COURT OF APPEALS
DECISION
DATED AND FILED

May 17, 2007

David R. Schanker
Clerk of Court of Appeals

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Appeal No. 2006AP1623-CR **Cir. Ct. No. 2004CF91**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL H. WILCOX, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed*.

Before Lundsten, P.J., Vergeront and Bridge, JJ.

¶1 LUNDSTEN, P.J. This is an ineffective assistance of counsel case arising from Michael Wilcox's conviction, after a jury trial, for two counts of sexual assault of a child, S.G. Wilcox appeals the judgment of conviction and the order denying his postconviction motion for a new trial. He argues that defense

counsel was ineffective for failing to (1) move to suppress evidence obtained during a police interview, after Wilcox invoked his right to silence the previous day, that Wilcox admitted that his penis "accidentally" went into S.G.'s mouth a number of times; (2) object to the State's use of Wilcox's refusal to be tape recorded during the same police interview; and (3) discover before trial a videotape of one of S.G.'s therapy sessions and retain a psychological expert. We conclude that Wilcox was not denied effective assistance of counsel and affirm the circuit court's judgment and order.

Background

¶2 S.G., who had been living with her biological mother and Wilcox, was placed in foster care on her fourth birthday, October 6, 2003. At that time, S.G. also began therapy for behavioral and transitional issues.

¶3 Shortly thereafter, S.G.'s foster mother discovered that S.G. had "tasted" the penises of her two foster brothers, ages four and two. S.G.'s foster mother asked S.G. why she would do something like that, and S.G. responded that her mom would get mad when she "tasted" her brother and "Michael." S.G.'s foster mother provided this information to the county social worker who had been working with S.G.

¶4 S.G. later made similar statements to others. S.G. spontaneously told her adoptive mother on more than one occasion that Wilcox had put his "pee-pee" in her mouth. According to S.G.'s adoptive mother, S.G. would not talk about the abuse if asked directly about it. S.G. also told a family support worker, in response to open-ended questions, that Wilcox "went pee-pee" in her mouth. Finally, S.G. told her babysitter, "out of the blue," that her "daddy" put his "pee-

pee" in her mouth. When the babysitter asked if S.G. meant "Keith" (S.G.'s adoptive father), S.G. responded, "no, that her other daddy, Daddy Michael did."

¶5 A police investigator first interviewed Wilcox on April 2, 2004. During this interview, Wilcox agreed to be tape recorded, but denied having had any sexual contact with S.G.

¶6 After the State filed a criminal complaint against Wilcox and police took him into custody, the same investigator, on July 15, 2004, attempted to interview Wilcox a second time, but Wilcox invoked his right to remain silent.

¶7 The next day, July 16, 2004, the same investigator again sought to interview Wilcox while he was in custody. This time, Wilcox agreed to talk, but declined to be taped. According to the investigator, during this interview, he asked Wilcox whether it was possible that Wilcox's penis may have "accidentally" gone into S.G.'s mouth, and Wilcox responded that it had. In discussing with the investigator how many times this happened, Wilcox at one point said five to ten times, but at another point said less than five times. Defense counsel did not move to suppress evidence of this admission.[1]

¶8 Approximately two months before trial, when S.G. was five and one-half years old, the State took a video deposition of S.G., during which defense counsel had the opportunity to cross-examine her. S.G. identified the private parts of a "butt" and a "peanut" on an anatomical diagram of a boy, and testified that Wilcox had put his "peanut" in her mouth "[a] lot of times."

[1] For the sake of brevity, throughout this opinion we refer to this evidence as Wilcox's admission that his penis "accidentally" went into S.G.'s mouth a number of times.

¶9 During the first day of Wilcox's two-day trial, the State played for the jury S.G.'s video deposition and called a number of witnesses, including the county social worker, the police investigator who interviewed Wilcox, and S.G.'s therapist. The police investigator testified about Wilcox's admission that his penis "accidentally" went into S.G.'s mouth a number of times. In addition, the investigator testified that Wilcox refused to be tape recorded during the interview in which he made this admission.

