COURT OF APPEALS
DECISION
DATED AND FILED

March 1, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP180-CR **Cir. Ct. No. 2003CF215**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARLYN J.J.,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Monroe County: STEVEN L. ABBOTT, Judge. *Affirmed*.

Before Lundsten, P.J., Dykman and Higginbotham, JJ.

¶1 LUNDSTEN, P.J. Marlyn J. appeals a circuit court order upholding his convictions for sexual assault of a child, J.D.J., along with related counts of incest, causing mental harm to a child, and misdemeanor intimidation of a victim. Marlyn argues that: (1) under ***State v. Pulizzano***, 155 Wis. 2d 633, 456 N.W.2d

325 (1990), he was denied his constitutional right to present a defense when the circuit court excluded evidence showing precocious sexual knowledge by J.D.J.; (2) he received ineffective assistance of trial counsel because counsel failed to object under ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984), to particular testimony of three State's witnesses as improperly vouching for the truthfulness of J.D.J.; and (3) his right to confrontation was violated when J.D.J. testified at trial via closed-circuit television because the evidence was insufficient to support a finding that J.D.J. could not "reasonably communicate" if required to testify in Marlyn's presence. We reject each of Marlyn's arguments and affirm the circuit court's judgments and order.

Background

¶2 J.D.J.'s biological mother terminated her parental rights to J.D.J. in March 2000, when J.D.J. was five years old. Starting in 1998, J.D.J. lived off and on with ViAnn J., a relative. ViAnn and her husband, the defendant Marlyn J., adopted J.D.J. around February 2002.

¶3 In July 2003, J.D.J., then eight years old, reported to another child, and then that child's mother, Terri R., that J.D.J.'s adoptive father, Marlyn, was sexually assaulting her.[1] Shortly thereafter, Terri R. informed J.D.J.'s adoptive mother, ViAnn. J.D.J.'s adoptive mother went to the police. A social worker with the Monroe County Department of Human Services conducted a videotaped interview of J.D.J. During the interview, J.D.J. described the assaults in detail,

[1] Some of the evidence at trial suggested that J.D.J. initially reported the assaults approximately one month earlier to one of her friends. This fact, however, is not material to our decision.

explaining how Marlyn would call her into his bedroom, put her on top of him, take her clothes off, put his finger in her vagina, and make her suck his penis. J.D.J. explained that the assaults occurred the year before, when she was in first grade. She also indicated that Marlyn said he would hurt her if she told anyone.

¶4 The State charged Marlyn with two counts of first-degree sexual assault of a child under thirteen years of age, as a person responsible for the welfare of the child, in violation of WIS. STAT. § 948.02(1) and (3m). He was also charged with one count each of incest with a child in violation of WIS. STAT. § 948.06(1), causing mental harm to a child in violation of WIS. STAT. § 948.04(1), and misdemeanor intimidation of a victim in violation of WIS. STAT. § 940.44(1).[2]

¶5 Prior to trial, Marlyn sought permission to introduce evidence that, prior to the charged conduct, J.D.J.'s biological mother's boyfriend, Art Drow, sexually assaulted J.D.J. when she was about four years old by touching her vagina and anus.[3] Marlyn also sought to introduce evidence that, when J.D.J. was about four years old, and at a daycare facility, she asked a boy to pull his pants down and then put her mouth on his penis. The circuit court denied Marlyn's request with respect to both the touching evidence and the daycare evidence, concluding that both were subject to exclusion under the rape shield statute, WIS. STAT. § 972.11(2), and both failed the test for admission under ***Pulizzano***.

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[3] We refer to the Art Drow evidence as "touching" evidence because that is how Marlyn refers to it in his appellate briefing. We note, however, that there appears to be ambiguity in the record as to whether the defense was prepared to present evidence that Drow not only touched, but also inserted his finger into J.D.J.'s vagina.

¶6 By the time of trial, J.D.J. was nine years old. Over Marlyn's objection, J.D.J. testified via closed-circuit television. The jury also viewed the videotaped interview of J.D.J. conducted when she was eight years old. In that tape, J.D.J. said that Marlyn would call her into his bedroom, put her on top of him, take off her clothes, pull down his undershorts, and push her head down to make her suck on his penis. She further said that Marlyn's penis "was like all hairy" and that "[i]t was soft, and then … when I put pressure on it, then it would get hard." J.D.J. said that Marlyn would put his finger "inside here," indicating the vaginal area on an anatomical drawing of a girl. J.D.J.'s trial testimony reaffirmed the allegations made in the videotaped interview. Several other witnesses testified for the State. Marlyn took the stand in his defense and denied the allegations. The jury found Marlyn guilty of all counts.

¶7 Marlyn filed a motion for postconviction relief, requesting that the circuit court vacate the judgments of conviction. The court denied the motion.

Discussion

I. Evidence Excluded Under The Rape Shield Statute

¶8 Marlyn first argues that he was denied his right to present a defense and, therefore, denied a fair trial, by the circuit court's application of the rape shield statute and ***Pulizzano*** to the touching evidence and the daycare evidence we described in the background section. Marlyn's argument presents a question of "'constitutional fact'" that we determine *de novo*. ***State v. St. George***, 2002 WI 50, ¶16, 252 Wis. 2d 499, 643 N.W.2d 777. For the reasons set forth below, we reject Marlyn's argument.

