COURT OF APPEALS
DECISION
DATED AND FILED

October 17, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2005AP2807-CR **Cir. Ct. No. 2004CF71**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES LEE DOYLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

Before Anderson, P.J., Nettesheim, and Snyder, JJ.

¶1 PER CURIAM. James Doyle appeals from a judgment of conviction for two counts of first-degree sexual assault of a child and from an order denying his postconviction motion for a new trial. He argues that certain evidence was improperly admitted and that he was denied a fair trial by improper

and prejudicial comments in the prosecutor's closing argument. He seeks a new trial in the interests of justice under WIS. STAT. § 752.35 (2005-06),[1] on the ground that the real controversy was not fully tried. In an October 11, 2006 decision we affirmed the judgment and order. On September 14, 2007, the Wisconsin Supreme Court summarily vacated our decision and remanded the case to this court for further consideration in light of ***State v. Mayo***, 2007 WI 78, __ Wis. 2d __, 734 N.W.2d 115, which addresses whether a prosecutor's improper comments during trial warrant a new trial. Upon further consideration, we affirm the judgment and order.

¶2 We first observe that the appellant's brief fails to set the issues in their proper procedural posture. Trial counsel did not object to the admission of the evidence that Doyle now claims was error or to the prosecutor's closing argument. "The absence of any objection warrants that we follow 'the normal procedure in criminal cases,' which 'is to address waiver within the rubric of the ineffective assistance of counsel.'" ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31 (quoted source omitted). Doyle argues that because trial counsel testified he had no tactical or strategic reason for not objecting, the claims should be reviewed directly on the merits.[2] Although we ultimately get to the merits of the issues, we cannot entirely dispense with the ineffective assistance of counsel analysis.

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

[2] Trial counsel's testimony that he had no tactical or strategic reason for not objecting is not necessarily dispositive. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶35, 246 Wis. 2d 648, 630 N.W.2d 752.

¶3 The two-part analysis for ineffective assistance of counsel requires that trial counsel's representation was deficient and that the deficiency prejudiced the defense so as to undermine our confidence in the outcome of the case. ***Id.***, ¶48. Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). The trial court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. ***Id.*** However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. *See* ***id.*** When reviewing a claim of ineffective assistance of counsel, the reviewing court may reverse the order of the two tests or avoid the deficient performance analysis altogether if the defendant has failed to show prejudice. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). Thus, we may reach the merits of the issue underlying the ineffective assistance claim because only if there was actual error could counsel's performance be deemed deficient or prejudicial. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel's failure to present legal challenge is not deficient performance if challenge would have been rejected). *See also* ***Carprue***, 274 Wis. 2d 656, ¶49 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed." (quoted sources omitted)).

¶4 The victim was nine years old when she reported that on two occasions Doyle had her put her mouth on his penis. At trial she testified that on the first occasion she was alone with Doyle in the garage at the house he shared with her family. She indicated that Doyle ejaculated during the assault. The second occurrence was at a storage facility but the child was unable to give the location of the facility. She said Doyle was seated in his truck when he asked her

to put her mouth on his penis again. She did but then stopped and refused to do it. She admitted that at one point she told members of her family that the assaults did not happen. She did so because she was told she could go back to living with her mom if she said it didn't happen. She also told one sister that it didn't happen and because she didn't like Doyle, she made up the assaults with the help of another sister. During social worker Rochelle Reif's testimony, the child's videotaped statement was played for the jury. In the videotaped statement the child indicated that the assault at the storage facility occurred first in time and that Doyle ejaculated during the assault.

¶5 Doyle argues that playing the videotaped statement after the child's testimony violated the mandatory procedure in WIS. STAT. § 908.08(5). *See* ***State v. James***, 2005 WI App 188, ¶9, 285 Wis. 2d 783, 703 N.W.2d 727 ("§ 908.05(5) is couched in mandatory terms and unambiguously requires the videotape to precede direct and cross-examination."). He contends that because the videotape was not played in the order required by the statute, the videotape was not admissible for any other reason.