¶10 S.G.'s therapist described to the jury what occurred during the course of S.G.'s therapy. The therapist testified that she did not ask S.G. leading questions and that S.G. told her during therapy sessions that S.G. "tasted" Wilcox's "pee-pee" or "private part." During cross-examination of S.G.'s therapist, defense counsel discovered that the therapist and county social worker had videotaped one of S.G.'s early therapy sessions. The same day, defense counsel obtained a copy of the tape and viewed it. On the tape, both S.G.'s therapist and the county social worker are heard asking S.G. numerous leading questions, including questions about Wilcox. The tape also showed S.G. reporting that she had "tasted" her brother and foster brothers, but not Wilcox.

¶11 On the second day of trial, the jury watched the videotape of the therapy session. Defense counsel re-called the county social worker to the stand and questioned her about the videotape. Defense counsel also relied on the tape extensively during closing arguments. For example, he argued that the tape showed S.G. denying that Wilcox's penis had been in her mouth, despite being "bombarded" by questions about Wilcox. He also argued that, after repeated therapy sessions like the one shown in the video, it would hardly be surprising that S.G. would say or believe that Wilcox had put his penis in her mouth. Throughout the trial, the defense theory was that S.G.'s allegations against Wilcox solidified

only after S.G.'s therapist and other adults repeatedly questioned S.G. about Wilcox, thereby planting the idea in S.G.'s head that Wilcox had sexually abused her.

¶12 Wilcox took the stand and disputed the investigator's account of the July 16 interview during which he allegedly admitted that his penis "accidentally" went into S.G.'s mouth a number of times. Wilcox denied that he ever had sexual contact with S.G. This denial was consistent with Wilcox's taped interview on April 2.

¶13 The jury found Wilcox guilty of two counts of sexual assault of a child under the age of thirteen.

¶14 Wilcox filed a postconviction motion seeking a new trial and claiming ineffective assistance of counsel. After a ***Machner*** hearing,[2] the circuit court determined that counsel performed deficiently in several respects, but concluded that there was no resulting prejudice. The court, therefore, denied Wilcox's motion.

Discussion

I. Standards For Ineffective Assistance Of Counsel

¶15 The standards that apply to ineffective-assistance-of-counsel claims are controlled by ***Strickland v. Washington***, 466 U.S. 668 (1984), and can be summarized as follows:

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

> In order to find that counsel rendered ineffective assistance, the defendant must show that trial counsel's representation was deficient. The defendant must also show that he or she was prejudiced by the deficient performance.
>
> Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness. When evaluating counsel's performance, courts are to be "highly deferential" and must avoid the "distorting effects of hindsight." …
>
> In order to demonstrate that counsel's deficient performance is constitutionally prejudicial, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." The focus of this inquiry is not on the outcome of the trial, but on "the reliability of the proceedings."

State v. Thiel, 2003 WI 111, ¶¶18-20, 264 Wis. 2d 571, 665 N.W.2d 305 (citing and quoting ***Strickland***, 466 U.S. at 687-89, 694).

¶16 Whether a defendant was denied the effective assistance of counsel presents a mixed question of fact and law. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will not reverse the trial court's findings of fact regarding counsel's actions unless those findings are clearly erroneous. ***Id.*** at 634. Whether counsel's performance was deficient and whether counsel's actions prejudiced the defense are questions of law that we review *de novo*. ***Id.***

II. Application Of Standards To Wilcox's Ineffective Assistance Claims

A. Failure To Move To Suppress Evidence Of July 16 Admission

¶17 Wilcox first argues that trial counsel was ineffective for failing to move to suppress evidence that, during the July 16 interview, Wilcox admitted his penis "accidentally" went into S.G.'s mouth a number of times. He asserts that the

evidence was inadmissible because he had invoked his right to silence the day before.

¶18 We begin by summarizing the pertinent events. On July 15, 2004, shortly after the State filed the criminal complaint against Wilcox, the police took Wilcox into custody, and the investigator who had questioned and tape recorded Wilcox during the April 2 interview approximately three months earlier asked Wilcox if he wanted to talk. Wilcox replied that he did not. The investigator honored Wilcox's invocation of silence and did not attempt to question Wilcox further that day.