¶9 In briefing before this court, Marlyn lumps together three closely related but distinct issues: the admissibility of the touching evidence, the admissibility of the daycare evidence, and whether he was unfairly prejudiced by some of the prosecutor's comments during closing argument. We understand that Marlyn believes his arguments are stronger as a whole than when viewed separately, but they present distinct issues and we address them separately.

¶10 In the first two subsections below, we address the admissibility of the touching evidence and the daycare evidence. It is undisputed that both categories of evidence show J.D.J.'s "prior sexual conduct" within the meaning of the rape shield statute and, therefore, that the evidence is inadmissible under the statute. The question here is whether, despite the rape shield statute, Marlyn had a constitutional right to present the evidence. The parties agree that our framework for analyzing this question was set forth in ***Pulizzano***. The ***Pulizzano*** test strikes a balance between the defendant's right to present a defense and the State's interest in protecting the complainant from unfair prejudice and irrelevant inquiries. *See* ***State v. Dunlap***, 2002 WI 19, ¶20, 250 Wis. 2d 466, 640 N.W.2d 112; *see also* ***id.***, ¶19 ("[E]vidence of a complainant's prior sexual behavior can improperly focus attention on the complainant's character and past actions, rather than on the circumstances of the alleged assault."). The rationale is that the admission of prior sexual conduct evidence is sometimes required to protect the right of a defendant to present a defense because it is "probative of a material issue, to show an alternative source for sexual knowledge." ***Pulizzano***, 155 Wis. 2d at 652. Stated differently, it is "necessary to rebut the logical and weighty inference" that the child could not have gained the sexual knowledge possessed unless the defendant committed the alleged sexual assaults. ***Id.***

¶11 Under ***Pulizzano***, the defendant must show that the proffered evidence meets five criteria: (1) the prior acts clearly occurred; (2) the prior acts closely resemble those of the present case; (3) the prior acts are clearly relevant to a material issue; (4) the evidence is necessary to the defendant's case; and (5) the probative value of the evidence outweighs its prejudicial effect. ***Id.*** at 651-52; *see also* ***St. George***, 252 Wis. 2d 499, ¶19. If the defendant satisfies these five criteria, the court asks whether "the defendant's right to present the proffered evidence is nonetheless outweighed by the State's compelling interest to exclude the evidence." ***St. George***, 252 Wis. 2d 499, ¶20.

¶12 As already indicated, Marlyn was convicted of two counts of first-degree sexual assault of a child. One count pertained to Marlyn's touching of J.D.J.'s vagina with his finger, and one count pertained to Marlyn forcing J.D.J. to engage in fellatio.[4] We must analyze the evidence of J.D.J.'s previous sexual conduct that Marlyn proffered in light of each count of sexual assault allegedly committed by Marlyn. *See* ***State v. Dodson***, 219 Wis. 2d 65, 77, 580 N.W.2d 181 (1998) ("In cases involving more than one count of sexual assault, the circuit court should analyze each count under the ***Pulizzano*** test.").

[4] With respect to the latter count, neither the information nor the jury verdict references J.D.J.'s mouth. However, it is clear from the trial transcript and the parties' arguments that this count related to Marlyn's conduct in making or attempting to make J.D.J. suck his penis, that is, fellatio.

A. The Touching Evidence

¶13 We first address the circuit court's decision to exclude evidence that, a few years before the charged conduct, a boyfriend of J.D.J.'s biological mother, Art Drow, assaulted J.D.J. by touching her vagina and anus with his finger.

¶14 As to the fellatio charge against Marlyn, we conclude that the proffered touching evidence fails the second, closely-resembles prong of ***Pulizzano***. The finger-to-vagina and finger-to-anus contact involved in the prior sexual assault does not closely resemble fellatio.[5]

¶15 As to the finger-to-vagina charge against Marlyn, we agree with the State that ***St. George*** is controlling and that it requires that we affirm exclusion of the proffered touching evidence.

¶16 In ***St. George***, the defendant was charged with first-degree sexual assault of a five-year-old child, Kayla, who alleged that the defendant touched her vagina and "wiggled and jiggled." ***St. George***, 252 Wis. 2d 499, ¶¶7-8, 24. The court addressed whether the defendant's right to present evidence was violated by application of the rape shield law to exclude evidence that at least one other child had previously touched Kayla's vagina. ***Id.***, ¶¶11, 16-20. The court said that the proffered evidence satisfied the requirement that the prior acts closely resembled the charged conduct. Still, the court concluded that the evidence did not meet the third, fourth, or fifth prongs of the ***Pulizzano*** test. ***St. George***, 252 Wis. 2d 499, ¶¶21-22. The court reasoned that a five-year-old child's allegation that someone

[5] At oral argument, counsel for Marlyn conceded that the Art Drow evidence was not relevant to the fellatio charge.

touched her vagina and "wiggled and jiggled" did not show the kind of precocious sexual knowledge that would lead a jury to infer the defendant must have sexually assaulted the child. Therefore, the evidence of similar prior sexual acts was not relevant and admission of that evidence to rebut such a nonexistent inference was unnecessary. ***Id.***, ¶¶24-27.

