrary to *Schumacher*.

unanimity instruction was required in this case because the State introduced evidence of more than one sexual assault by Reynosa against the victim. *See State v. Gustafson*, 119 Wis. 2d 676, 695, 350 N.W.2d 653 (1984) (“[I]f the jury is presented with evidence of multiple crimes, unanimity is required as to each crime.”). Reynosa argues that his trial counsel was deficient in failing to request the instruction, and that he was prejudiced because, without the instruction, he was denied his right to a unanimous verdict.

¶22 As set forth above, the test for prejudice is whether, absent the claimed error by trial counsel, there is a reasonable probability of a different outcome at trial. We conclude that, assuming trial counsel was deficient for failing to request the unanimity instruction, Reynosa has not established that he was prejudiced by that error. First, the victim testified in detail as to one incident of penis-to-buttocks contact and that there were other times that Reynosa touched her private parts with his hand. The circuit court directed the jury as follows:

Evidence has been presented regarding other conduct of the defendant for which the defendant is not on trial. Specifically evidence has been presented that the defendant touched [the victim’s] buttocks and/or vagina with his hand on another occasion or occasions. If you find this conduct did occur, you should consider it only on the issue of context or background.

Second, in closing argument, the State reminded the jury that it had to decide whether the State had proven the incident of penis-to-buttocks contact, not the other incidents of touching. We conclude that, viewing the record as a whole, there is no reasonable probability the jury rendered its verdict on anything other than the single incident of penis-to-buttocks contact described by the victim. Because the record conclusively demonstrates that Reynosa is not entitled to relief

on his claim of ineffective assistance of counsel, the circuit court properly denied Reynosa's motion without a hearing.

Conclusion

¶23 For the reasons above, we affirm the judgment of conviction and order denying postconviction relief.

By the Court.—Judgment and order affirmed.

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

