COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP241-CR **Cir. Ct. No. 2004CF42**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES JULIUS EMERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dunn County: JAMES C. BABLER, Judge. *Affirmed*.

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

¶1 PER CURIAM. James Emerson appeals a judgment, entered upon a jury's verdict, convicting him of first-degree sexual assault of a child and incest with a child. Emerson also appeals an order denying his postconviction motion for a new trial. Emerson argues that the trial court erred by failing to grant his motion

for a mistrial and he was denied the effective assistance of trial counsel. Emerson additionally urges this court to grant a new trial in the interest of justice on grounds that the real controversy was not fully tried. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 The State charged Emerson with first-degree sexual assault of a child and incest.[1] The complaint alleged the assault occurred in February 2004, when the child, his daughter Elizabeth F., was ten years old. At trial, Elizabeth testified that on the last weekend she spent at Emerson's house—February 6-8, 2004—Emerson engaged in intercourse with her after tying her to the bed. Elizabeth additionally described other assaults by Emerson that allegedly began when she was six years old. Elizabeth testified that before the sex acts, Emerson would have her inhale marijuana from a bong or drink alcohol.

¶3 A forensic scientist specializing in DNA analysis testified that she found both Emerson's and Elizabeth's DNA on Emerson's bedding. Although the analyst identified Emerson's semen on the bedding, she could not conclusively identify the source of Elizabeth's DNA. The analyst nevertheless opined that Elizabeth's DNA likely consisted of either saliva or vaginal fluids. A nurse who examined Elizabeth testified regarding irregularities in Elizabeth's hymenal tissue that were consistent with her allegations of abuse, but also consistent with a playground injury or other physical activity. The State also presented several witnesses who had spent time with Emerson and Elizabeth, and claimed to have

[1] A charge of misdemeanor bail jumping was later dismissed.

seen Emerson act inappropriately toward Elizabeth, though none had seen sexual contact between the two.

¶4 In turn, Emerson testified that he never assaulted Elizabeth. Although he admitted smoking marijuana in front of Elizabeth, he denied having her use it. Two individuals who stayed at Emerson's house the weekend of February 6-8, 2004, testified that they never saw Emerson engage in inappropriate behavior toward Elizabeth. The defense additionally presented several witnesses who had spent time with Emerson and Elizabeth and had seen no inappropriate behavior.

¶5 The jury ultimately returned verdicts finding Emerson guilty of the crimes charged. The court imposed consecutive sentences totaling twenty-five years' initial confinement and thirty years' extended supervision. Emerson's motion for postconviction relief was denied and this appeal follows.

DISCUSSION

A. Mistrial Motion

¶6 Emerson argues that the trial court erred by failing to grant his motion for a mistrial. Whether to grant a mistrial is within the trial court's discretion. *See* ***State v. Bunch***, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995). The trial court must assess, in light of the whole proceeding, whether the basis for the mistrial request is sufficiently prejudicial to warrant a new trial. *See* ***id.*** We will uphold the trial court's discretionary decision if it examined the relevant facts, applied a proper legal standard and employed a rational decision-making process. *See* ***id.*** at 506-07. Not all errors warrant a mistrial, and it is

preferable to employ less drastic alternatives to address the claimed error. ***State v. Adams***, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998).

¶7 Here, Emerson contends that the testimony of Ricky Stelling, a State's witness, was sufficiently prejudicial to warrant a new trial. On direct examination, Stelling testified that he heard Emerson tell Elizabeth: "Come over here, you sexy bitch, give me another kiss." Stelling further testified that he saw Emerson give Elizabeth an "open mouth, long lasting" kiss four times. When the prosecutor asked what Stelling thought about this, he responded: "I knew something was up right then and there, that he was a pervert, and I'd also heard plenty comments … comments he made to my sister." The court then interrupted Stelling, instructing him to simply answer the question asked. When asked if Stelling ever reported what he saw to the police, Stelling replied: "My brother and my family came forward … [b]ecause there was way more to it after that." The court again interrupted Stelling's testimony.

¶8 On cross-examination, the court continued to admonish Stelling for giving more information than called for by defense counsel's questions. When asked if he understood the court's directive, Stelling replied, "If you don't want the truth." When the court intervened again, Stelling stated, "I'm trying to tell the truth." Defense counsel ultimately asked: "Earlier when [the prosecutor] was asking you the questions you made some strong statements about Mr. Emerson based upon what you observed … Is that a fair summary?" Stelling replied, "There is more to it." The court consequently warned Stelling to simply answer "yes" or "no," and Stelling replied, "Your Honor, it involves my little sister, too." When the court interrupted Stelling's testimony, Stelling stated: "Fine. I'm done. I wasn't subpoenaed. I don't need to be here." The court told Stelling to sit down

as he started to leave the witness box. The jurors were then removed from the courtroom.

¶9 Defense counsel moved for a mistrial, arguing that Stelling's comments left the jury with the impression that Emerson may have assaulted Stelling's sister. The court denied the motion, stating:

> It was one very small item in this entire trial. The jury obviously knows that this man doesn't like your client. That may be to your benefit, [defense counsel]. In fact, I can hear you arguing how beneficial that is in closing arguments that these people have an axe to grind, they are going to do whatever they can to try to get him convicted and even lie. I'm not saying that he's lying, I'm just saying he was going to say whatever he had to say today.