¶19 The next day, approximately 19 hours later, the investigator gave Wilcox an opportunity to read the criminal complaint, informed Wilcox of his ***Miranda*** rights, and again asked Wilcox if he would be willing to talk. Wilcox read the complaint, signed a written waiver of his ***Miranda*** rights, and agreed to talk with the investigator. Wilcox declined, however, to be tape recorded. As previously indicated, the investigator testified at trial that Wilcox admitted during this interview that his penis "accidentally" went into S.G.'s mouth a number of times.

¶20 We disagree with Wilcox that defense counsel was ineffective for failing to move to suppress evidence of Wilcox's July 16 admission. We conclude that Wilcox has not demonstrated either deficient performance or prejudice because the evidence is admissible, and a reasonable defense attorney could have concluded that it was pointless to seek suppression.

¶21 As Wilcox concedes, police are not permanently barred from interrogating a suspect who has invoked the right to silence. Rather, "the admissibility of statements obtained after the person in custody has decided to

remain silent depends under ***Miranda*** on whether his 'right to cut off questioning' was 'scrupulously honored.'" ***Michigan v. Mosley***, 423 U.S. 96, 104 (1975); *see also* ***State v. Hartwig***, 123 Wis. 2d 278, 285, 366 N.W.2d 866 (1985) ("The essential issue is whether, under the circumstances, the defendant's right to silence was scrupulously honored.").

¶22 Wilcox's argument turns on the application of ***Mosley***, which courts have interpreted as outlining a five-factor test used in analyzing whether an accused's rights were "scrupulously honored" or if, instead, police reinterrogation resulted in a constitutional violation. *See, e.g.*, ***State v. Badker***, 2001 WI App 27, ¶12, 240 Wis. 2d 460, 623 N.W.2d 142 (Ct. App. 2000). The ***Mosley*** factors are whether:

(1) the original interrogation was promptly terminated;

(2) interrogation was resumed after a significant period of time;

(3) the accused received ***Miranda*** warnings at the beginning of the subsequent interrogation;

(4) a different officer conducted the subsequent interrogation; and

(5) the subsequent interrogation related to a different crime.

See ***Badker***, 240 Wis. 2d 460, ¶12 (citing ***Mosley***, 423 U.S. at 105-06).

¶23 Each case of "reinterrogation" turns on its particular facts. *See* ***Hartwig***, 123 Wis. 2d at 284-85 (the absence or presence of the ***Mosley*** factors is not "exclusively controlling" and the factors do not establish a test that can be "woodenly" applied). Still, the facts before us are substantially the same as those

in ***State v. Turner***, 136 Wis. 2d 333, 401 N.W.2d 827 (1987), and we find significant guidance in that case.

¶24 In ***Turner***, the defendant was advised of and waived his ***Miranda*** rights and was then questioned for about 45 minutes. ***Id.*** at 337-38. He denied involvement in certain crimes, and then stated that he did not want to answer any more questions. ***Id.*** at 338. The detectives terminated questioning, but the defendant remained in custody. ***Id.*** at 338-39. The next day, approximately 24 hours after the first interview, the same detectives again met with the defendant. ***Id.*** The defendant was again advised of his ***Miranda*** rights, and he waived them and agreed to talk. ***Id.*** at 339. He initially denied committing the crimes but, after he was confronted with inconsistencies in his story, he confessed. ***Id.***

¶25 Applying the ***Mosley*** factors, the ***Turner*** court concluded that the police did not violate the defendant's right to silence. *See* ***Turner***, 136 Wis. 2d at 355-60. There was no dispute that the third ***Mosley*** factor was satisfied and that the fourth and fifth factors were not. ***Turner***, 136 Wis. 2d at 356. The same is true here. There is no dispute that Wilcox received ***Miranda*** warnings at the beginning of the subsequent July 16 interrogation (factor three), that the subsequent interrogation was not conducted by a different officer (factor four), and that the subsequent interrogation did not relate to a different crime (factor five).[3]

[3] Thus, the court in ***State v. Turner***, 136 Wis. 2d 333, 401 N.W.2d 827 (1987), established that reinterrogation by the same officer for the same crime does not by itself run afoul of ***Michigan v. Mosley***, 423 U.S. 96 (1975): "[I]t is not dispositive that the same officer conducted the reinterrogation regarding the same crime." ***Turner***, 136 Wis. 2d at 359. Before ***Turner***, the court's decision in ***State v. Hartwig***, 123 Wis. 2d 278, 366 N.W.2d 866 (1985), might have been read to imply that the fifth ***Mosley*** factor is almost always critical. *See* ***Hartwig***, 123 Wis. 2d at 287.

