

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 5, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-2303-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FAIRLY W. EARLS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: DALE L. ENGLISH, Judge. *Affirmed.*

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Fairly W. Earls appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. He argues on appeal that the State presented improper opinion evidence, that the court erred in admitting certain videotaped evidence, and that the jury instructions were improper. Because we conclude that to the

extent there were errors in the trial, those errors do not shake our confidence in the fairness or outcome of the trial, we affirm.

¶2 Earls was charged with four counts of first-degree sexual assault of a child. The underlying incident occurred in August 1997 and involved a very young girl, J.M.O. Earls was convicted after trial of three counts. The court sentenced him to forty-five years in prison and twenty years' probation.

¶3 During trial, the court allowed the State to play a videotaped interview between J.M.O. and a clinical social worker. The social worker also testified at the trial. Earls first alleges that the State improperly presented opinion evidence through both the testimony of the social worker, and her statements in the videotaped interview with J.M.O. Specifically, Earls objects to the following testimony concerning the social worker's interaction with J.M.O.:

Q: In this interview with [J.M.O.] throughout the course were you looking for those things which you already described to see if it appears if the person is being truthful with you?

A: Yes.

Q: And did you notice anything like that?

A: Again, she resisted suggestibility. And she appeared to be able to let me know she didn't know the answer to something as we were talking.

Q: Was there anything that you look for that you saw in [J.M.O.] that would indicate that she was not being truthful?

A: Nothing that I noted at the time, no.

Q: Anything that would indicate that she was just kind of guessing the answers to the questions?

A: No, not at all.

Q: Or anything to indicate that she was just trying to say what you wanted to hear?

A: No.

Q: Or anything to indicate to you that she was just telling you what somebody else had told her to tell you?

A: No.

¶4 Earls argues that this evidence violated the rule that a witness may not testify that another witness is telling the truth. *See State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984); *State v. Romero*, 147 Wis. 2d 264, 278, 432 N.W.2d 899 (1988). While we agree with Earls that this testimony comes very close to the kind of testimony prohibited by *Haseltine* and *Romero*, we need not decide that issue at this time. Because trial counsel did not object to this testimony at the time it was offered, we must decide the issue by using the ineffective assistance of counsel methodology.

¶5 To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. Consequently, if counsel's performance was not prejudicial, the claim fails and this court need not examine the performance prong. *State v. Moats*, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶6 In this case, the circuit court concluded that the testimony did not violate *Haseltine* and that, therefore, counsel was not ineffective when he did not object to it. We agree that counsel was not ineffective, but for a different reason. We assume, without deciding, that it was error for counsel to not have objected to this testimony. That error, however, does not shake our confidence in the ultimate outcome of the trial. Earls, therefore, was not prejudiced by the error. Since Earls

cannot establish that he was prejudiced by the error, he cannot establish that his counsel was ineffective.

¶7 We advise the State, however, that if the issue had been properly preserved for appeal, the outcome of the appeal on this issue may well have been different. The testimony elicited by the State came very close to the testimony prohibited by *Haseltine* and *Romero*. The State must heed the directives of these cases and be very careful in the questions it poses to witnesses, or it risks reversal.

¶8 Earls also argues that the State improperly offered opinion testimony about J.M.O.'s character for truthfulness. Earls argues that opinion evidence about a witness's character for truthfulness may be offered only if the witness's character for truthfulness has been attacked. *See* WIS. STAT. § 906.08(1) (1999-2000).¹ Earls argues that J.M.O.'s character for truthfulness was not attacked during trial and, consequently, the testimony concerning her truthfulness was improperly admitted.

¶9 Although defense counsel did not raise a timely objection to this evidence at trial, the issue was raised in Earls's postconviction motion. The circuit court addressed the issue by applying the standards set forth in *State v. Eugenio*, 219 Wis. 2d 391, 405, 579 N.W.2d 642 (1998). "[T]he determination of whether the character of truthfulness of a witness is being challenged is a matter left to the proper discretion of the circuit court. This determination is not dependent upon particular labels placed on witnesses or even express accusations of untruth. Rather, the inquiry is to be conducted by the circuit court based on the substance

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

of the character allegations offered and on the manner and tenor in which the attack on the witness's character for truthfulness is presented." *Id.*

¶10 The circuit court found that although defense counsel never directly called J.M.O. a liar, he did "everything other than that." The court noted that defense counsel had said, among other things, that Earls had been wrongly accused "through the confused and muddled and unprovable words of a child." Defense counsel also stated that J.M.O. was not sure about anything, that she had obtained information from her mother and that her mother had prompted her. He also stated that her story had changed over time, that she was confused and mixed up, that she was suggestible and that her testimony appeared memorized. The court found that these and other similar statements constituted an attack on J.M.O.'s character for truthfulness.

¶11 We agree with the circuit court that these comments constituted an attack on J.M.O.'s character for truthfulness. Earls argues that the defense was arguing that J.M.O. was confused and mistaken, not that she was lying. The defense, however, argued not only that she was confused and mistaken, but that she was suggestible, had been prompted, and had memorized what her mother told her. These statements strongly suggest that the child was not testifying truthfully. We agree with the circuit court that these statements constituted an attack on her character for truthfulness. Consequently, the evidence supporting J.M.O.'s truthfulness was properly admitted. Since the evidence was properly admitted, counsel was not ineffective for failing to object to it.

¶12 Earls next argues that the videotaped interview between J.M.O. and the social worker was improperly admitted. Specifically, Earls argues that the videotape was unfairly prejudicial, cumulative, inadmissible hearsay, and should

not have been admitted. “A trial court’s decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has ‘a reasonable basis’ and was made ‘in accordance with accepted legal standards and in accordance with the facts of record.’” *State v. Jenkins*, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992) (citations omitted).