As the court noted, Stelling's testimony was potentially harmful, rather than helpful, to the State because of his obvious animosity toward Emerson.

¶10 At the hearing on Emerson's postconviction motion for a new trial, the court further noted that the other trial evidence overwhelmingly supported the jury's verdict—specifically, the DNA evidence and Elizabeth's testimony. To the extent Emerson challenges inconsistencies between Elizabeth's trial testimony and her original statement, these inconsistencies are trivial in comparison to her detailed description of the sexual abuse. Although Emerson additionally emphasizes Elizabeth's initial denials of abuse to a social worker, the social worker testified that it is not uncommon for a child to initially deny abuse.

¶11 In any event, Elizabeth's claims were consistent with observations made by a number of witnesses. Elizabeth's mother, Dana F., testified that she discovered Elizabeth was wearing "bikini-style thong underwear" and a t-shirt with "huge condom-looking characters." Dana also testified that in the summer of 2003, she was concerned about an unusual "redness between [Elizabeth's] legs"

that had been happening "for a while." Elizabeth's stepmother, Renee Emerson, testified that near the end of her marriage to Emerson, he would take Elizabeth into their bed "at least three nights a week" and "hold her so tight that [Elizabeth] just couldn't move." Stelling's sister, Teresa Cook, testified that she heard Emerson call Elizabeth "sexy," and saw Emerson lean over Elizabeth on a chair, "kissing her like an open-mouthed kiss, not a father-daughter."

¶12 Emerson's contention that Stelling's comments left the jury with the impression that Emerson may have sexually assaulted Stelling's sister is speculative at best. Cook testified immediately after Stelling, and she, like her brother, testified that she witnessed an open-mouth kiss between Emerson and Elizabeth and heard Emerson call Elizabeth "sexy." In context, the jury could reasonably infer from Stelling's statement about his sister's involvement that he was displeased about her involvement in the proceedings.

¶13 Given the overwhelming evidence supporting the jury's verdict, we conclude that Stelling's testimony was not sufficiently prejudicial to warrant a new trial. The trial court, therefore, properly denied Emerson's mistrial motion.

B. Effective Assistance of Counsel

¶14 Emerson claims he was denied the effective assistance of trial counsel. This court's review of an ineffective assistance of counsel claim is a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The trial court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** However, the ultimate determination whether the attorney's performance falls below the constitutional minimum is a question of law that this court reviews independently. ***Id.***

¶15 "The benchmark for judging whether counsel has acted ineffectively is stated in ***Strickland v. Washington***, 466 U.S. 668 (1984)." ***State v. Johnson***, 153 Wis. 2d 121, 126, 449, N.W.2d 845 (1990). To succeed on his ineffective assistance of counsel claim, Emerson must show both (1) that his counsel's representation was deficient and (2) that this deficiency prejudiced him. ***Strickland***, 466 U.S. at 694.

¶16 In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. However, "every effort is made to avoid determinations of ineffectiveness based on hindsight … and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***Johnson***, 153 Wis. 2d at 127. In reviewing counsel's performance, we judge the reasonableness of counsel's conduct based on the facts of the particular case as they existed at the time of the conduct and determine whether, in light of all the circumstances, the omissions fell outside the wide range of professionally competent representation. ***Strickland***, 466 U.S. at 690. Because "[j]udicial scrutiny of counsel's performance must be highly deferential … the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." ***Id.*** at 689. Further, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." ***Id.*** at 690.

¶17 The prejudice prong of the ***Strickland*** test is satisfied where the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. ***Id.*** at

694. However, we need not address the prejudice prong if we conclude there is no deficient performance by counsel. *See* ***id.*** at 697.

¶18 Here, Emerson claims counsel was ineffective for not moving to strike Stelling's testimony in its entirety. Counsel's performance is not deficient, however, unless counsel fails to take an action clearly available or perform a duty clearly required under the law. *See* ***State v. Maloney***, 2005 WI 74, ¶23, 281 Wis. 2d 595, 626 N.W.2d 583; ***State v. Thayer***, 2001 WI App 51, ¶14, 241 Wis. 2d 417, 626 N.W.2d 811; ***State v. McMahon***, 186 Wis. 2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994). Noting that the trial court may strike the testimony of a witness who refused to answer certain questions on cross-examination, *see* ***State v. Monsoor***, 56 Wis. 2d 689, 203 N.W.2d 20 (1973), Emerson argues counsel should have moved to strike Stelling's testimony. ***Monsoor***, however, is distinguishable from the present case. Stelling did not refuse to answer questions on cross-examination but, rather, provided more information than requested. Emerson provides no authority for extending the ***Monsoor*** rule to a situation where, as here, a witness's behavior causes the court to cut off cross-examination before defense counsel asks his last question of the witness.

