

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 14, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2006AP582-CR

Cir. Ct. No. 2003CF123

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

BRANDON W. HARRIS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Chippewa County:
RODERICK A. CAMERON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. The State appeals an order granting Brandon Harris a new trial on a charge that he had repeated sexual contact with his twelve-year-old babysitter, Jade P. The trial court concluded Harris's trial counsel was ineffective for failing to present any evidence to counter a statement allegedly

made by Harris that could be construed as an admission of the accusations. The State argues Harris proved neither deficient performance nor prejudice. We reject those arguments and affirm the order.

¶2 The allegations surfaced when Jade’s stepfather read her diary which contains descriptions of sexual contact with Harris. A social worker, Mary Jo Larkowski, confronted Harris with the diary entries. Larkowski testified that she stated to Harris, “Thank goodness this did not result in intercourse,” to which he responded, “Yeah, thank God.” In the context of the interview, Harris’s statement could be construed as an adoptive admission, that is, Harris’s adoption of all of Larkowski’s statements, including the accusations contained in the diary. In her closing argument, the prosecutor seized on Harris’s statement, noting that Harris did not deny the allegations when Larkowski informed him of the diary’s content.

¶3 In postconviction proceedings, Harris alleged ineffective assistance of trial counsel for numerous reasons, including his failure to present any evidence or make any argument regarding the adoptive admission. Trial counsel indicated that he forgot to address that issue. Trial counsel did not ask Harris whether he made the statement or what he meant by the statement. He did not cross-examine Larkowski by noting that her notes failed to mention the alleged statement and the report of a police officer present at the questioning did not include that statement. Counsel also failed to present any closing argument that the statement should be construed as Harris being grateful that the accusations, although false, were not more serious. The trial court concluded that counsel’s failure to address Harris’s alleged statement prejudiced the defense because it was a close case and the prosecutor’s final rebuttal argument, reminding the jurors of the statement, “pretty much slammed the door on the defendant.”

¶4 To establish ineffective assistance of trial counsel, Harris had to show deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Deficient performance occurs when counsel’s representation falls below an objective standard of reasonableness. *Id.* at 687. To establish prejudice, Harris had to show a reasonable probability that, but for his counsel’s unprofessional errors, the result of the trial would have been different. A reasonable probability is one that undermines all confidence in the outcome. *Id.* at 694.

¶5 The State offers three arguments in support of its contention that Harris’s trial counsel performed reasonably. First, it argues that if the statement were so important to Harris’s credibility, one would expect Harris himself to have broached the subject. The State does not identify any particular question to which it would have been appropriate for Harris to deny making the statement to Larkowski or to explain what he meant. A claim of ineffective assistance of trial counsel cannot depend on a defendant’s volunteering unresponsive testimony to cover for his attorney’s failure to remember to ask appropriate questions.

¶6 Second, the State argues that Harris’s denial that he made the statement would have “recalled the jury’s attention to the statement.” As the trial court noted, there is no reason to believe the jury would forget the statement, particularly in light of the prosecutor’s final rebuttal argument.

¶7 Third, the State argues that Harris’s denial of making the statement could have placed him in a credibility battle with Larkowski as well as the officer and Harris’s ex-wife who witnessed the interview. Neither the officer nor Harris’s ex-wife testified at the postconviction hearing. The prosecutor’s brief indicated that she would have called them as witnesses if Harris had denied making the

statement. Argument is not evidence. *State v. Eugenio*, 210 Wis. 2d 347, 358, 565 N.W.2d 798 (Ct. App. 1997). Because they did not testify at the postconviction hearing, the record contains no evidence that would justify counsel's failure to broach the subject based on any fear that a credibility battle would ensue. Furthermore, Larkowski's notes from the interview and the officer's report of the interview do not include mention of this statement. Each of them could have been impeached on that basis. Harris's ex-wife could have been impeached by her bias.

¶8 The State offers eight reasons for concluding that counsel's failure to counter the adoptive admission did not prejudice Harris's defense. First, it argues that Harris's denial of the charges on the witness stand would be construed by the jury as a denial of making any out-of-court admissions as well. This argument fails to consider the effect a statement construed as an admission would have on the jury.

¶9 Second, the State argues that denial of making the statement would not have enhanced Harris's credibility because it would have been just one more denial from Harris. The uncorrected, unexplained statement could have been construed by the jury as a prior inconsistent statement, substantially damaging Harris's credibility.

¶10 Third, the State again argues that Harris's denial of making the statement would have invited a credibility battle with Larkowski, a police officer and his ex-wife. Because the officer and Harris's ex-wife did not testify at the postconviction hearing, and each of the witnesses' statements were subject to impeachment, we cannot conclude that the jury would have resolved the credibility issues against Harris. This argument also fails to take into account the

possibility that Harris could have explained any statement to the jury in a manner that would defeat the prosecutor's argument that he, in effect, adopted Larkowski's recitation of facts from the diary.

¶11 The State's fourth, fifth, sixth, and seventh arguments recite inculpatory evidence, suggesting that the State's case was so strong that any error of defense counsel did not affect the result. We defer to the trial court's characterization of the case as a "close case" in which the adoptive admission may have been the pivotal piece of evidence. The trial court had the advantage of hearing all of the testimony and observing the demeanor of the witnesses. Jade frequently could not remember aspects of the allegations and had to refer to her diary. The diary itself was, in some instances, copied from other notes and was not a contemporaneous writing. Counsel's failure to counter the adoptive admission undermines our confidence in the verdict.

¶12 Finally, the State notes that concern for the victim is a significant consideration in assessing a defendant's proffered grounds for reversing a conviction involving child sexual assault. Concern over the alleged victim's trauma cannot rise to the level of denying a defendant a fair trial in which the issues are fully explored by effective counsel.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

