COURT OF APPEALS
DECISION
DATED AND FILED

September 4, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2868-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID E. RUSCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Roggensack, JJ.

VERGERONT, J. David Rusch appeals from a judgment of conviction for committing three or more sexual assaults in violation of § 948.02(1) or (2), STATS., and having sexual intercourse or contact with a child under the age of sixteen in violation of § 948.02(2). He also appeals from the order denying his postconviction motions for a new trial. He contends on appeal that he is entitled to

a new trial because he was denied effective assistance of counsel; because the comments of the prosecutor in voir dire, opening and closing statements constituted plain error; and because the trial court erred in failing to sua sponte instruct the jury regarding prior acts, in excluding certain evidence, and in refusing to grant a new trial based on newly discovered evidence. For the reasons discussed below, we conclude that Rusch is not entitled to a new trial and we affirm.

The charges against Rusch arose out of accusations by Caroline H., the daughter of Lesa K., with whom Rusch lived. Caroline H. who was twelve at the time of the trial, testified to various sexual acts performed by Rusch on her and that Rusch forced her to perform on him. These incidents took place at various times at her home in the evening, in the morning when her mother was at work, or when she did not have school. She told her friend, Mikki S. about what had occurred, and Mikki S. told her father, who reported it. Additional facts will be related below.

INEFFECTIVE ASSISTANCE OF COUNSEL

In order to prevail on his claim of ineffective assistance of counsel, Rusch must show that counsel's performance was deficient and that as a result he was prejudiced. ***Strickland v. Washington***, 466 U.S. 668 (1984). There is a strong presumption that counsel rendered adequate assistance. ***Id.*** at 690. Professionally competent assistance encompasses a "wide range" of behaviors and a "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time" ***Id.*** at 698. To meet the prejudice test, Rusch must show

that there is a reasonable probability that, but for trial counsel's unprofessional errors, the result of the proceeding would have been different. ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996).

We defer to a trial court's factual findings regarding counsel's actions during trial court proceedings. ***State v. Jones***, 181 Wis.2d 194, 199, 510 N.W.2d 784, 786 (Ct. App. 1993). However, whether counsel's performance was deficient and, if so, whether that performance prejudiced the defense, are questions of law, which we review de novo. ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985). Finally, since Rusch has the burden of showing both deficient performance and prejudice, we affirm the denial of postconviction relief if we conclude he has failed to meet his burden on either issue. ***Jones***, 181 Wis.2d at 200, 510 N.W.2d at 786.

Rusch cites numerous instances of alleged deficient performance on the part of his trial counsel which, he contends, resulted in prejudice.[1] The trial court concluded that although trial counsel's performance was deficient in certain respects, Rusch had not demonstrated that he was prejudiced by any of the deficiencies. The court stated that, having observed Caroline H. testify and in view of all the evidence presented, even if trial counsel had done all the things Rusch said he should have done, there was not a reasonable probability that the result would have been different. We have examined Rusch's claims of ineffective assistance in light of the trial record and the testimony at the

[1] Rusch's brief does not group these numerous instances nor use headings to identify or organize. We have organized the instances into six categories for purposes of discussion. We have not addressed those instances where Rusch simply asserts that trial counsel should have taken a particular action, without developing the argument further. *See* ***State v. Pettit***, 171 Wis.2d 627, 646-47, 492 N.W.2d 633, 642 (Ct. App. 1992) (we may decline to consider arguments that are not developed).

postconviction hearing. We conclude that he has not made the requisite showing with respect to any of the claims.

Failure to Obtain Records

Rusch claims that trial counsel was ineffective because he did not seek Caroline H.'s school records or records from the La Crosse County Department of Human Services (DHS). Rusch alleges that these records could have contained materials for impeachment or may have contained evidence of psychological and or emotional problems.

In order for a defendant to prove counsel was ineffective for failing to investigate or present defense evidence, the defendant must show with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. ***State v. Flynn***, 190 Wis.2d 31, 47, 527 N.W.2d 343, 349 (Ct. App. 1984).

The trial court in the postconviction proceeding reviewed the school records and stated that it did not observe anything of an exculpatory nature and that the records supported what the school witnesses testified to at trial. The court also stated that the DHS records it reviewed related to events after the assault occurred. Rusch does not specify what information contained in these records or any other record would have affected the outcome of the trial. In his postconviction testimony, trial counsel acknowledged that these records could have "potentially" contained materials that could have been used for impeachment purposes. This type of speculation is not sufficient to show that there is a reasonable probability that the result would have been different. ***Id.*** at 48, 527 N.W.2d at 349.