¶26 The ***Turner*** court also determined that the first ***Mosley*** factor was not violated. ***Turner***, 136 Wis. 2d at 357. The same is true here. When the investigator sought to question Wilcox on July 15, Wilcox invoked his right to silence and that invocation was honored.

¶27 The ***Turner*** court focused in detail on the second ***Mosley*** factor, whether a "significant period of time" elapsed between interrogations. *See* ***Turner***, 136 Wis. 2d at 357-59. The court observed that "courts are moving toward a more flexible analysis under ***Mosley***" and that "a wide range of time gaps between interrogations may satisfy ***Mosley***." ***Id.*** at 357-58. The ***Turner*** court viewed the 24-hour time gap between interrogations as significant, at least when combined with the absence of any other indication that police had coerced the defendant or done anything that would have suggested to the defendant that his right to silence would not be "scrupulously honored." *See* ***id.*** at 359-60.[4]

¶28 "What constitutes a 'significant' period must be interpreted in light of the circumstances of the case and in light of the goals to dispel the compulsion inherent in custodial surroundings and to assure the defendant that his right to silence will be scrupulously honored." ***Hartwig***, 123 Wis. 2d at 285-86. Here, as in ***Turner***, the reinterrogation occurred the day after the previous interrogation, albeit approximately 19 hours later, instead of 24 hours later. We conclude this five-hour difference is not significant. And, just as in ***Turner***, there were no

[4] The court in ***Turner*** contrasted the situation before it with that in ***Hartwig***. *See* ***Turner***, 136 Wis. 2d at 358-59. In ***Hartwig***, police initially discontinued questioning when the accused invoked his right to silence, but almost immediately thereafter placed a tape recorder in front of the accused, told him that the recorder would record anything he said, and resumed interrogation approximately one-half hour later. ***Hartwig***, 123 Wis. 2d at 286; *see also* ***Turner***, 136 Wis. 2d at 358-59.

indications of coercion or that police would not scrupulously honor Wilcox's right to silence should he invoke that right.

¶29 Wilcox argues that ***Turner*** does not apply because that case did not involve a "true ***Mosley*** issue[]." What Wilcox means is unclear because the ***Turner*** court plainly viewed the case as presenting a ***Mosley*** issue, as do we. Although ***Turner*** involved additional issues and facts that we have not discussed, their presence does not negate ***Turner***'s relevance here. The court in ***Turner*** separately analyzed each issue, and the court's ***Mosley*** analysis made clear which facts it viewed as determinative. *See* ***Turner***, 136 Wis. 2d at 341-42, 355-60.

¶30 Thus, Wilcox has demonstrated neither deficient performance nor prejudice.[5]

B. Failure To Object To The State's Use Of Wilcox's Refusal To Be Tape Recorded

¶31 Both the State and Wilcox made reference at trial to the fact that Wilcox refused to be tape recorded during the July 16 interview. Wilcox argues that defense counsel was ineffective for failing to object to the State's use of this fact.

[5] Wilcox also argues that counsel was ineffective in failing to move to suppress because the investigator continued interrogating Wilcox on July 16 despite repeated statements by Wilcox that he did not want to continue to talk. The State disputes whether Wilcox's statements were sufficient to demonstrate that he unequivocally invoked his right to silence because Wilcox would say he did not want to talk, but would continue to talk anyway. We need not, however, address the argument. The circuit court found that Wilcox first made the admission that his penis "accidentally" went into S.G.'s mouth *before* stating that he did not want to continue to talk to the investigator. This finding of fact is supported by the investigator's testimony, is not "against the great weight and clear preponderance of the evidence," and, therefore, is not clearly erroneous. *See* ***Royster-Clark, Inc. v. Olsen's Mill, Inc.***, 2006 WI 46, ¶12, 290 Wis. 2d 264, 714 N.W.2d 530.