¶17 The State contends here that there is no material difference between a five-year-old child's allegation that someone touched her vagina then "wiggled and jiggled" and J.D.J.'s allegation that Marlyn touched her vagina and anus with his finger.

¶18 Marlyn does not provide a developed argument disputing the State's reliance on ***St. George***. Indeed, Marlyn essentially conceded the point at oral argument.[6]

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[6] The following exchange occurred at oral argument:

> JUDGE HIGGINBOTHAM: … I still haven't gotten an answer about what it is about the [Drow evidence] that distinguishes it from the factual circumstances in ***St. George***. You still haven't gotten us there.
>
> MR. LaZOTTE: Yeah. The best I can do, Your Honor, is in terms of the alleged activity itself. I don't see any distinction between the alleged activity—what happened to the complainant in ***St. George*** and what happened to the complainant here.
>
> JUDGE HIGGINBOTHAM: So you would concede to that?
>
> MR. LaZOTTE: Right. The only distinction that I can see between ***St. George*** and the instant case is the level of sophistication in detail in the respective complainant's descriptions of what occurred to them.

(continued)

¶19 In sum, Marlyn fails to show that the circuit court erred in excluding the touching evidence.

B. The Daycare Evidence

¶20 Marlyn argues that evidence showing that, when J.D.J. was four years old, she asked one of the boys at her daycare to pull his pants down and then put her mouth on the boy's penis is admissible under ***Pulizzano***.

¶21 As to the finger-to-vagina charge against Marlyn, there is no serious dispute. The daycare evidence was not admissible on this charge because it does not meet the closely-resembles prong of ***Pulizzano***.

¶22 As to the fellatio charge against Marlyn, he argues that the daycare evidence was admissible to prove that J.D.J. knew about fellatio when she was three or four years old, well before the time of the charged assaults by Marlyn, thereby serving the very reason such evidence is admissible under ***Pulizzano***, despite the rape shield statute. The problem with this argument, according to the State, is that it conflicts with reasoning employed by the supreme court in ***Dunlap***. We agree.

¶23 In ***Dunlap***, a defendant was charged with sexually assaulting a six-year-old child by touching the child's buttocks and vagina. ***Dunlap***, 250 Wis. 2d 466, ¶¶3-4, 22. The ***Dunlap*** defendant sought to introduce evidence that, prior to the charged conduct, the child engaged in sexual behavior, including touching men

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> JUDGE HIGGINBOTHAM: Yeah. But that doesn't tie it to [the prior sexual assault], does it?
>
> MR. LaZOTTE: No.

in the genital area, "'humping the family dog,'" and frequent masturbation. ***Id.***, ¶¶8, 22. The ***Dunlap*** court concluded that this prior sexual behavior was subject to exclusion under the rape shield law, WIS. STAT. § 972.11(2), because it constituted clear examples of "sexual conduct" under the statute and none of the statutory exceptions applied. ***Dunlap***, 250 Wis. 2d 466, ¶¶16-17. The ***Dunlap*** court then addressed whether the evidence, nonetheless, should have been admitted under ***Pulizzano*** to counteract the normal assumption that such a young child would lack the sexual knowledge necessary to make a false claim. *See* ***Dunlap***, 250 Wis. 2d 466, ¶¶18-20. The ***Dunlap*** court concluded that the sexual behavior evidence was not admissible under ***Pulizzano*** because it was insufficiently similar. ***Dunlap***, 250 Wis. 2d 466, ¶¶22-23, 27, 29.

¶24 Pertinent here, the ***Dunlap*** court went on to address Dunlap's argument that the sexual behavior evidence was admissible under ***Pulizzano*** because it "could have been brought on by a previous act of sexual abuse." ***Dunlap***, 250 Wis. 2d 466, ¶28. The ***Dunlap*** court's resolution of this argument compels us to affirm the exclusion of the daycare evidence here. The ***Dunlap*** court reasoned that Dunlap was

> unable to connect [the child's] behaviors with any specific incident. Furthermore, Dunlap cannot rule out the possibility that [the child] might have learned these behaviors from exposure to pornography or from having viewed sexual activity, rather than from having been previously sexually assaulted. Dunlap's inability to show a connection to any specific prior incident leads us to conclude that he has not met the second prong of the ***Pulizzano*** test.

Id. The State contends that this reasoning applies here, and we agree. The ***Dunlap*** court might have rejected Dunlap's argument simply on the ground that the proffered evidence did not show knowledge of the type of conduct charged.

Instead, the court relied on Dunlap's inability to show a connection between the sexual behaviors and any specific prior incident. ***Id.*** That same lack of a connection exists here. Like the child in ***Dunlap***, J.D.J. engaged in behavior showing she had precocious sexual knowledge, knowledge that would not be expected of a child that age. Like the defendant in ***Dunlap***, Marlyn is unable to connect the child's behavior to any specific incident. Finally, as in ***Dunlap***, it is possible here that the alleged victim "might have learned [the behavior] from exposure to pornography or from having viewed sexual activity, rather than from having been previously sexually assaulted." *See* ***id.*** Thus, following the reasoning employed in ***Dunlap***, we conclude here that the daycare evidence does not satisfy the ***Pulizzano*** test.