Failure to Bring or Renew Motions

Rusch claims that trial counsel was ineffective for failing to: (1) file a motion to suppress his statement to a police officer when the officer informed him of the allegations; (2) file a motion seeking an order that the State make more definite and certain the dates during which the assaults occurred; (3) renew the motion to introduce the book *Rafaella*; and (4) renew the motion on the admissibility of certain testimony of Mikki S.

Trial counsel testified that he did not bring a ***Miranda*-*Goodchild*** motion to suppress Rusch's statement because he did not have a factual basis for concluding that the statement was taken in violation of Rusch's constitutional rights: in his view, Rusch was not in custody at the time, and Rusch signed a waiver form which trial counsel discussed with him. Rusch presented the testimony of William Reddin, an experienced criminal defense attorney, who stated that he would have brought such a motion because the police report suggests the possibility that Rusch was in custody and it is important to bring such a motion to get all the facts of the circumstances surrounding the statement the client made. Reddin acknowledged that, "arguably you don't bring a [***Miranda*-*Goodchild***] motion when there is clear evidence he was ***Miranda***-ized" and some people might agree with that but he did not. This testimony is insufficient to establish either that trial counsel was deficient in not bringing the motion or that, had the motion been brought, the outcome of the trial would have been different.

Rusch offered no evidence to show that a motion to make more definite and certain the dates of the assaults would have been beneficial to him in any way—for example, that he had an alibi for any dates. We agree with the trial court that Rusch failed to show prejudice for this reason.

Trial counsel was not deficient for failing to renew his motion to introduce the book *Rafaella*. Trial counsel made an offer of proof that Caroline H. had read the book, that the plot involves a young girl who is unhappy at home and falls in love with her father who refuses her sexual advances, and that the book details sexual acts. Trial counsel argued that the book was relevant because it was an alternative source of her sexual knowledge and an alternative explanation for her accusations—that Rusch had spurned her sexual advances. The State contended that the State was not relying on Caroline H.'s young age as circumstantial evidence that the assault occurred; Caroline H. was thirteen and had access to other information about the sexual acts of which she accused Rusch. And, the State contended, Rusch had made no showing, through an offer of proof or otherwise, that he ever spurned a sexual advance by Caroline H., so the book had no factual resemblance to this case. The trial court denied the motion, concluding that the book was irrelevant. It stated that trial counsel could make an offer of proof at trial, but indicated that unless more was presented, the court would make the same ruling.

A trial court's decision on the relevancy of evidence is discretionary. ***In Interest of Shawn B.N.***, 173 Wis.2d 343, 366-67, 497 N.W.2d 141, 149 (Ct. App. 1992). A trial court properly exercises its discretion when its ruling is supported by a logical rationale and is based on the record and a correct view of the law. *See* ***id.*** We conclude the trial court properly exercised its discretion in excluding *Rafaella*. There is no evidence that trial counsel learned of additional facts or law after the court denied the motion that would or should have led trial counsel to believe that renewing the motion would have been beneficial.

Rusch filed a motion for permission to cross-examine Mikki S. to show that she told Caroline H. that she (Mikki S.) had been sexually abused. Trial

counsel argued that this testimony would demonstrate that Caroline H. had this alternative source of knowledge of what would happen to Rusch if she accused him and it would prove her motive in falsely accusing Rusch—both to have him punished and to "one-up" Mikki S. The State opposed the motion on the ground that it was irrelevant for these reasons: there was no contention that Caroline H. would not know of the punishments for sexual abuse in the absence of her conversation with Mikki S.; Mikki S. told a police officer, not Caroline H., that the person who abused her went to prison; Mikki S. told Caroline H. about the abuse she had suffered after Caroline H. told Mikki S. that she was being abused; and there was no factual similarity between the abuse Mikki S. suffered, which occurred when she was three, and Caroline H.'s accusations against Rusch.

The trial court denied the motion because it concluded that the reasons Rusch wanted to introduce this testimony were based on "rank speculation." The court stated that it would permit trial counsel to make an offer of proof, but indicated that unless something more was shown, the motion would again be denied. Trial counsel did not make an offer of proof or renew the motion. He testified that he did not do so because after the court denied the motion, he talked to Mikki S. and she said she hardly remembered anything about her assault. This led him to believe that he would not be successful in persuading the court to let him cross-examine Mikki S. on this topic.[2] The trial court's ruling was within its discretion. Trial counsel's judgment that further efforts would not be successful was a reasonable one.

