COURT OF APPEALS
DECISION
DATED AND RELEASED

August 27, 1996

No. 96-0771-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WA THAO LOR,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: GREGORY A. PETERSON, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

MYSE, J. Wa Thao Lor appeals a judgment of conviction for second-degree sexual assault, having sexual intercourse with a minor under the age of sixteen, and an order denying his request for a new trial or modification of sentence. Lor contends that he was denied effective assistance of counsel when his counsel failed to object to questions eliciting opinions from certain witnesses as to the truthfulness of other witnesses' testimony. Lor contends that improper questions were directed to three witnesses during the course of the trial asking them to express an opinion as to the truthfulness of the victim's before-court and in-court statements and Lor's pretrial statement given to the

police. We agree that several of the inquiries improperly sought an opinion as to the truthfulness of another witness's testimony; however, because we conclude the improper admission of this testimony was harmless error, the judgment and order are affirmed.

A. H. and Wa Thao Lor began dating in August 1994. At the time, A. H. was fifteen years of age and would turn sixteen on January 3, 1995. It is undisputed that at some point A. H. and Lor engaged in sexual intercourse resulting in A. H. becoming pregnant. When Lor was charged with having sexual intercourse with a person under the age of sixteen, the issue became whether the sexual relationship commenced prior to A. H.'s sixteenth birthday.

A. H. acknowledged in statements to the investigating officers that she and Lor had sexual intercourse prior to her sixteenth birthday. At the trial, however, A. H. denied any sexual intercourse with Lor prior to turning sixteen. A. H. acknowledged that she had feelings for Lor and that she was concerned about getting him in trouble. She further acknowledged that she stated to officer Anger that she had sexual intercourse with Lor prior to Halloween of 1994 and that they engaged in sexual intercourse six times between August and December 1994. She also acknowledged that she told detective Colleen Kuehn that she was pregnant with Lor's child and that they had engaged in sexual intercourse beginning in August or September 1994. Despite these admissions, however, she continued to assert at trial that she and Lor had no sexual intercourse prior to her sixteenth birthday.

In a pretrial statement given by Lor to Kuehn, Lor acknowledged that he was the father of A. H.'s child and admitted that they had engaged in sexual intercourse during the summer of 1994. The State also called Brenda Ganyon, a certified nurse and midwife, who testified that based on A. H.'s uterine size on March 24, 1995, she believed the date of conception was from early to mid-December 1994. An ultrasound was performed, and Ganyon stated her opinion that conception was estimated to be December 24 or 25, give or take one week, but her estimate of the period of conception was that it occurred in December 1994.

During Kuehn's testimony, the State asked, without objection from Lor's attorney, whether she had any reason to believe that A. H. was not being

truthful when A.H. made her pretrial statements in which she acknowledged sexual intercourse with Lor prior to her sixteenth birthday. Kuehn responded that she had no reason to doubt A. H.'s truthfulness in making those statements. The State then asked Kuehn whether she had any reason to believe that A. H. was not being truthful in the testimony given in court when she denied having intercourse until after her sixteenth birthday. Kuehn indicated that she did not believe A. H. was being truthful in her courtroom testimony.

Kuehn was also asked about her pretrial interview with Lor in which Lor acknowledged that he was the father of A. H.'s child and admitted that they had sexual intercourse prior to her sixteenth birthday. Kuehn was asked if she had any reason to believe that the information Lor gave during this interview was not truthful. Kuehn replied that she had no reason to doubt the truthfulness of Lor's pretrial statement.

The State called A. H.'s mother as a witness and asked her whether she heard the testimony to the effect that there was no sexual intercourse with Lor prior to her sixteenth birthday. The mother responded that she heard the testimony and that her reaction was one of "shock."