¶25 We follow ***Dunlap***, but question the part of that decision on which we rely. It is not apparent to us that the paragraph from ***Dunlap*** we quote above comports with the concern underlying ***Pulizzano***. As we understand ***Pulizzano***, the concern is that jurors might accept as true a young child's account of a sexual assault because of the reasonable assumption that a young child would not know enough about many sexual acts to fabricate an account of such acts. That concern is present here, where the alleged assaultive behavior involves fellatio and the reporting child is eight years old. If *knowledge* of fellatio is the concern, why does it matter how the child acquired the knowledge? Regardless whether the child had prior knowledge of fellatio because she was the victim of a prior sexual assault by a different perpetrator or because she viewed pornography, or she acquired it from some other source, evidence demonstrating that the child had such knowledge effectively counteracts the "logical and weighty inference that [the child] could

not have gained the sexual knowledge [she] possessed unless the [alleged assault] occurred." *See* ***Pulizzano***, 155 Wis. 2d at 652.[7]

C. *Prosecutor's Closing Argument*

¶26 In rebuttal closing argument, the prosecutor suggested that J.D.J. would not have been able to make the detailed allegation she made if it did not happen. Marlyn asserts that the prosecutor's argument exacerbated the erroneous exclusion of the touching evidence and the daycare evidence. However, as we have explained, under ***Dunlap***, the circuit court did not err when it excluded that

[7] Because we conclude that ***State v. Dunlap***, 2002 WI 19, 250 Wis. 2d 466, 640 N.W.2d 112, is dispositive, we need not address the State's argument that the daycare evidence was properly excluded because it does not show that J.D.J. had knowledge of the appearance or sexual functioning of an adult penis. Still, we note that this argument is complicated. But for ***Dunlap***, we would need to consider whether the daycare evidence must be admitted under ***State v. Pulizzano***, 155 Wis. 2d 633, 456 N.W.2d 325 (1990), because it rebuts the inference that J.D.J. could have had knowledge of the appearance and sexual functioning of an adult penis only if Marlyn had sexually assaulted her.

In addition, we observe that the State does not argue that, if the circuit court erred in excluding the daycare evidence, such error was harmless. It may be that the State does not believe that, if error, the exclusion of the daycare evidence was harmless. Alternatively, the State may believe that a harmless error argument is foreclosed by the following language in ***Pulizzano***: "We find the harmless error rule is inapplicable. The [harmless error] rule is subsumed by the finding that exclusion of the evidence deprived [defendant] of a necessary element of her defense." ***Id.*** at 655-56. We question what this language means. Does it mean that the "necessary" prong of the ***Pulizzano*** test includes harmless error analysis? Such a reading is inconsistent with the general applicability of the harmless error rule to the denial of the right to present a defense. *See* ***Crane v. Kentucky***, 476 U.S. 683, 685-86, 687, 691 (1986) (exclusion of evidence undercutting the reliability of defendant's confession and, thereby, depriving defendant of his constitutional right to present a defense is subject to harmless error analysis); ***Delaware v. Van Arsdall***, 475 U.S. 673, 674, 684 (1986) (violation of defendant's Sixth Amendment right to confrontation was subject to harmless error analysis). Furthermore, it is readily apparent that a pretrial ruling erroneously excluding evidence under ***Pulizzano***, *when viewed from a post-trial perspective*, might prove to be insignificant, given developments at trial. This was the situation in ***Crane***, where the State of Kentucky asserted the error was harmless because "the very evidence excluded by the trial court's ruling ultimately came in through other witnesses." ***Crane***, 476 U.S. at 691. In any event, the State does not argue harmless error here, and we have no reason to resolve the issue since we affirm the ruling excluding the evidence.

evidence. Using ***Dunlap's*** reasoning as our starting point, we are unable to reconcile affirming the exclusion of this evidence with reversing Marlyn's convictions based on the prosecutor's argument.

¶27 The challenged argument is the following:

> [Prosecutor]: The third thing I would have you pay critical attention to is the level of detail on the tape, what she told [others]…. This was not a bunch of 20 something or 30 something women sitting around with a glass of wine talking about their sexual experience. She was a first grader, first semester first grade.
>
> Ladies and gentleman, the reason we have jurors is so that you can rely on your common sense, rely on your own fund of information.
>
> What do kids know about sex first semester first grade?... She said that her dad pushed her head down. If you watch the tape, she does this. He pushed her head down so that she could suck on his penis. And the next question, open-ended question was, "What does it look like?" Quite frankly, I was surprised by the answer. I was expecting her to describe a penis. She didn't describe a penis. She said, "It was all hairy."
>
> The second question was, "Was it hard or was it soft?"… She said, "Soft," and then again with her hand gestures, she would put pressure on it and it would get hard. This is not in the fund of information first graders have about sex.
>
> [Defense Counsel]: I am going to object. There is no testimony about that, Your Honor. That's pure speculation.
>
> [Prosecutor]: I am asking that the jurors rely on their common sense, Your Honor.
>
> THE COURT: Overruled. But the state has already used combined that's 30 minutes, so move on.
>
> [Prosecutor]: Thank you, Judge. You're to bring in your common sense about what a first grader would know about how a man makes himself erect or hard. You are not to speculate about other ways that she would have gotten this information.