[2] Mikki S. testified at trial on what and when Caroline H. told her about Rusch's abuse. Rusch contends trial counsel was deficient in not cross-examining Mikki S. on discrepancies between this testimony and an earlier statement of Mikki S. Rusch cites Reddin's testimony at the postconviction hearing but does not cite to Mikki S.'s prior statement, and we are unable to locate it in the record. We therefore do not address this issue.

School Witnesses

Rusch contends that trial counsel was ineffective in a number of ways with respect to these witnesses of the State: Daniel Kahler, a school counselor; Mary Garves, a school speech pathologist; and Julie Van Dunk, a school social worker. Rusch argues that trial counsel was deficient in failing to prevent Garves and Van Dunk from testifying about Caroline H.'s mother's neglect of Caroline H.; failing to ask for limiting instructions with respect to this testimony; failing to object to testimony of all three which improperly vouched for Caroline H.'s honesty; and failing to cross-examine all three.

To put these claims in context, we first describe the defense theory, and how trial counsel supported it at trial. Trial counsel testified that the defense theory was that Caroline H. fabricated the sexual assault accusation because she hated Rusch; craved attention; wanted to please adults; and, in particular, wanted to please Helen Madigan, the DHS social worker who interviewed her regarding her accusations, and Detective David Mitchell, who also interviewed her, by telling them what they wanted to hear.

Trial counsel's cross-examination of Caroline H. elicited admissions to lying and breaking house rules and her feelings that she was treated unfairly by Rusch, and that Rusch did not care about her or her brother and was using her mother. Trial counsel also elicited testimony from Caroline H. that the people investigating her claims were really nice to her and "it seems like I'm the only kid in the world because I have been getting treated really nice by a lot of the teachers and stuff in all my other schools…."

Trial counsel also introduced the testimony of Caroline H.'s mother, Lesa K., and Caroline H.'s brother to establish that they thought Caroline H. was a

liar and was lying about the sexual assaults. Lesa K. testified about her rules and discipline for her children, her awareness of everything going on in her home concerning her children, and Caroline H.'s irresponsibility and untrustworthiness. On cross-examination of Lesa K., the prosecutor inquired about whether Caroline H. would regularly go to school dirty; whether Caroline H. was properly fed; whether she refused to allow her kids to participate in a free lunch school program; whether she refused to cooperate in other school programs; and whether the children had head lice. Lesa K. denied neglect of her children and lack of cooperation with the school. Trial counsel's objection on the grounds of relevancy and because the issues constituted a character attack was overruled. The court reasoned that the implication of Lesa K.'s testimony on direct was that she kept a close watch over Caroline H. and therefore would have known if Rusch was abusing her, and this was proper cross-examination to dispute that.

The prosecutor called Garves, Van Dunk and Kahler as rebuttal witnesses and established their roles at Caroline H.'s school and with respect to Caroline H. The first two testified that Caroline H. came to school unwashed and unkempt, was always hungry, and Lesa K. was not cooperative with the school in dealing with these and other problems concerning Caroline H. The prosecutor asked all three witnesses whether they had "an opinion about Caroline H.'s reputation for truthfulness and honesty." Kahler answered that "she is very honest. She doesn't have a hidden agenda. I guess you could say she is very anxious to please adults." Garves answered, "I think she is honest and truthful." Garves also testified that Caroline H. sought out teachers for attention but not in an inappropriate way. Van Dunk answered that she could not recall any incidences in which Caroline H. was not honest. Van Dunk also testified that

Caroline H. was always seeking out adult attention and always looking for hugs. Trial counsel did not cross-examine any of the three witnesses.

It was within the discretion of the trial court to permit the cross-examination of Lesa K. and the rebuttal testimony of Garves and Van Dunk regarding Lesa K. Rusch does not argue otherwise but contends, relying on Reddin's testimony, that defense counsel should have requested a hearing outside the presence of the jury to ask that they not be permitted to testify. However, Rusch does not explain why this would have been successful when the objections to Lesa K.'s cross-examination on the same grounds were not. He does not explain what legal basis trial counsel could have advanced to keep this testimony out. He has not shown that trial counsel was deficient in failing to make more efforts to keep this evidence out.

Rusch contends that trial counsel should at least have asked for a hearing to determine under what exception to § 904.04(2), STATS.[3] Garves' and Van Dunk's testimony was to be admitted and asked for a cautionary jury instruction consistent with that determination.[4] Rusch does not explain why

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[3] Section 904.04(2), STATS., provides:

> OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[4] WISCONSIN J I—CRIMINAL § 275 provides in part:

> Evidence has been received regarding other (crimes committed by) (conduct of) (incidents involving) the defendant for which the defendant is not on trial.