¶6 The presentation of the videotaped statement did not conform to WIS. STAT. § 908.08(5). However, no reported decision has held that a violation of the timing set forth in the statute renders the evidence inadmissible. ***James***, 285 Wis. 2d 783, was decided after Doyle's trial. The examination of trial counsel's conduct must be based on the law and the facts as they existed when trial counsel's conduct occurred. ***State v. Felton***, 110 Wis. 2d 485, 502-03, 329 N.W.2d 161 (1983). Trial counsel is not required to object and argue a point of law that is unsettled. ***State v. McMahon***, 186 Wis. 2d 68, 84, 519 N.W.2d 621 (Ct. App. 1994). Trial counsel was not deficient when the duty to object to the

order of presentation of evidence was not clear such that reasonable counsel should know enough to raise the issue. *See* ***id.*** at 85.

¶7 Even if counsel should have objected, Doyle was not prejudiced. The child's videotaped statement was admissible as a prior consistent statement. *See* ***State v. Snider***, 2003 WI App 172, ¶16, 266 Wis. 2d 830, 668 N.W.2d 784 (WIS. STAT. § 908.08(7) permits a trial court to admit a child's videotaped statement under a hearsay exception without requiring compliance with the statute). Doyle points out that from the outset the theory of defense was that the child fabricated the assaults. He argues that because a prior consistent statement is only admissible to rebut an allegation of *recent* fabrication or improper influence, WIS. STAT. § 908.01(4)(a)2., there was no basis to admit the prior consistent statement because there was no claim of recent fabrication. That is too narrow a view of the evidence. After her initial reports of the assaults, the child told family members that the assaults did not happen. However, she testified at trial that they did. On cross-examination the defense attempted to persuade the jury that the child's reaffirmation of the initial reports was to please social worker Reif, a person who had been nice to the child and whom the child liked. Trial counsel explained during his ***Machner***[3] testimony that part of the defense strategy was to show that Reif was encouraging the child to testify in conformity with the child's initial reports of the assaults. In his closing argument, trial counsel argued that the child trusted Reif and knew what Reif expected her to say. Thus, the videotaped statement was admissible to address a claim that after recanting the allegations the child was subject to influence to reaffirm her initial reports of the assaults.

[3] A ***Machner*** hearing addresses a defendant's ineffective assistance of counsel claim. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶8 Additionally, there was no harm in playing the videotaped statement after the child's testimony. If the videotape had been played first, the child's testimony would still have been admitted and of the same substance. The defense used the videotaped statement to point out inconsistencies in the child's reports. Doyle was not prejudiced by the admission of the videotaped statement. Trial counsel was not deficient for not objecting to the admission of the videotaped statement.

¶9 During her redirect examination, social worker Reif read her notes of the initial interview with the child. Doyle argues that the recitation of the child's statement to the social worker placed inadmissible hearsay before the jury. *See* ***Boyer v. State***, 91 Wis. 2d 647, 661, 284 N.W.2d 30 (1979) (when the report contains out-of-court assertions by others, an additional level of hearsay is contained in the report and an exception for that hearsay must also be found). He contends that the recitation of the child's accusations for a fourth time was prejudicial because the child's credibility was the only real issue at trial.

¶10 For the same reasons discussed on the admissibility of the child's videotaped statement, the child's statement repeated in Reif's notes was admissible as a prior consistent statement. The context of the admission of the report also bears on admissibility. On cross-examination, the child was questioned about details she provided to Reif in the initial interview. In turn, Reif was cross-examined about the notes she made from the child's initial interview and whether she had tried to provide exacting detail in those notes. Defense counsel asked Reif whether the child had described details about the storage facility site and the assault there but Reif was unable to recall those details. On redirect the report was read to fill in the gaps on the details left hanging during Reif's cross-examination. The report was admissible under WIS. STAT. § 901.07, the rule of completeness.