¶13 Earls argues first that the evidence was inadmissible hearsay and that the circuit court improperly admitted the evidence as residual hearsay. *See* WIS. STAT. § 908.03(24). Before admitting the evidence, the circuit court applied the factors set forth in *State v. Sorenson*, 143 Wis. 2d 226, 245-46, 421 N.W.2d 77 (1988). *Sorenson* held that the residual hearsay rule was appropriately used to admit hearsay statements of young sexual assault victims. *Id.* at 243. The court must first establish certain “guarantees of trustworthiness.” *Id.* The court should consider:

First, the attributes of the child making the statement should be examined, including age, ability to communicate verbally, to comprehend the statements or questions of others, to know the difference between truth and falsehood, and any fear of punishment, retribution or other personal interest, such as close familial relationship with the defendant, expressed by the child which might affect the child’s method of articulation or motivation to tell the truth.

Second, the court should examine the person to whom the statement was made, focusing on the person’s relationship to the child, whether that relationship might have an impact upon the statement’s trustworthiness, and any motivation of the recipient of the statement to fabricate or distort its contents.

Third, the court should review the circumstances under which the statement was made, including relation to the time of the alleged assault, the availability of a person in whom the child might confide, and other contextual factors which might enhance or detract from the statement’s trustworthiness.

Fourth, the content of the statement itself should be examined, particularly noting any sign of deceit or falsity and whether the statement reveals a knowledge of matters not ordinarily attributable to a child of similar age.

Finally, other corroborating evidence, such as physical evidence of assault, statements made to others, and opportunity or motive of the defendant, should be examined for consistency with the assertions made in the statement.

Id. at 245-46.

¶14 The record establishes that the circuit court considered all of these factors when it decided to allow the evidence. Earls has not demonstrated that the circuit court erroneously exercised its discretion when it allowed the evidence in under the residual hearsay rule.

¶15 We also conclude that the evidence should not have been excluded as cumulative. *See* WIS. STAT. § 904.03. While the evidence may have been somewhat cumulative, it was not unfairly prejudicial. As the State argues, any evidence of a defendant's guilt is prejudicial. Unfair prejudice results when "the proffered evidence, if introduced, would have a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case." *State v. Mordica*, 168 Wis. 2d 593, 605, 484 N.W.2d 352 (Ct. App. 1992) (citations omitted). The videotaped interview was not unfairly prejudicial. Further, the evidence was also relevant to establish the child's credibility, which, as discussed before, had been attacked by the defense. We conclude that the circuit court did not erroneously exercise its discretion when it admitted the videotaped interview.

¶16 Earls's final argument is that the jury instructions unconstitutionally relieved the State of its burden of proving all the elements of the crime. The

instruction he objects to incorporated a stipulation between Earls and the State. The State had sought to introduce at trial evidence that Earls had been convicted of engaging in similar acts with other young girls. To preclude the admission of this other acts evidence, Earls entered into a stipulation pursuant to *State v. Wallerman*, 203 Wis. 2d 158, 167-68, 552 N.W.2d 128 (Ct. App. 1996).²

¶17 Earls objects to the following instruction given by the circuit court:

As you have already been informed, the defendant has stipulated that, if the defendant did touch the vaginal area of [J.M.O.] on any or all of the four times during the weekend of August 30-31, 1997, as alleged in the Information, then the touching was intentional and was not for any other purpose but sexual arousal or gratification, and you must accept these facts as conclusively proved.

Earls argues that this instruction, and the stipulation on which it was based, were misleading because they intimated that Earls did not know whether any touching had occurred, and thereby reduced the State's burden of proof. Earls also objects that the instruction required the jury to accept all the facts as having been proven.

¶18 The stipulation upon which the instruction was based was proposed by defense counsel. The court conducted a personal colloquy with Earls to determine whether he understood the nature of the stipulation before allowing the stipulation. At the time of the jury instruction conference, defense counsel asked that "if and only if" be added to the instruction. Defense counsel also expressed some concern about the "conclusively proved" language. Defense counsel did not object on the grounds asserted in the appeal that the instruction suggested that

² Using a *Wallerman* stipulation, a defendant may concede elements of a crime and thereby avoid the introduction of other acts evidence. *State v. DeKeyser*, 221 Wis. 2d 435, 443, 585 N.W.2d 668 (Ct. App. 1998).

Earls did not know whether any touching had occurred, and therefore the instruction was confusing and misleading to the jury.

¶19 To the extent that Earls's counsel did not object to the instruction on the grounds that it was confusing and misleading, that argument is waived. *See* WIS. STAT. § 805.13(3). We must, therefore, consider whether counsel was ineffective for not objecting on the grounds now asserted. The instruction was based on the stipulation proposed and agreed to by Earls and defense counsel. Entering into the stipulation was a reasonable trial strategy to prevent the jury from hearing potentially damaging evidence. "A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." *State v. Elm*, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) (citation omitted). Since the stipulation was part of a reasonable strategic decision, and the instruction was based on that stipulation, we conclude that counsel was not ineffective for failing to object on the grounds now asserted.

¶20 We also note, as did the circuit court, that the verdict itself belies the claim that the jury would be confused into believing that the State was relieved of its burden of proving that Earls touched J.M.O. The jury did not find Earls guilty on one of the four counts charged. It is reasonable to infer from this verdict that the jury understood the requirements of the burden of proof.

¶21 For the reasons stated, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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