¶28 We agree with the State that if, under ***Dunlap***, the challenged evidence was not admissible to rebut the ***Pulizzano*** inference, then it does not matter whether the prosecutor expressly asked the jurors to draw that inference.[8] The holding in ***Pulizzano*** is based on the assumption that jurors *will* wonder how a young child could have precocious sexual knowledge if the child did not experience the charged sexual assault. *See* ***Pulizzano***, 155 Wis. 2d at 639, 652; *see also* ***Dunlap***, 250 Wis. 2d 466, ¶19 ("Because the normal presumption is that a child does not have a sexual history, it is possible that a jury might incorrectly attribute any evidence of a child complainant's sexual behavior to an assault by the defendant."). Thus, the problem Marlyn complains about is present regardless of the prosecutor's argument. To repeat, ***Pulizzano*** is premised on the proposition that jurors will, on their own, wonder how a young child would know about the charged sex act if it did not occur. Thus, the prosecutor's argument at most verbalized what we assume the jurors were already wondering about. It follows that there is no reason to think the argument affected the verdict.

¶29 Furthermore, under the rationale of ***Dunlap***, there is no evidence here rebutting the ***Pulizzano*** inference and, thus, the prosecutor's argument was not improper. The dissent disagrees. In the dissent's view, the prosecutor knew about the evidence rebutting the ***Pulizzano*** inference, yet she knowingly asked the jury to draw that inference. The problem with that approach is that it assumes ***Dunlap*** was wrongly decided and that there is evidence here rebutting the ***Pulizzano*** inference. But it cannot be both ways. Either ***Dunlap*** was correctly decided, there was no evidence here rebutting the ***Pulizzano*** inference, and the

[8] This argument was made by the State during oral argument and was unrebutted by Marlyn's counsel.

prosecutor's argument was proper. Or, ***Dunlap*** was wrongly decided, there was evidence here rebutting the ***Pulizzano*** inference, and the prosecutor's argument was improper. The dissent accepts ***Dunlap*** as controlling on the ***Pulizzano*** evidentiary issue, but its analysis of the prosecutor's closing argument is inconsistent with ***Dunlap***.

¶30 We have expressed our reservations with the part of ***Dunlap*** on which we rely today. But, if there is a problem with ***Dunlap***, it is a matter for the supreme court, not this court.[9]

II. Ineffective Assistance Of Counsel

¶31 Marlyn next argues that he received ineffective assistance of counsel because his trial counsel failed to object under ***Haseltine*** to certain testimony of three witnesses: the social worker who conducted the videotaped interview of J.D.J., the arresting police officer, and the State's psychological expert. We disagree with Marlyn.

¶32 ***Haseltine*** provides that "[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." ***Haseltine***, 120 Wis. 2d at 96. In ***Haseltine***, the State's expert, a psychiatrist, testified that there "was no doubt whatsoever" that the complainant, the defendant's daughter, was an incest victim. ***Id.*** at 95-96.

[9] The State, in this closing argument context, makes essentially the same argument it made with respect to the ***Pulizzano*** evidentiary issue, namely, that the prosecutor's recitation of J.D.J.'s description of the particulars of the assaults included details, such as the appearance and functioning of an adult penis, that are not explained by the daycare evidence. *See* footnote 7, *supra*. And, as with the argument in the admissibility context, we need not address that argument in the closing argument context.

¶33 A defendant alleging ineffective assistance of counsel bears the burden of showing that his trial counsel's performance was deficient and that he suffered prejudice as a result. ***State v. Koller***, 2001 WI App 253, ¶7, 248 Wis. 2d 259, 635 N.W.2d 838. Whether counsel's actions constitute ineffective assistance presents a mixed question of fact and law. ***Id.***, ¶10. We will not reverse the circuit court's factual findings regarding counsel's actions unless those findings are clearly erroneous. ***Id.*** Whether counsel's performance was deficient and whether that performance prejudiced the defense are questions of law we review *de novo*. ***Id.***

¶34 In order to establish deficient performance, Marlyn must show that counsel committed errors that were "'so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" ***State v. Ludwig***, 124 Wis. 2d 600, 607, 369 N.W.2d 722 (1985) (quoting ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)). This requires showing that counsel's performance fell below an objective standard of reasonableness. ***State v. Pitsch***, 124 Wis. 2d 628, 636, 369 N.W.2d 711 (1985).

¶35 Showing prejudice means showing that counsel's alleged errors actually had some adverse effect on the defense. ***Strickland***, 466 U.S. at 693. The defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

¶36 We conclude, as further explained below, that Marlyn has not demonstrated deficient performance because ***Haseltine*** does not bar the

challenged testimony. We also conclude that, with respect to two witnesses, Marlyn has failed to demonstrate prejudice.[10]

A. Social Worker

¶37 We first address trial counsel's failure to object to the social worker's testimony that J.D.J.'s allegations were "substantiated." More specifically, when the prosecutor asked, "Following your investigation, did you substantiate abuse," the social worker responded, "Yes, I did."