(continued)

§ 904.04 (2) is applicable, what the instruction should have been or how he was harmed by the absence of this instruction, and none of these points are apparent to us. The purpose of § 904.04(2) and the related cautionary instruction is to prevent the jury from finding that a person has committed a particular wrong because he or she has done so in the past and therefore has a disposition to such acts. *See* ***State v. Rutchik***, 116 Wis.2d 61, 67-68, 341 N.W.2d 639, 642 (1984). Section 904.04(2) is applicable to witnesses other than defendants. *See* ***State v. Johnson***, 184 Wis.2d 324, 336, 516 N.W.2d 463, 466 (Ct. App. 1994) (§ 904.04(2) applicable to evidence that victim of alleged battery had in past fabricated similar accusation against another for same reason). However, Rusch does not explain what "wrong" the jury might believe Lesa K. committed because of Garves' and Van Dunk's testimony about her parenting. The evidence on Lesa K.'s parenting went to her credibility as a witness, and, in particular, to her testimony on her vigilance regarding Caroline H. To the extent this evidence undermined her credibility in the eyes of the jury, it would have weakened her attack on Caroline

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> Specifically, evidence has been received that the defendant (describe act) . If you find that this conduct did occur, you should consider it only on the issue(s) of [CHOOSE THOSE THAT APPLY] (motive) (opportunity) (intent) (preparation or plan) (knowledge) (identity) (absence of mistake or accident) (_____). (Endnotes omitted.)
>
> You may not consider this evidence to conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with that trait or character with respect to the offense charged in this case. The evidence was received on the issue(s) of [CHOOSE FROM THE FOLLOWING; more than one may apply] (Endnote omitted.) [Motive, Opportunity, Intent, Preparation or plan, Knowledge, Identity, Absence of mistake or accident]
>
> You may consider this evidence only for the purposes I have described, giving it the weight you determine it deserves. It is not to be used to conclude that the defendant is a bad person and for that reason is guilty of the offense charged.

H.'s credibility. It is not apparent to us how an instruction based on § 904.04(2) would have affected the jury's assessment of this evidence and Rusch does not explain. He has not shown he was prejudiced by the absence of an instruction.

Regarding trial counsel's failure to cross-examine Garves, Van Dunk and Kahler, trial counsel testified that he did not do so because he did not consider the testimony of Van Dunk and Garves on "whether [Lesa K.] had dirty kids" to be significant because he felt the jury would see that it was not relevant to the sexual assault charges. He conferred with another attorney from his office who was watching the trial after this testimony. He recognized that the prosecutor emphasized this evidence in closing, but his reaction at the time was that "she [the prosecutor] was going nowhere with it." Trial counsel also considered parts of the testimony of Garves, Van Dunk and Kahler to be helpful because they mentioned Caroline H.'s desire to please adults and have their attention, testimony he thought he could use in his closing and did in fact use. When asked whether in retrospect it was a wise decision not to cross-examine these witnesses, trial counsel testified that in retrospect it was not.

A trial attorney's selection of trial tactics in the exercise of professional judgment is "substantially the equivalent of the exercise of discretion." ***State v. Felton***, 110 Wis.2d 485, 502, 329 N.W.2d 161, 169 (1983). When the record shows that trial counsel made a strategic decision based on the facts and the law which is reasonable under the circumstances, we do not second guess that decision. *See* ***id.*** We conclude that the postconviction testimony and the trial record demonstrate that the decision not to cross-examine these witnesses was a reasonable exercise of counsel's professional judgment. Rusch has not explained, and the record does not show, what trial counsel could have accomplished by cross-examining these witnesses. The fact that trial counsel may

have handled it differently in retrospect does not make it deficient. At the time trial counsel made the decision not to cross-examine, he had a reasonable basis for concluding that their testimony, at the end of direct, was not significantly damaging in some respects and was helpful in others, and that cross-examination would not benefit the defense.

Rusch contends that trial counsel should have objected to the answers of these witnesses to the questions on their opinion of Caroline H.'s reputation for truthfulness and honesty because either the form of the question or the answer was not as required by § 906.08(1), STATS. That section permits evidence "in the form of opinion or reputation on the character for truthfulness or untruthfulness" of a witness after the character of the witness for truthfulness has been attacked. ***Id.*** We agree with the trial court that even if objections had been made to the form of the question or answer, essentially the same testimony would have come in after the prosecutor rephrased the questions. Rusch has not demonstrated prejudice.