¶19 To the extent Emerson argues that Stelling's behavior was tantamount to a refusal to answer, Emerson fails to establish how he was prejudiced. Defense counsel assured the court that the only thing he wanted Stelling to confirm was whether, and if so, when, Stelling reported Emerson's inappropriate behavior to authorities. The State agreed to stipulate that Stelling never personally reported what he saw to authorities and defense counsel accepted the stipulation. Emerson therefore fails to establish how he was prejudiced by any claimed deficiency on the part of trial counsel for not moving to strike Stelling's testimony.

¶20 Next, Emerson claims trial counsel was ineffective for failing to object to Bradley Leach's testimony. Leach, an investigator for the Dunn County Sheriff's Department, conducted the search of Emerson's house. The search warrant had been issued based on a police interview with Elizabeth. Leach testified about finding a bong that looked exactly as Elizabeth had described it and located "where she said it would be." Leach also confirmed that he found marijuana in a kitchen drawer where Elizabeth said it would be. Leach additionally confirmed that when interviewed, Elizabeth said that Emerson would tear her clothes. Leach testified that he found a torn shirt in Elizabeth's bedroom. Finally, with respect to the bed, Leach testified: "On the bed itself had some … like disturbances or something where she talked about being tied down to the bed, I can't say it was rope marks or not, but there was scratching and stuff." Emerson challenges Leach's reference to Elizabeth's out-of-court statements as a violation of hearsay rules and further challenges these portions of Leach's testimony as improper comment on Elizabeth's truthfulness. *See* ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984) ("No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth.").

¶21 Even were we to assume counsel was deficient for failing to object to Leach's statements on either hearsay or ***Haseltine*** grounds, Emerson fails to establish how he was prejudiced by the deficiency. Leach's references to Elizabeth's out-of-court statements were largely cumulative. Moreover, admission of the alleged hearsay is harmless because Elizabeth was available for further cross-examination on these topics. While Leach's testimony could have the effect of bolstering Elizabeth's credibility, his testimony was not a comment on her character for truthfulness but, rather, evidence from which the jury could judge

Elizabeth's credibility for itself. Ultimately, given the overwhelming evidence of Emerson's guilt, Leach's reference to what Elizabeth told him in connection with the search and whatever bolstering affect it may have had was not sufficiently prejudicial to call the verdict into question.

¶22 Emerson also contends counsel was ineffective for failing to object to a jury instruction and a verdict form that specified no date and made no reference to the Information. The jury was given Jury Instruction 255, which provides: "[I]t is not necessary for the State to prove that the offense was committed on the precise date alleged in the information. If the evidence shows beyond a reasonable doubt that the offense was committed on a date near the date alleged, that is sufficient." WIS JI—CRIMINAL 255. Emerson argues that in light of Elizabeth's testimony about alleged assaults that occurred prior to February 2004, this particular instruction with the unspecific verdict form, likely confused the jury. We are not persuaded.

¶23 Emerson raises the mere possibility that the other acts evidence might have confused the jury as to which crimes were before it. "[A]n allegedly erroneous jury instruction warrants reversal" only if "it probably and not merely possibly misled the jury." ***Fischer v. Ganju***, 168 Wis. 2d 834, 849-50, 485 N.W.2d 10 (1992). As the trial court stated and the record consistently demonstrates, the jury knew that the entire trial was about the assault committed during the weekend of February 6-8, 2004. Emerson thus fails to establish how he was prejudiced by any claimed deficiency on counsel's part for failing to object to the jury instruction.

¶24 To the extent Emerson challenges the unspecific verdict form as a violation of his right to a unanimous verdict, the precise date the alleged crime

was committed need not be specified on the verdict form in sexual assault cases. ***State v. Miller***, 2002 WI App 197, ¶18, 257 Wis. 2d 124, 650 N.W.2d 850. When determining whether a defendant's right to a unanimous verdict has been denied, we must determine whether the jury has been presented with evidence of multiple crimes or evidence of alternate means of committing the *actus reus* element of one crime. ***State v. Lomagro***, 113 Wis. 2d 582, 592, 335 N.W.2d 583 (1983). This case involved a single incident of sexual assault that occurred during the first weekend in February 2004. Because the evidence involved a single criminal act and did not present alternate means of commission, we conclude there is no jury unanimity issue. Because the verdict form was proper, counsel was not ineffective for failing to challenge it.

C. New Trial in the Interest of Justice

¶25 Emerson alternatively seeks a new trial under WIS. STAT. § 752.35,[2] which permits us to grant relief if we are convinced "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." In order to establish that the real controversy has not been fully tried, Emerson must convince us "that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoting ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996)). To establish a miscarriage of justice, Emerson "must convince us 'there is a substantial degree of

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

probability that a new trial would produce a different result.'" ***Darcy N. K.***, 218 Wis. 2d at 667 (quoting ***State v. Caban***, 210 Wis. 2d 597, 611, 563 N.W.2d 501 (1997)). An appellate court will exercise its discretion to grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶26 As we discussed above, Emerson has failed to establish that Stelling's testimony prejudiced the trial or that he was denied the effective assistance of counsel. Accordingly, we conclude there is no reason to exercise our discretionary authority under WIS. STAT. § 752.35 to grant Emerson a new trial.

By the Court.—Judgment and order affirmed.

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