See ***State v. Sharp***, 180 Wis. 2d 640, 653-54, 511 N.W.2d 316 (Ct. App. 1993) (the prosecution could offer the testimony of the specific content of the challenged interviews and conversations to address the implications of cross-examination). Where, as here, there is the suggestion of improper influence and an attempt to create inconsistencies in the details of a child's various statements, evidence is admissible under the rule of completeness to provide the jury "the opportunity to evaluate whether incompleteness or inconsistency within and among the interviews indicated improper influence on the child's testimony." ***Id.*** at 657. Trial counsel was not ineffective for not objecting to Reif's reading of her notes.

¶11 Doyle also argues that Reif was improperly allowed to bolster the child's credibility when she explained that she and the investigating officer took certain actions based on their opinions of the child's credibility.[4] For the same reason he challenges Reif's testimony that at an emergency detention hearing a juvenile court judge found probable cause that the child needed to be removed from her home for her protection. We recognize that no witness may render an opinion on the credibility of another witness. *See* ***State v. Romero***, 147 Wis. 2d 264, 277, 432 N.W.2d 899 (1988) (testimony from police officer and social worker that the victim was truthful with them was impermissible opinions that the victim's accusations were true); ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984) (it was improper for a psychiatrist to give his opinion

[4] When asked what Reif did after the child's initial interview, she indicated that she and the investigating officer discussed their opinions of the child's credibility and whether they believed the allegations. After interviewing the child's brother and attempting to contact the mother, Reif decided to take the child into temporary custody. Reif explained that a child is taken into temporary custody when "we" believe there is a potential of a child being harmed. Reif's notes of the initial interview indicate that Reif told the child that Reif and the officer believed her and would do whatever they could to keep her safe.

that the victim, who claimed to have been sexually assaulted by her father, was an incest victim, as that was tantamount to his testifying that she was telling the truth).

¶12 Trial counsel testified at the ***Machner*** hearing that it was possible that he had a strategy reason for not objecting to this portion of Reif's testimony. He explained that the testimony was consistent with the defense claim that Reif wanted to insulate the child from influences that might cause the child to change her story. He stated: "I wanted the jury to know at some point that the social worker believed this victim and then wanted to make sure that this victim did not change or alter her allegation … of sexual assault." He also indicated that the defense strategy included showing that Reif "had blinders on" with respect to the facts of the case. Indeed, trial counsel's closing argument attacked the social worker's approach preserving the original allegation and refusal to have a forensic psychologist interview the child once recantations started to emerge. We are not to second-guess trial counsel's selection of trial tactics which is based upon rationality founded on the facts and law. *See* ***Felton***, 110 Wis. 2d at 502. Inasmuch as Reif's testimony dovetailed defense strategy, the failure to object was not deficient performance.

¶13 Also, the failure to object did not prejudice Doyle. The defense wanted the jury to hear that Reif believed the child. As trial counsel explained, Reif's revelation that she found the child credible was simply injected into her answer about the investigative process. The same is true about Reif's explanation of the judge's probable cause determination. There was no direct question on whether Reif found the child credible. Consequently, there was no direct message to the jury that it should find the child credible based on Reif's or the juvenile court's opinion. The prosecutor's closing argument did not mention Reif's

assessment of the child's credibility. Rather, the prosecutor recounted the chain of events that led Reif to place the child outside her home and the continuation of that placement in response to family members trying to pressure the child to recant her allegations. There was no suggestion that the jury should find the child credible because Reif or the juvenile court did. This is not a case like ***Romero***, 147 Wis. 2d at 279, where the court concluded that the improper reference to the child's truthfulness pervaded the whole trial. We conclude trial counsel was not ineffective for not objecting to Reif's testimony about her and the investigating officer's perceptions of the child's credibility and the juvenile court determination of probable cause.