Expert Witnesses

Rusch claims that trial counsel should have attempted to have Madigan, Mitchell and Lucretia Mallory, Caroline H.'s therapist, disqualified as experts. He also challenges the adequacy of the cross-examination of these witnesses, asserting that trial counsel failed to effectively address their claims that Caroline H.'s behavior was like that of a sexually abused child, failed to expose alternative explanations for the observed behavior, and reinforced the merits of Caroline H.'s claims. He contends that trial counsel should have consulted an expert himself, either to assist him in preparation or to offer impeachment testimony of the State's witnesses.[5]

Madigan testified that her job is to interview the child when there is a report of sexual abuse and make sure that there is something to investigate. She has thirteen years of experience in child abuse investigations. Madigan interviewed Caroline H. at school. Caroline H. told Madigan that she was worried that she was pregnant and that it was Rusch she was concerned about. The next day Madigan, a co-worker, and Mitchell interviewed Caroline H. again at her school. Madigan said Caroline H. was very talkative and cooperative, but had difficulty talking about what had happened and became more embarrassed as that subject was more embarrassing. Madigan's observation was that Caroline H. was ashamed. In her experience, feelings of shame and embarrassment are usual in

[5] Rusch also contends that in trial counsel's cross-examination of Dr. Johnetta Craig, who performed a pelvic exam on Caroline H., he should have developed explanations for her testimony that Caroline H. tolerated a pelvic exam well—such as sexual activity with boys or men besides Rusch. Trial counsel testified that Lesa K. had told him that she thought Caroline H. was "sleeping around with boys," but he could not find any substantiation of that. Rusch does not develop his argument sufficiently to explain why trial counsel's performance was deficient in view of the results of his effort to verify Lesa K.'s statement, and we do not address it further.

abuse victims. Madigan also testified that delay in reporting and fear of not being believed were common.

Trial counsel's cross-examination of Madigan showed that there is a low threshold of proof necessary for an assault allegation to proceed to the investigative stage; that Madigan had never met Caroline H. before and knew no one in her home; and that Madigan told Caroline H. she "did well" after Madigan was finished questioning her. Cross-examination also showed that Caroline H.'s brother was still in the home even though it is Madigan's experience that if there was sexual abuse to one child, it could happen to the other child.

Later in the trial, after Lesa K. testified that Caroline H. had never shown fear of Rusch, the State recalled Madigan. She testified that it was not unusual for victims of sexual abuse not to show fear of the perpetrator. On cross-examination, she admitted that a child victim of sexual abuse might show fear of the perpetrator and might not.

Mallory testified that she has been a clinical social worker since 1971, has been trained in sexual abuse of children and the characteristics they show, and in recent years her practice has focused on sexual abuse. She observed behaviors in Caroline H. that were consistent with sexual abuse, including cutting her arm, which Mallory described as tension reduction behavior; talking and thoughts of suicide; low self-esteem; more than the usual amount of adolescent confusion about sexual issues; and loathing for her body, particularly her genitals. Caroline H. talked to Mallory about the abuse and expressed anger toward Rusch, her fear that he might abuse her brother, and her disappointment and anger over her mother's response.

On cross-examination, Mallory admitted that many teenagers suffer from low self-esteem and have suicidal tendencies or thoughts and not all of those are a result of sexual abuse. On redirect, Mallory acknowledged that although it was her assessment that Caroline H.'s low self-esteem regarding sexuality was the result of sexual abuse rather than another type of bad sexual relationship with someone else, clinicians can make an error in their assessments. She also acknowledged she had known Caroline H. only since November. (The trial was in March.)

Miller testified that he was head of the juvenile bureau of the La Crosse Police Department and has been an investigator for seventeen or eighteen years. His duties are mainly to investigate crimes where juveniles are either victims or offenders. He described Caroline H.'s demeanor when he interviewed her as initially happy and progressing to sullen and crying as she began describing more of the abuse. He stated that this demeanor is typical of kids being interviewed who are talking about sexual abuse. On cross-examination, trial counsel brought out that Miller had failed to obtain a sample of the couch to verify Caroline H.'s account that during one of the incidents Rusch ejaculated on to the couch. On redirect, Miller described Caroline H.'s demeanor while she related the incident on the couch as crying and affected by what she was telling him, and he said this behavior was consistent with other kids he had interviewed. On re-cross, Rusch pointed out in a question form that Caroline H.'s demeanor in testifying at trial "wasn't sad or anything" and Miller responded that her demeanor was "pretty normal."