Lor contends that he was denied effective assistance of counsel when counsel failed to object to questions seeking to elicit from witnesses their opinion as to the truthfulness of other witnesses' statements made both at trial and before trial. Allegations of ineffective assistance of counsel are analyzed under the two-part test enunciated in ***Strickland v. Washington***, 466 U.S. 668, 694 (1984); ***State v. Pitsch***, 124 Wis.2d 628, 640-41, 369 N.W.2d 711, 718 (1985). To establish ineffective representation a defendant must demonstrate that counsel's performance was deficient and that counsel's errors or omissions were prejudicial to the defense. ***Strickland***, 466 U.S. at 694; ***Pitsch***, 124 Wis.2d at 640-41, 369 N.W.2d at 718. Even if counsel's performance was deficient, if a defendant is not prejudiced by such deficiencies, the conviction will not be reversed for ineffective assistance of counsel. *See* ***Pitch***, 124 Wis.2d 641-42, 369 N.W.2d at 718-19. Error is prejudicial if it undermines confidence in the outcome. ***Id***. at 642, 369 N.W.2d at 719. No defendant is guaranteed a right to a perfect trial. ***State v. Rock***, 92 Wis.2d 554, 560, 285 N.W.2d 739, 742 (1979). Reversal is required only if counsel's performance was so deficient or prejudicial as to undermine this court's confidence in the outcome. ***Pitsch***, 124 Wis.2d at 641-42, 369 N.W.2d at 718-19. This is a question of law subject to

independent appellate review. ***State v. Johnson***, 153 Wis.2d 121, 127-28, 449 N.W.2d 845, 848 (1990).

We first examine whether counsel's failure to object to the questions concerning credibility addressed to Kuehn and A. H.'s mother constitutes deficient performance. It is improper to elicit from a witness that witness's opinion upon the credibility or truthfulness of another witness's testimony. ***State v. Haseltine***, 120 Wis.2d 92, 96, 352 N.W.2d 673, 676 (Ct. App. 1984). The principles underlying this rule rest upon the fact that the assessment of credibility is submitted to the factfinder. Opinions vouching for the truthfulness of another's testimony usurp the factfinder's function and open the door for "experts" to express opinions in an area not sufficiently suitable for expert testimony. ***Id.***

The State argues that the questions propounded by the State to Kuehn were not designed to elicit her opinion as to the credibility of the various witnesses but an attempt to elicit whether there was any information possessed by the investigating officer that would contradict the information received from the various witnesses. The questions posed to Kuehn were as follows:

Q. Okay. At the time that you spoke with her on March 30, did you have any reason to believe that she wasn't being truthful?

A. No, I do not.

Q. When you heard her in court today, did you have any reason to believe she wasn't being truthful?

A. Yes, I did.

Kuehn was also asked about the pretrial statement given by Lor in which he acknowledged sexual intercourse with A. H. prior to her sixteenth birthday:

Q. When you spoke with Mr. Lor during the interview that you previously testified about, did you have any reason

to believe that the information that he gave you was not truthful?

A. No, I did not.

Notwithstanding the State's imaginative contention that these questions did not seek an opinion as to the truthfulness of the statements, but were simply an inquiry as to whether the officer possessed any contradictory information, the record belies such a contention. In each instance, the question was specifically designed to elicit the witness's opinion as to the truthfulness of the statements. The question was not framed in regard to any information the officer may possess that would have contradicted the statements given. Indeed, in each case the question was concerning the truthfulness of the statements about which inquiry was made. We conclude that the inquiry as to Kuehn's opinion as to the truthfulness of the witness giving the statements, both prior to trial and at trial, are improper inquiries. "No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." ***State v. Romero***, 147 Wis.2d 264, 278, 432 N.W.2d 899, 905 (1988) (quoting ***Haseltine***, 120 Wis.2d at 96, 352 N.W.2d at 676).

A. H.'s mother, who had discovered the pregnancy and discussed the matter with her daughter on numerous occasions prior to trial, was also called as a witness by the State. A. H.'s mother was the one who reported the incident to the Eau Claire Department of Human Services. The following questions and answers were made in her testimony:

Q. So were you present when she testified today?

A. Yes, I was.

Q. And you heard her say that there was no sex before her 16th birthday?

A. Yes, I did.

Q. And what was your reaction?

A. I was shocked.

It is not so clear that this inquiry was eliciting the mother's testimony as to A. H.'s truthfulness at trial. Indeed had the question been framed as to whether her courtroom testimony was consistent with other statements she had made to her mother in regard to when she and Lor had sexual intercourse, the evidence would have been properly admitted. The law does not preclude the introduction of evidence of prior inconsistent statements from which the factfinder may conclude that a witness's courtroom testimony is untrue. ***Vogel v. State***, 96 Wis.2d 372, 386, 291 N.W.2d 838, 843 (1980); *see* ***State v. Horenberger***, 119 Wis.2d 237, 247, 349 N.W.2d 692, 697 (1984). The mother's response that she was shocked leads to the inference that this testimony was not consistent with her daughter's previous statements to her.