¶14 We turn to Doyle's claim that in his closing argument, the prosecutor improperly vouched for the child's and Reif's credibility and stated his personal beliefs as to Doyle's guilt. Trial counsel testified that he made no objection because he did not believe the prosecutor crossed the line between proper and improper closing argument.

> The line between permissible and impermissible argument is drawn where the prosecutor goes beyond reasoning from the evidence and suggests that the jury should arrive at a verdict by considering factors other than the evidence. The constitutional test is whether the prosecutor's remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Whether the prosecutor's conduct affected the fairness of the trial is determined by viewing the statements in context. Thus, we examine the prosecutor's arguments in the context of the entire trial.

State v. Neuser, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995) (citations omitted).

¶15 Doyle argues that that the prosecutor's reference to Reif being a dedicated social worker and deserving of God's blessing was improper because it served to bolster Reif's credibility. The prosecutor argued:

> Reif, who is a very dedicated social worker, befriended the child and this is at a time when this child really needed a friend. I think social workers and people who do this kind of work, God bless them. She interviewed the child. She interviewed the sibling. Made home visits went to the school. Made the appointment at Children's Hospital and made a determination, based on what the child told her, that there was probable cause to believe the child should be taken out of the home.

This portion of the prosecutor's argument recounted the chain of events that led Reif to place the child outside her home. It was not argument based on facts outside of the record. It was nothing more than a fair characterization of the social worker's role and inferences from the evidence. We are not persuaded that the argument served to improperly bolster Reif's credibility.

¶16 The prosecutor's argument that the child is "an honest kid. She told you the truth" was just that—argument. It did not reach beyond the evidence. We do not view that statement, or the prosecutor's rebuttal argument that the child did the right thing and "told the truth," to be directly vouching for the child's credibility. The prosecutor was explaining why the jury could believe the child. Even if those arguments are viewed as improper, Doyle was not prejudiced. The jury was instructed that closing arguments are not evidence and that the jury is the sole judge of credibility. We presume the jury follows the instructions and the isolated statements that the child told the truth did not prejudice Doyle. *See* ***State v. Delgado***, 2002 WI App 38, ¶¶15-18, 250 Wis. 2d 689, 641 N.W.2d 490.

¶17 Doyle claims that during rebuttal argument the prosecutor disparaged defense counsel and gave his own opinion of Doyle's guilt. We set

forth the quoted passages in total. The prosecutor started his rebuttal argument as follows:

> [Defense counsel] started out his discussion with the different roles that we have and this is an adversary relationship. It's my job to present facts to you and he has a job, too, to his client. If I say the sky is up and the ground is down, it's his job to say, well, not if you stand on your head. Then it's different. That's what a defense lawyer is trying to do. Stand on your head and get a different perspective. His job is to get the guy off. I like [defense counsel] a lot. We went to law school together. He's my friend but we have jobs to do and he's effective at his job. But what really has to happen is you have to focus on the facts in this case.

¶18 Shortly thereafter the prosecutor added the following:

> I'm not in the business of prosecuting people who are innocent. Obviously it's my job to show you that a crime has been committed. That's what I do, okay. So I try not to ignore facts which may lead me to believe someone is innocent, okay. I tried to be fair. I tried to present you with everything. I don't know anything about this case other than what you know. I have no magic eye. I have no magic eight ball. I have no knowledge of any other facts on this case other than what you have, and you need to base your decision based upon what's in the evidence. Not on speculation.

¶19 ***Mayo***, 734 N.W.2d 115, ¶42, concluded that the prosecutor's statements that the role of defense counsel was to "get his client off the hook" and "not to see justice done but to see that his client was acquitted" were disparaging and improper. The court accepted the State's concession that the prosecutor improperly commented on materials not in evidence, when the prosecutor stated during closing argument that her job was to examine police reports, to decide whether to file charges, and to decide whether to dismiss charges. ***Id.***, ¶41. However, when the improper comments were viewed in the context of the entire

trial, the court found that Mayo was not prejudiced and not entitled to a new trial. ***Id.***, ¶43.