Rusch's argument on the deficiency of trial counsel's performance with respect to these witnesses is based on the testimony of Reddin explaining how he would have prepared to cross-examine, and would have cross-examined

these witnesses; on trial counsel's testimony that he did not prepare for their cross-examination by informing himself as well as he should have; and on the testimony of psychologist Dr. Joseph Collins. Dr. Collins explained the approach he would use to determine if sexual abuse occurred, an approach that involved gathering and having more information than that which the State's experts' testimony showed they had.

We conclude that Rusch has not shown prejudice as a result of any deficiencies there may have been in trial counsel's performance with regard to these witnesses. With respect to the failure to voir dire in an effort to have them disqualified as experts, trial counsel testified that he had conducted other hearings on sexual assault matters where Madigan and Miller had testified regarding their expertise in investigating sexual assault matters. Nothing in the record indicates that an effort to have Madigan, Miller or Mallory excluded would have been successful.[6] Rusch presents no argument that their testimonies that Caroline H. exhibited behaviors consistent with sexual abuse were inadmissible. *See* ***State v. Jensen***, 147 Wis.2d 240, 250, 432 N.W.2d 913, 917 (1988) (testimony by school guidance counselor who was asked to state his opinion whether the child's behavior was consistent with the behavior of children who are victims of sexual abuse is admissible because it was elicited to explain context in which child made the allegation, not to prove child was assaulted, and it was relevant to rebut defense theory that child fabricated the allegation).

[6] Trial counsel did file a motion in limine requesting that the State's witnesses from the DHS not be allowed to testify as experts in the field of sexual abuse. The court left that motion undecided until trial and trial counsel did not pursue the motion further.

These three witnesses' testimonies were brief and provided little or no detail of Caroline H.'s statements about the assaults. Although trial counsel may not have prepared as well for cross-examination of these witnesses as he should have, his cross-examination of Madigan and Mallory did get across the critical point that Caroline H.'s behaviors were not specific to sexual abuse and did suggest that professional assessments on whether abuse occurred may be wrong. He also established support for the defense theory that Caroline H. was motivated by a desire to gain adult approval. We are not persuaded that more extensive cross-examination on these same points would make it reasonably probable that the outcome of the trial would have been different.

Caroline H.'s testimony on what Rusch did to her was detailed and convincing. More testimony on sources other than sexual abuse for the symptoms of distress she exhibited would not make her testimony on the assaults less credible. The same is true with the presentation of expert testimony by the defense. Dr. Collins's testimony did serve to emphasize the point made on cross-examination—that there could be other explanations for Caroline H.'s behavior. However, Dr. Collins did not testify that Caroline H.'s behaviors could not be the result of sexual abuse.

Failure to Object to State's Closing Argument

Rusch contends that trial counsel's failure to object to the prosecution's closing argument was deficient performance and prejudiced his defense. Rusch points to numerous statements made by the prosecutor during closing argument that, he claims, were either not part of the evidence presented at trial, or constituted the personal opinions of the prosecutor. We conclude that the

statements Rusch complains of were not improper and trial counsel was therefore not deficient in not objecting to them.[7]

During closing argument, counsel should be allowed considerable latitude, with discretion to be given to the trial court in determining propriety of the argument. ***State v. Draize***, 88 Wis.2d 445, 454, 276 N.W.2d 784, 789 (1979). A prosecutor may comment on the evidence, detail the evidence, argue from it to a conclusion, and state that the evidence convinces him or her and should convince the jurors. ***Id.*** The line between permissible and impermissible argument is where the prosecutor goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering factors other than the evidence. ***Id.***

Rusch claims that the following comments by the prosecutor during closing argument were not supported by the record: (1) Caroline H. tolerated the pelvic examination like an older female with sexual experience; (2) like most

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[7] On this point, the trial court stated:

> I agree I guess – I do agree with Mr. Reddin that there is no way you would object as much as the defendant would have me believe today and I don't think very many lawyers would do it.
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> As to the prosecutor's initial argument, I agree that there should have been objections, to hopefully if nothing else as Mr. Reddin said, tone down that argument as it progresses but you would normally do it once or twice on occasion unless it's completely outrageous, and I find the argument wasn't outrageous based on logical inferences from the evidence produced during this trial.