¶32 The State may not "comment" at trial on a defendant's invocation of the right to remain silent before or during trial. ***State v. Wedgeworth***, 100 Wis. 2d 514, 526, 302 N.W.2d 810 (1981). Such comment is impermissible when it is "manifestly designed to demonstrate a tacit admission of guilt on the part of the defendant," or its purpose is "to allow the jury to draw an inference of defendant's guilt from the defendant's silence." ***Reichhoff v. State***, 76 Wis. 2d 375, 378, 251 N.W.2d 470 (1977).

¶33 Wilcox argues that counsel was ineffective both for failing to object before trial when the State indicated that it intended to use Wilcox's refusal to be tape recorded on July 16, and for failing to object during trial to each of three instances in which the State referred to or elicited testimony about Wilcox's refusal. We will accept, for purposes of this discussion only, the proposition that, when Wilcox refused to be taped, he was exercising his right to silence and that the prosecutor's reference to this refusal could be construed as a comment on the exercise of that right. Nonetheless, for the reasons that follow, we reject Wilcox's argument.

¶34 The first reference by the prosecutor to Wilcox declining to have his inculpatory answers taped occurred during opening statements. The prosecutor explained to the jury that it would hear the investigator testify about both the April 2 interview and the July 16 interview. After summarizing the expected evidence produced by the July 16 interview, the prosecutor said: "Now, at the end of this statement that Mr. Wilcox gave[,] … Investigator Henry gave Mr. Wilcox an opportunity to put this on tape and at that point Mr. Wilcox refused and declined to do that."

¶35 The second instance occurred during the prosecutor's direct examination of the investigator. The investigator testified that he would typically conduct interviews of suspects by asking questions and taking notes, then asking whether the suspect would give a taped statement. The investigator explained that, if a suspect was willing to give a taped statement, the investigator would go through his notes and re-ask the same questions he had just asked. The investigator testified that this was the procedure he followed during both interviews. The investigator explained that Wilcox agreed to a taped statement during the April 2 interview, but refused to be taped during the July 16 interview.

¶36 The third instance occurred during the prosecutor's cross-examination of Wilcox. The prosecutor cross-examined Wilcox at some length with respect to the inconsistency between the investigator's and Wilcox's descriptions of the July 16 interview. Wilcox admitted that some of the investigator's description was accurate, including that the investigator asked whether Wilcox's penis could have accidentally gone into S.G.'s mouth. Wilcox denied, however, that he responded affirmatively to that question. The following exchange then occurred:

> Q So that never—you never had that discussion with Investigator Henry?
>
> A (Nonverbal response.)
>
> Q Do you recall that even being a topic—
>
> A No.
>
> Q —of discussion? Okay. Do you recall at the end of this contact with Investigator Henry that he asked you if you wanted to put your statement on tape recording?
>
> A Yes.
>
> Q And you declined that.

A Yes, I was appointed [counsel], but—

Q I understand, but I'm just asking if you declined.

A Yes, I declined.

Q Okay, so after speaking with him for a—well, for a period of time, you—again, it was your choice and you declined to put your statement on tape.

A. Yes.

The prosecutor's cross-examination of Wilcox concluded almost immediately thereafter.

¶37 For the reasons that follow, we reject Wilcox's argument that he was denied the effective assistance of counsel based on counsel's failure to object to references to Wilcox's refusal to have his answers at the July 16 interview taped.

¶38 The investigator's testimony that Wilcox admitted to "accidentally" inserting his penis into S.G.'s mouth a number of times—which we have concluded was admissible—was extremely damaging to Wilcox's case. If this testimony was true, it amounted to a confession because the notion that Wilcox's penis accidentally went into S.G.'s mouth a number of times is beyond ludicrous. Thus, it was crucial for the defense to attempt to undermine the credibility of this evidence. To this end, as was entirely predictable, defense counsel sought to bolster Wilcox's credibility at the April 2 interview containing exculpatory comments, while simultaneously attacking the credibility of the subsequent inculpatory July 16 interview, by suggesting that it was suspicious and convenient that Wilcox's exculpatory interview was taped while his inculpatory interview was not.

¶39 Consistent with this strategy, Wilcox testified on re-direct examination that, in effect, he refused to give a taped statement at the second

interview because he thought the investigator was trying to trip him up. He asserted his thinking was that, because he had already given a taped statement, there was nothing more to be said. During closing arguments, defense counsel reminded the jury that it had "listened to the tape recorded statement that [the investigator] took of Mr. Wilcox. And everything was very clear." Counsel contrasted that with the July 16 interview, characterizing it as ambiguous based on the investigator's and Wilcox's differing descriptions of the interview. Counsel then argued: "The only thing we have is what's tape recorded and there—it was very clear what he said and he said it again on the stand that he never, ever inserted that—that it never happened under any circumstances, inserting his penis in [S.G.]'s mouth."