¶38 We disagree that this testimony ran afoul of the ***Haseltine*** rule because cross-examination of the social worker by Marlyn's trial counsel made clear to the jury that "substantiated" abuse for purposes of the social worker's investigation did not amount to a determination that Marlyn was guilty of a crime. The social worker testified on cross-examination as follows:

> Q When you discussed substantiation, that's a term used in terms of, that term has nothing to do with the criminal case, correct?
>
> A Correct.
>
> Q It has to do with basically a determination your department makes about any case that comes in, is that fair to say?
>
> A Yes.
>
> ….

[10] We acknowledge that trial counsel testified at a ***Machner*** hearing that, in retrospect, he thought he should have raised objections under ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984). However, the question is not whether defense counsel thinks his or her performance was deficient. Rather, as explained in the body of this opinion, the standard for deficient performance is one of objective reasonableness, a standard under which *courts* decide what is or is not deficient performance.

> Q And it's fair to say that there are many cases that are substantiated where the parents involved or the alleged perpetrator isn't even charged criminally, correct? Doesn't mean that somebody is going to be charged criminally because something is substantiated, is that right?
>
> A Correct.

¶39 We also agree with the State that the purpose and effect of the prosecutor's line of questioning regarding substantiation was to rebut Marlyn's argument to the jury that the State's investigation was inadequate. For these reasons, the social worker's testimony did not constitute the type of opinion testimony contemplated by ***Haseltine***. Therefore, Marlyn's trial counsel did not perform deficiently by failing to object to that testimony.

¶40 In addition, we conclude that Marlyn has not demonstrated prejudice. Our review of the videotaped interview with J.D.J. and the balance of the social worker's testimony persuades us that, even without the challenged testimony, it would have been apparent to the jurors that the social worker believed J.D.J. was telling the truth.

B. Arresting Officer

¶41 Marlyn argues that trial counsel should have raised a ***Haseltine*** objection to the following testimony by the police officer who arrested him:

> Q And what was the basis for your decision to arrest?
>
> A Based on the statement by [J.D.J.] of what had occurred, what allegedly occurred, and me not believing.
>
> ….
>
> THE WITNESS: I may not—I didn't believe Marlyn was telling me the truth. Based on those

> circumstances, I believed I had enough probable cause to place him under arrest.

¶42 Counsel's failure to object to this testimony did not constitute deficient performance. Such an objection would have lacked merit under ***State v. Snider***, 2003 WI App 172, 266 Wis. 2d 830, 668 N.W.2d 784, and ***State v. Smith***, 170 Wis. 2d 701, 490 N.W.2d 40 (Ct. App. 1992). Those cases make clear that testimony explaining an officer's thought process at the time he or she acted is not impermissible ***Haseltine*** evidence. *See* ***Snider***, 266 Wis. 2d 830, ¶27; ***Smith***, 170 Wis. 2d at 718-19. Moreover, the officer here immediately corrected himself, referring to J.D.J.'s statement of what "allegedly" occurred.

¶43 We also conclude that Marlyn has not shown prejudice. Given the arresting officer's involvement in the investigation and his decision to arrest Marlyn, the jurors would naturally have assumed that the officer did not think Marlyn's denial was credible. Thus, the officer's testimony added nothing to what the jurors would already have assumed to be true.

C. State's Psychological Expert

¶44 Marlyn asserts that his trial counsel should have raised a ***Haseltine*** objection to certain testimony by the State's psychological expert. Marlyn explains that the prosecutor questioned the expert about the reliability of interviews like the videotaped interview of J.D.J., and the expert testified that such interviews, when conducted properly, "would tend to be reliable." The expert further testified about the factors she would use to determine whether a particular interview was reliable or unreliable, then described "salient points" of J.D.J.'s interview that corresponded to those factors. Based on this testimony, Marlyn

asserts that, "as a practical matter, [the expert] opined that the videotaped interview of J.D.J. was reliable, that is, that J.D.J. was telling the truth."

¶45 We disagree with Marlyn that his trial counsel's failure to raise a ***Haseltine*** objection to this testimony constituted deficient performance. Marlyn's argument fails under ***State v. Kirschbaum***, 195 Wis. 2d 11, 535 N.W.2d 462 (Ct. App. 1995). We determined in ***Kirschbaum*** that this type of testimony is permissible and is not controlled by ***Haseltine***:

> We recognize that in Wisconsin, no witness, expert or otherwise, should normally be permitted to testify that a witness is or is not telling the truth, unless the witness whose credibility is at issue suffers from a physical or psychological disorder. *See* … ***Haseltine***, 120 Wis. 2d at 96, 352 N.W.2d at 676. This is because the credibility of a witness is ordinarily something a lay juror, having the knowledge and general experience common to every member of the community, can determine on his or her own. ***Haseltine***, 120 Wis. 2d at 96, 352 N.W.2d at 676. However, the purpose of the child psychologist's testimony in this case was allegedly to discuss the procedures and techniques used in pretrial interviews with [the child] and how these procedures and techniques may have affected the reliability of the child's recollections. This is a subject with which a lay juror may be unfamiliar.