We do not read this as a conclusion that trial counsel's failure to object to closing argument was deficient performance. A conclusion that there should have been one or two objections to "tone down the argument" does not meet the standard for deficient performance, *see* ***Strickland v. Washington***, 466 U.S. 668, 695 (1984), and the remainder of the court's statement suggests that the court did not consider the prosecutor's argument to be improper.

children who are victims of sexual abuse, Caroline H. cannot tell you the day that it started; (3) Caroline H.'s brother was not old enough to acknowledge or accept that the father figure in the home was having sex with his sister; (4) Lesa K. was mean, vindictive, not there for her daughter, was not emotionally prepared to accept that Rusch chose to be intimate with her daughter, and viewed Caroline H. as a burden; (5) Lesa K. did not say she loved her daughter; and (6) had Caroline H. told Lesa K. about the abuse, nothing would have happened. We conclude these statements are all fair comments on the evidence.

Dr. Craig testified that she was surprised by how well Caroline H. tolerated the pelvic exam because she would not have expected a thirteen-year-old who had not had sexual intercourse to be that tolerant of the exam. Madigan testified that it is sometimes difficult for children to distinguish specific incidences or to pinpoint the frequency if the abuse occurred over a period of months, weeks or years. Madigan also testified that she spoke with Caroline H.'s brother and he said he did not believe Caroline H. when she told him about the abuse. Madigan said that his response was not uncommon because sometimes these things are too hard for children to believe or too hard for them to understand.

The remarks concerning Lesa K. are also fair comments based upon the evidence. There was testimony that Caroline H. was not properly cared for and Lesa K. was not cooperative in the school's efforts to improve her nutrition and hygiene, and address other problems. Lesa K. testified that if she had seen anything improper between Rusch and Caroline H., she would have confronted both of them, together, "to see why they were doing it, and if I didn't get the answer that I was looking for or I figured that one of them would be lying, one of them would not be in the home."

Rusch also claims that with the following statements the prosecutor improperly argued, vouching for the credibility of her witnesses: (1) "you the [jury] can rely upon what this child has told you;" (2) "The teachers all believe that she is an honest girl, she is not manipulative;" (3) "[Caroline H.] is not a girl who would make up something about the home to get attention;" (4) "[Caroline H.] is a good kid who wants to please adults;" (5) "[Caroline H.] was honest with you in what [Rusch] did and did not do;" and (6) "[Caroline H.] was very brave" in coming forward and describing the abuse. We do not agree that these statements are improper. They express the prosecutor's interpretation of the evidence. A prosecutor may properly comment on the credibility of the witnesses as long as the comment is based on the evidence. *See* ***Draize***, 88 Wis.2d at 454, 276 N.W.2d at 789.

Failure to Individually Poll the Jury

The trial court instructed the jurors before they began their deliberations that their verdict had to be unanimous. Both Rusch and counsel were present when the verdict was returned. After the court read the guilty verdict on both counts, it asked any juror to raise a hand if he or she did not agree with the verdicts. No juror did. Trial counsel answered "no" when asked by the court if there was a request to poll the jury. Trial counsel testified that he did ask for an individual polling of the jury because the jurors assented to the verdict by a show of hands. The decision to request an individual poll of the jury is delegated to trial counsel. ***State v. Yang***, 201 Wis.2d 725, 744-45, 549 N.W.2d 769, 776-77 (Ct. App. 1996). Under the circumstances of this case and in the absence of any indication that the verdicts were not unanimous, we conclude trial counsel's decision not to request an individual polling was reasonable and not deficient.

PROSECUTOR'S COMMENTS—PLAIN ERROR

Even without an objection to the prosecutor's argument by defense counsel, this court may review the propriety of the argument if the error is so plain or fundamental as to affect the substantial rights of the defeat. ***State v. Neuser***, 191 Wis.2d 131, 140, 528 N.W.2d 49, 53 (Ct. App. 1995). Rusch argues that the prosecutor's arguments, which we have discussed above, constitute plain error because they are both improper and prejudicial, thereby preventing the appellant from obtaining a fair trial. We have already concluded the challenged comments were proper. This conclusion resolves the plain error claim against Rusch.

TRIAL COURT ERROR

Cautionary Jury Instruction

Rusch argues that the trial court had an obligation to give an instruction based on § 904.04(2), STATS., in relation to Garves' and Van Dunk's testimony on Lesa K.'s parenting, even though trial counsel did not request it. Rusch contends he is entitled to a new trial because of this error.

The State concedes that there is language in certain cases that the cautionary instruction on prior acts evidence should be given unless deliberately waived by counsel. *See* ***State v. Evers***, 139 Wis.2d 424, 449, 407 N.W.2d 256, 267 (1987). However, the State contends that the failure to give such an instruction does not require reversal in the absence of prejudice. *See* § 805.18, STATS. We agree. For the reasons discussed in the preceding section, we conclude that, whatever the nature of the trial court's obligation, if any, in the circumstances of this case, the absence of an instruction based on § 904.04(2),

STATS., regarding the testimony on Lesa K.'s parenting by the school witnesses did not prejudice Rusch.