¶20 In accordance with ***Mayo,*** our starting point is that the prosecutor's comments that defense counsel's job was "to get the guy off" and that it was the prosecutor's obligation not to prosecute innocent people were improper comments. We examine the context of improper comments to determine it they infected the trial with unfairness.

¶21 At the outset of its closing argument, the defense talked about the role of the judge, prosecutor, defense counsel, and jury at trial. Highlighting that the defense had no obligation to prove innocence, defense counsel argued:

> I really don't have to do anything at a trial, if I don't want to. I don't have to prove anything to you. That's not my burden. It's not my obligation. What I am required to do is to make sure that you people understand your obligation to decide the case fairly and by the parameters and the strictures of the law beyond a reasonable doubt.

¶22 We view the prosecutor's rebuttal argument to be a measured and reasonable response to the defense argument. *See* ***State v. Wolff***, 171 Wis. 2d 161, 168, 491 N.W.2d 498 (Ct. App. 1992). The prosecutor was addressing the roles of the prosecutor and defense counsel just as the defense had done. The comment that the prosecutor was not in the business of prosecuting innocent people was related to the prosecutor's role to show that a crime has been committed. The roles of the prosecutor and defense counsel as advocates for their positions are common knowledge and shared by jurors. *See* ***Mayo***, 734 N.W.2d 115, ¶44. The prosecutor's remarks about those roles were not likely to have had any significant effect on the jury's decision. ***Id.***

¶23 Further, the prosecutor's comments did not suggest that defense counsel was dishonest or untrustworthy since the prosecutor also expressed that he liked defense counsel and considered him a friend. In ***Mayo***, both the prosecutor and defense counsel made disparaging remarks running afoul of rules of ethics and civility that members of the bar are required to follow. ***Id.***, ¶42. Although the prosecutor here made the same "his job is to get the guy off" comment, it was accompanied by friendly admiration for defense counsel and immediate reference to deciding the case on the facts presented. The prosecutor's remark was preceded by a description that it was defense counsel's role to get the jury to look at the facts from different perspectives. There was no disparaging reference that defense counsel was attempting to thwart justice.

¶24 In context, the prosecutor's comment that the prosecution tries not to ignore facts that suggest innocence was a response to the defense argument that the prosecution was afraid to have the child examined by a forensic psychologist. In any event, such comments provide general information regarding the prosecutorial process and do not give the jury any information that unfairly influences its decision. *See* ***id.***, ¶45. The prosecutor was not inviting a decision based on his opinion of guilt or matters outside the record. The prosecutor went on to focus the jury on making a decision based on the evidence.

¶25 We conclude that in the context of the entire trial, the rebuttal argument did not unfairly prejudice Doyle. Trial counsel was not constitutionally deficient for not objecting.

¶26 Doyle's final claim is one for a new trial in the interests of justice pursuant to our discretionary authority in WIS. STAT. § 752.35. We exercise our discretionary power to grant a new trial where the real controversy has not been

fully tried infrequently and judiciously. *See* ***State v. Ray***, 166 Wis. 2d 855, 874-75, 481 N.W.2d 288 (Ct. App. 1992).

¶27 We acknowledge that the real issue was the child's credibility. Doyle contends that it is impossible to conclude that the jury was not influenced by the improper repetition of the child's statement, the improper bolstering of the child's credibility, and the improper closing remarks of the prosecutor. We have rejected those claims of error and prejudice. A new trial will not be granted on the cumulative effect of non-errors. *See* ***State v. Marhal***, 172 Wis. 2d 491, 507, 493 N.W.2d 758 (Ct. App. 1992). In short, we are confident that the credibility of the child was fully and fairly tried.

By the Court.—Judgment and order affirmed.

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