Kirschbaum, 195 Wis. 2d at 25. Under the reasoning of ***Kirschbaum***, a ***Haseltine*** objection to the testimony of the State's psychological expert would have lacked merit.

III. J.D.J.'s Testimony By Closed-Circuit Television

¶46 J.D.J. testified at trial by closed-circuit television. The procedure to be followed before a child is permitted to testify in this manner is contained in

WIS. STAT. § 972.11(2m).[11] The statute reflects a number of requirements similar to those that are constitutionally mandated under ***Maryland v. Craig***, 497 U.S. 836, 849-50 (1990). In ***Craig***, the United States Supreme Court held that such testimony comports with the defendant's right to confrontation if the circuit court hears evidence and makes an individualized determination that (1) use of the closed-circuit television procedure is necessary to protect the welfare of the child; (2) the child would otherwise be traumatized, not by the courtroom generally, but by the presence of the defendant; and (3) the emotional distress suffered by the child in the presence of the defendant is more than mere nervousness, excitement, or reluctance to testify. ***Id.*** at 855-56.

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[11] WISCONSIN STAT. § 972.11(2m) provides, in pertinent part:

> (a) At a trial in any criminal prosecution, the court may, on its own motion or on the motion of any party, order that the testimony of any child witness be taken in a room other than the courtroom and simultaneously televised in the courtroom by means of closed-circuit audiovisual equipment if all of the following apply:
>
> 1. The court finds all of the following:
>
> a. That the presence of the defendant during the taking of the child's testimony will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.
>
> b. That taking the testimony of the child in a room other than the courtroom and simultaneously televising the testimony in the courtroom by means of closed-circuit audiovisual equipment is necessary to minimize the trauma to the child of testifying in the courtroom setting and to provide a setting more amenable to securing the child witness's uninhibited, truthful testimony.
>
> 2. The trial in which the child may be called as a witness will commence:
>
> a. Prior to the child's 12th birthday ….

¶47 Even though Marlyn relies on ***Craig***, his focus is not on the three requirements from ***Craig*** set forth immediately above. Rather, Marlyn argues that the evidence before the circuit court was insufficient to support a finding that J.D.J. could not "reasonably communicate" if required to testify in his presence. Therefore, argues Marlyn, J.D.J.'s testimony by closed-circuit television violated the Confrontation Clause under the Federal Constitution, as well as his right "to meet the witnesses face to face" under article I, section 7 of the Wisconsin Constitution.[12] We disagree.

¶48 We first observe that, although Marlyn makes his argument primarily under ***Craig***, it is unclear whether the "cannot reasonably communicate" requirement is mandated by ***Craig*** and, therefore, the Constitution. The Court's summary of its holding in ***Craig*** might arguably be read to include a requirement of a showing that the child not be able to communicate in the presence of the defendant. *See* ***Craig***, 497 U.S. at 857. Elsewhere in its opinion, however, the Court seemed to say that it was not deciding the "minimum showing of emotional trauma required," only that, whatever the minimum showing, the "cannot reasonably communicate" standard of the Maryland statute at issue was constitutionally sufficient. The Wisconsin statute contains the same standard. *See* ***id.*** at 856; WIS. STAT. § 972.11(2m)(a)1.a. Thus, the "cannot reasonably communicate" requirement *is* mandated by *statute*.

[12] Marlyn's briefing suggests that the right to confrontation under article I, section 7 of the Wisconsin Constitution is broader than the right to confrontation under the Federal Constitution. However, Marlyn does not develop or support this proposition. Accordingly, we do not treat the state constitutional right to confrontation as a question separate from the federal one. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (stating that this court need not address issues on appeal that are inadequately briefed).

¶49 At the same time, we note that the State appears to assume the constitutional necessity of the "cannot reasonably communicate" standard. Accordingly, we will assume, without deciding, that the standard is constitutionally mandated. Acting under this assumption, we nonetheless disagree with Marlyn that the evidence before the circuit court was insufficient to satisfy the standard.

¶50 When it determined that J.D.J. could testify by closed-circuit television, the circuit court had before it the testimony of J.D.J.'s therapist, who had been treating J.D.J. "over quite some time." The therapist's testimony included the following:

> Q And then the other question I have … do you think she could reasonably communicate, or would she not be able to do so?
>
> A I think her testimony could be compromised because of the anxiety she would experience.
>
> Q When you say compromised, what do you mean?
>
> A Well, I mean, I think that she may not be able to testify as, you know, accurately and as well as you would want her to if she is under that kind of distress. It would be much more if she would be able to testify if she was not in that, under that kind of anxiety.
>
> Q Would it make a difference if she was in a different room and testifying by a closed circuit television?
>
> A Yes. I think she could do that.
>
> Q And do you think—
>
> A Without being traumatized, I think she could do that.