Exclusion of Evidence

Rusch argues that the trial court erred in excluding from evidence the novel *Rafaella*. He also asserts that the trial court erred in denying him the right to cross-examine Mikki S. about the sexual abuse that Mikki S. had experienced as a young child. We have already concluded, in the context of Rusch's ineffective assistance of counsel claim, that the trial court properly exercised its discretion in both rulings. We agree with the trial court that the novel and Mikki S.'s testimony of the abuse she experienced when she was three years old are irrelevant. A defendant's constitutional right to present evidence and confront witnesses is not violated by the exclusion of irrelevant evidence. *See* ***State v. Morgan***, 195 Wis.2d 388, 430, 536 N.W.2d 425, 441 (Ct. App. 1995).

Newly Discovered Evidence

Rusch's claim of newly discovered evidence consists of the statement of Betty Ives that, after the trial, Caroline H. told her on two occasions that she had lied when she accused Rusch of sexual assault in order to get him out of the house. Ives testified to this at the hearing on the motion for a new trial. Ives is the sister of Lesa K.'s former husband and the aunt of Caroline H.'s younger brother. Ives had no recollection of the circumstances of these conversations with Caroline H., except that it was during the summer and at her (Ives's) house. She did not recall if there were other witnesses present.

The trial court also questioned Ives:

> THE COURT: After [Caroline H.] told you that she made this up or whatever to get Mr. Rusch out of the house, did you go tell the police or anyone else about it?
>
> THE WITNESS: No, just one of those lawyers that came and gave me one of the papers, the appeal, when he wrote it down.
>
> THE COURT: Why didn't you go tell the police about it?
>
> THE WITNESS: I didn't think of it at the time.
>
> THE COURT: Mr. Rusch was in jail at that time, wasn't he?
>
> THE WITNESS: I didn't know. No one didn't tell me at the time.

Ives acknowledged that she knew that there was pressure put on Caroline H. by either Rusch or Lesa K. and knew that Caroline H. felt badly that she lost her family (including Ives and Caroline H.'s younger brother) as a result of her accusations.

Motions for a new trial based on newly discovered evidence are entertained with great caution and are submitted to the sound discretion of the trial court. ***State v. Terrance J.W.***, 202 Wis.2d 496, 500, 550 N.W.2d 445, 447 (Ct. App. 1996). We will affirm the trial court's exercise of discretion as long as it has a reasonable basis and was made in accordance with accepted legal standards and the facts of record. ***Id.*** The trial court may grant a new trial based on newly discovered evidence only if the following requirements are met: (1) the evidence was discovered after trial; (2) the moving party was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative to the evidence that was introduced at trial; and (5) it is reasonably probable that a different result would be reached at a new trial. In addition, a recantation must be sufficiently corroborated by other newly discovered evidence before a new trial is warranted. ***Id.***

By its very nature, a recantation will generally meet the first four criteria and these criteria are not disputed in this case. ***Id.*** at 501, 550 N.W.2d at 447. The determinative factors to be considered are whether it is reasonably probable that a different result would be reached at a new trial and whether the recantation is sufficiently corroborated by other newly discovered evidence. ***Id.***

The correct legal standard when applying the "reasonable probability of a different outcome" criteria is whether there is a reasonable probability that a jury, looking at both the accusation and the recantation, would have a reasonable doubt as to the defendant's guilt. ***State v. McCallum***, 208 Wis.2d 463, 474, 561 N.W.2d 707, 711 (1997). A finding that the recantation is incredible necessarily leads to the conclusion that the recantation would not lead to a reasonable doubt in the minds of the jury. ***Id.***

The trial court concluded that Ives's testimony on Caroline H.'s recantation was incredible. When the trial court makes findings of fact concerning the credibility of a witness, we will not upset those findings unless they are clearly erroneous. ***Terrance J.W.***, 202 Wis.2d at 501, 550 N.W.2d at 447. The trial court's finding on Ives's credibility is not clearly erroneous. The vagueness of Ives's testimony on such a significant communication and her failure to tell anyone else about it until the defense investigator questioned her because "she just didn't think about it at the time" support the trial court's credibility determination. We conclude the trial court did not erroneously exercise its discretion in concluding that Rusch was not entitled to a new trial on this ground.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.