Because it is also a reasonable inference that the mother's shock at her daughter's testimony is a comment on the truthfulness of the testimony we will assume, without deciding for the purpose of this analysis, it is this inference the jury was asked to draw. However, in analyzing whether the admission of this testimony is prejudicial, it must be remembered that an equally permissible inference from the mother's testimony is that her courtroom testimony was in conflict with previous statements made to her regarding the issue of when she and Lor had sexual intercourse. Because such an inquiry would be proper, the suggestion that the unobjected to question prejudiced Lor's right to a fair trial becomes less persuasive.

We conclude that the questions asked of Kuehn in regard to her opinion as to the truthfulness of A. H.'s pretrial statements, her courtroom testimony and Lor's pretrial statements were improper commentary on the truthfulness of these statements. Counsel's only explanation for his failure to interpose an objection to these questions was that he was unaware of the rule in ***Haseltine*** and ***Romero***. Because this rule in sexual assault cases is so fundamental, counsel's failure to be aware of the prohibition eliciting opinions as to the truthfulness of other witnesses' testimony is an inadequate explanation. Counsel's failure to interpose objections to these questions falls below the minimum level of performance required of counsel defending the party accused of sexual assault of a child under the age of sixteen. Similarly, we will assume for the purposes of this analysis that the question posed to A. H.'s mother was subject to the same objection and that counsel's failure to object was below the minimum standard of representation to which a defendant is entitled.

We are now required to examine the question whether Lor was prejudiced by counsel's failure to object. As stated earlier, error is prejudicial if it undermines confidence in the outcome. ***Pitsch***, 124 Wis.2d at 642, 369 N.W.2d at 719. In order to undermine confidence in the outcome, the defendant need not show the result would have been different, rather a defendant must show that there is a reasonable possibility that the error contributed to the conviction. ***State v. Dyess***, 124 Wis.2d 525, 543-44, 370 N.W.2d 222, 231-32 (1985). The burden is on the defendant to show prejudice. ***State v. Sanchez***, 201 Wis.2d 219, 231-32, 548 N.W.2d 69, 74 (1996). In evaluating the reliability of the conviction, the reviewing court will consider whether the conviction is "strongly supported by evidence untainted by error." ***Dyess***, 124 Wis.2d at 545, 370 N.W.2d at 233.

The State demonstrated that on a variety of occasions A. H. had stated to others that she and Lor had engaged in sexual intercourse prior to her sixteenth birthday. While her courtroom testimony denied that such intercourse occurred, the State demonstrated that she had strong feelings for Lor at the trial and that she did not want Lor to get into trouble. Her emotional relationship with Lor and the fact that he faced criminal penalties as a result of their conduct provided a strong motive for her to falsify her testimony at trial. In addition to the pretrial statements made by A. H., Lor acknowledged both that he was the father of the child and that he and A. H. had sexual intercourse prior to her sixteenth birthday. This admission, made against his penal interest and unrebutted at trial, presents strong evidence of Lor's guilt.

Further, the State introduced medical evidence that the conception took place during December 1994. While not one of these factors demonstrates Lor's guilt sufficiently to discount the improper questions posed to Kuehn and A. H.'s mother, when taken together they demonstrate a compelling indication that Lor was guilty of the offense charged. Without regarding the improper inquiries, the factfinder could be led to only one reasonable conclusion as to whether Lor had sexual intercourse with A. H. prior to her sixteenth birthday.

Because the evidence of Lor's guilt is so overwhelming, the improper questions did not rise to the level necessary to raise doubt as to the reliability of the results of this trial. We note, as did the trial court, that the State did not elude to this opinion evidence in the closing statement. The existence of compelling evidence of Lor's guilt, which is independent of the improperly admitted opinion testimony and the fact that Kuehn's opinions were not

cloaked or identified as expert opinions were sufficient for the trial court to conclude that Lor was not prejudiced by virtue of counsel's derelictions.

Finally, Lor argues that this court should exercise its power of discretionary reversal pursuant to § 752.35, STATS., and order a new trial because the real controversy was not fully tried. The record discloses that the real controversy was fully tried and was not clouded by the improper opinion testimony. We, therefore, decline to exercise our discretionary power to order reversal.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.