¶40 In short, key to the defense strategy, in the face of the investigator's damaging testimony, was to highlight, not downplay, the fact that Wilcox's July 16 interview was not recorded. Given Wilcox's own need to highlight that his admission during the July 16 interview was not recorded, at least some reference at trial to Wilcox's refusal to be recorded during this interview was inevitable.

¶41 Similarly, we agree with the State's argument that the prosecutor did not impermissibly "comment" on Wilcox's silence because the prosecutor referenced Wilcox's refusal to be taped in order to explain to the jury why the inculpatory interview was not taped, while the prior, exculpatory interview was taped. It would have been readily apparent to the jury that the gist of the prosecutor's argument was *not* that Wilcox must be guilty because he refused to cooperate and answer questions. *Cf.* ***United States v. Robinson***, 485 U.S. 25, 32 (1988) (no violation of Fifth Amendment privilege when prosecutorial comment "did not treat the defendant's silence as substantive evidence of guilt" but was "a

fair response to a claim made by defendant or his counsel"); ***Wedgeworth***, 100 Wis. 2d at 526-27 (detective's testimony that defendant started providing his address but then stopped was "not intended to suggest 'a tacit admission of guilt,'" but was "a necessary explanation for the partial answer which, if left unexplained, would have suggested the defendant lived at an address other than the one involved in the case" (citation omitted)); ***State v. Johnson***, 121 Wis. 2d 237, 246, 358 N.W.2d 824 (Ct. App. 1984) (distinguishing between improper comment and the State's right to "fair reply").

¶42 Because the prosecutor did not impermissibly comment on Wilcox's invocation of his right to silence, his counsel was not deficient when he failed to object, and Wilcox suffered no prejudice.

C. Failure To Discover Videotape Of Therapy Session And Failure To Retain Psychological Expert

¶43 Wilcox argues that he was denied effective assistance of counsel because his attorney failed to discover, before trial, the videotape of a session S.G. had with her therapist. Wilcox also argues that counsel was ineffective for failing to retain a psychological expert to evaluate the therapist's techniques as displayed in the videotape.

¶44 The State conceded at the ***Machner*** hearing that counsel's failure to discover the tape before trial was deficient performance. The circuit court agreed, and the State does not contend otherwise on appeal. We accept the State's implicit concession, and address prejudice.

¶45 We begin by observing that the evidence against Wilcox, much of which we have already set forth, was powerful. Most notably, Wilcox admitted to the investigator that his penis "accidentally" went into S.G.'s mouth a number of

times. On this topic, Wilcox introduced no evidence calling into question the investigator's credibility except Wilcox's own self-serving denial.

¶46 Furthermore, consistent with the investigator's testimony, S.G. testified during the video deposition that Wilcox had put his "peanut" in her mouth "[a] lot of times." S.G. also testified that "pee" came out of his "peanut" and went into her mouth, that she spit it out in the toilet, and that it was "kind of yickey."

¶47 In addition, as recounted in the background section of this opinion, four witnesses whose credibility went largely unchallenged testified that S.G. reported to them, often spontaneously, that Wilcox had abused her. These witnesses were S.G.'s foster mother, S.G.'s adoptive mother, a family support worker, and S.G.'s babysitter.

¶48 Still, Wilcox maintains that, if his counsel had obtained the videotape of S.G.'s therapy session before trial, counsel could have more effectively cross-examined S.G. during her video deposition and could have more effectively cross-examined S.G.'s therapist at trial. As we discuss below, we are not persuaded. Indeed, it is much more likely that the eleventh-hour discovery of the videotape during trial was the best case scenario for Wilcox because it took the State off-guard after the therapist was bound by testimony that was inconsistent with her behavior shown on the videotape. Furthermore, counsel was able to highlight the inconsistencies by re-calling the county social worker to the stand and examining her to advance the defense theory that adults had planted ideas in S.G.'s head.