¶51 In addition, the therapist testified that J.D.J. would "suffer some trauma" if she testified in person; that J.D.J. was experiencing anxiety, sleep disturbances, intrusive thoughts, and nightmares; that J.D.J. was afraid of Marlyn;

that J.D.J. was manifesting symptoms of posttraumatic stress disorder; and that it was "probable" that J.D.J. would suffer serious emotional distress if she testified in Marlyn's presence.

¶52 The circuit court also had before it evidence that J.D.J. "sees the defendant in other men" and is afraid of them, and that J.D.J. was so frightened of being in the same room with Marlyn at his preliminary hearing that she had to be removed from the courtroom. In addition, the circuit court's decision indicates it was aware of and considered allegations that Marlyn threatened J.D.J. and that there were weapons in the home where Marlyn and J.D.J. lived. Marlyn did not object in the circuit court, and does not object now, to the court's consideration of these allegations.

¶53 We conclude the evidence was sufficient to support a circuit court's finding that J.D.J. would suffer serious emotional distress, such that she could not reasonably communicate, if she were to testify in Marlyn's presence. Accordingly, we reject Marlyn's argument that J.D.J.'s testimony by closed-circuit television violated his right to confrontation.[13]

By the Court.—Judgments and order affirmed.

Not recommended for publication in the official reports.

[13] Marlyn has not told us what standard of review he thinks we should apply to his argument that the evidence was insufficient to support a finding that J.D.J. could not reasonably communicate if required to testify in his presence and that J.D.J.'s testimony by closed-circuit television therefore violated his right to confrontation. Regardless whether we treat this issue as a sufficiency of the evidence question, as review of a finding of fact, as an ultimate question of "constitutional fact," or as some combination thereof, we would affirm the circuit court's conclusion that J.D.J. could testify in this manner without offending Marlyn's right to confrontation.

¶54 DYKMAN, J. (*dissenting*). I share the majority's concern with ¶28 of ***State v. Dunlap***, 2002 WI 19, 250 Wis. 2d 466, 640 N.W.2d 112. But I disagree with the majority's conclusion in section C of its opinion, entitled "Prosecutor's Closing Argument."

¶55 ***State v. Pulizzano***, 155 Wis. 2d 633, 645-48, 456 N.W.2d 325 (1990), held that the Sixth Amendment to the United States Constitution and article I, section 7 of the Wisconsin Constitution require that, regardless of legislation designed to prevent inquiry into a victim's past sexual activity, a defendant may present evidence that is so relevant and probative under the circumstances that denying admission implicates the defendant's constitutional right to present his or her defense. If this was not true, state and federal legislatures could repeal constitutional provisions enacted for the very purpose of giving those accused of crimes (criminals, many would say) protection from government.

¶56 The majority reasons that ¶28 of ***Dunlap*** requires that we affirm the trial court's refusal to permit Marlyn J.J. to show an alternative source for J.D.J.'s prior knowledge of the functioning of an adult penis. It then concludes that the district attorney's argument that the jury should recognize that children of J.D.J.'s age do not have knowledge of fellatio was acceptable. I do not agree. Analyses or arguments that fail on one ground may succeed on another ground. Evidence may not violate one rule of evidence but be inadmissible for another reason. An

attorney may make an argument that is not frivolous under WIS. STAT. § 802.05(2)(a) (2005-06)[1] but is frivolous under § 802.05(2)(b). ***Dunlap*** holds that evidence of prior sexual knowledge may be excluded because a child may have gained that sexual knowledge from exposure to pornography. But it does not follow that it is permissible for a prosecutor to tell a jury that a child would have no knowledge of the alleged sexual activity absent sexual abuse by the defendant when the prosecutor knows full well that is untrue. ***Dunlap*** addresses a question of law. Perpetuating a false belief is a question of ethics.

¶57 We hear lay criticism of attorneys from time to time, and when questioned, those who criticize tend to comment on a perceived lack of honesty. It does our profession no service to conclude, as the majority does today, that attorneys are free to make statements to juries they know are false, but also know are permissible. I conclude that this is, and should be sanctionable. I recognize that SCR 20:3.8, *Special Responsibilities of a Prosecutor*, is limited. But SCR 20:4.1(a), *Truthfulness in Statements to Others*, applies to all attorneys, including prosecutors, and requires that they avoid making a false statement of material fact or law to a third person. And SCR 20:8.4(c) prohibits attorneys from engaging in conduct that involves misrepresentation.

¶58 A dilemma posed here is that the record shows the prosecutor probably knew of ***Pulizzano*** and ***Dunlap***, and probably reasoned, as does the majority, that the misrepresentation condoned by the majority was permissible. So, sanctioning the prosecutor would be unfair. But that does not mean that the

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

result obtained by the misrepresentation should be ignored. Thus, I would reverse to permit a trial at which the prosecutor would be prohibited from arguing that J.D.J. would have no other way of knowing of the act of fellatio, and therefore must have learned of it from Marlyn J.J. I recognize that this raises the issue of harmlessness that the majority does not need to examine. But, though the issue is not clear cut, I would conclude that because this was in large part a case that required the jury to compare the credibility of J.D.J. and Marlyn J.J., the district attorney's comment was not harmless. Accordingly, I respectfully dissent.