¶49 As previously noted, both the therapist and the county social worker are heard on the videotape asking S.G. numerous leading questions, including questions about Wilcox. This conflicts with the therapist's testimony that she did

not ask leading questions. Further, the therapist failed to say that S.G. ever denied that Wilcox put his penis in S.G.'s mouth, but the tape shows S.G. reporting that she had "tasted" her brother and foster brothers but not Wilcox, and it shows S.G. specifically denying that she ever touched Wilcox's "privates." Through the social worker, Wilcox's counsel also showed that the therapist's notes on the session say that S.G. reported "tast[ing]" Wilcox. The social worker also conceded that, although S.G. said on the video that Wilcox touched her "private parts," S.G. then pointed to her "butt," the place where S.G. said Wilcox had spanked her for "tasting" her brother. Finally, the social worker admitted that she and the therapist "focused" their questions on Wilcox during the session.

¶50 During closing arguments, defense counsel made extensive use of the tape to emphasize the points summarized above. The late discovery of the tape also enabled Wilcox's counsel to plausibly suggest during closing argument that the State intentionally withheld the tape. The significance of all of this was surely not lost on the jury, which requested and received permission to watch the tape a second time during deliberations.

¶51 Accordingly, we are not persuaded that counsel's failure to discover the tape sooner prejudiced Wilcox. Arguably, he was better off.

¶52 Wilcox's argument that he was prejudiced by defense counsel's failure to retain a psychological expert is also unavailing. To put this argument in context, a bit more background information will be helpful.

¶53 At the ***Machner*** hearing, Wilcox presented a psychological expert who had reviewed various materials, including S.G.'s videotaped therapy session and S.G.'s video deposition. The expert criticized several aspects of the interview format used during the therapy session, and he opined that there was never an

adequate forensic interview of S.G. He discussed differences between S.G.'s therapy session and her video deposition, and he made the following conclusions:

> [S]ome of the reasons that her responses were I think stronger [in the video deposition] were that her responses may not have just been reflections of the recall and I don't think her responses were just … of a recall in the earlier video, but I think they were probably colored by the comments of others or statements of others made to her during the course of that year.
>
> I think she may have internalized some other's perspectives or attitudes regarding the alleged perpetrator. That's really important. I think that she may have interpreted or internalized the data learned through her various therapy and interview sessions and she had a fair amount of therapy and talked with a lot of people about that.

¶54 Wilcox argues that he was prejudiced by defense counsel's failure to retain a psychological expert, such as the one who testified at the ***Machner*** hearing. Wilcox asserts that expert testimony could have assisted the jury in understanding how unskilled questioning of a child witness, like the questioning used during the videotaped therapy session, could create or solidify false allegations in a child's mind. According to Wilcox, defense counsel's failure to retain an expert prevented the defense from undermining the credibility of S.G.'s allegations in a case where the credibility of those allegations was obviously of prime importance.

¶55 We agree with Wilcox that S.G.'s credibility was critical, and we acknowledge that experts sometimes assist juries in understanding why a child might make untrue sexual abuse allegations. We are not, however, persuaded that expert testimony of the type Wilcox presented at the ***Machner*** hearing would have made a difference.

¶56 First, the expert's testimony could not undercut the testimony of S.G.'s foster mother showing that, after S.G. was discovered "tasting" her foster brothers, the foster mother simply asked her why she would do something like that and S.G. volunteered that her mom would get mad at her when it happened with "Michael." S.G.'s foster mother did not even know who "Michael" was at the time. This occurred before the videotaped therapy session. Indeed, it was only this report, relayed from S.G.'s foster mother to the county social worker, that first triggered inquiry by the social worker and therapist into possible sexual abuse.

¶57 Second, the basic concept, if not the details, of the expert's opinion—that young children are susceptible to suggestion—is not something that would be foreign to the average juror.

¶58 Third, in light of the totality of the evidence, including Wilcox's admission that his penis "accidentally" went in S.G.'s mouth a number of times, we cannot conceive of how such an expert's general testimony on the topic of suggestion would have affected the outcome of the trial.

¶59 In sum, whether viewed separately or in combination, we conclude that defense counsel's failure to discover the videotaped therapy session before trial and to retain a psychological expert did not prejudice Wilcox.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.