COURT OF APPEALS
DECISION
DATED AND FILED

February 28, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP745-CR **Cir. Ct. No. 2005CF16**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FREDRICK J. B.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Price County: NEAL A. NIELSEN, III, Judge. *Affirmed*.

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

¶1 PER CURIAM. Frederick J.B. appeals a judgment convicting him of two counts of second-degree sexual assault of a child and two counts of incest. He also appeals an order denying his postconviction motion alleging ineffective

assistance of counsel. We conclude there was no prejudice from any of the alleged errors made by counsel, and therefore affirm the judgment of conviction.

BACKGROUND

¶2 The charges stemmed from allegations made by the defendant's teenaged daughter, Alissa. At trial, the prosecutor prefaced his opening argument with the following remarks:

> [T]his is a case about a violation of family. It's about a violation of trust. It's about a violation of parental responsibility. It's about a violation of innocence.

¶3 Alissa testified that on two separate occasions her father had reached a hand inside her pants and touched her vagina. One incident occurred in a pantry or laundry room and the other occurred in a bedroom while they were watching television. On each occasion, Alissa was able to break free after her father had been moving his fingers around for about a minute. Alissa further testified that her father was both physically and verbally abusive, and that there was tension in the household. She said she did not feel comfortable at first disclosing the incidents to anyone other than her friends. However, one day when her parents came into her room to question her about whether she had been smoking, she told them she did it only to cope with her father touching her. She did not disclose the matter to the police until several weeks later, when a friend called 911 in response to a cutoff phone call with Alissa that led the friend to believe that Alissa might be in danger from her father.

¶4 The dispatched police officer testified that when he arrived, Alissa was outside of the house and appeared to have been crying. Alissa told him that her parents were fighting about her father touching her. The officer took Alissa

and her mother, Kathleen, to the police station, where they each wrote out statements.

¶5 Kathleen, the defendant's wife, also testified. She said that after Alissa had first blurted out that her father needed to stop touching her:

> I was in shock. I looked at her, I saw she was terrified; and I looked at Fred and he went past—I've known him so long I knew it was true.…

Kathleen and Frederick then went into the basement to talk, and Kathleen told her husband she knew her daughter was telling the truth. Kathleen testified:

> I asked him, "Did you put your hand down her pants?" He said yes. I asked him again, "Did you put your hand down her pants?" He said, "Yes, I was testing her."

Kathleen asked him how he could do something like that, but he didn't respond. She told him she wanted to get him help, and he said he didn't need help, that Alissa was overreacting and he was testing her. He also said he wasn't going to leave the home, and he would burn down the house before he would ever leave. Kathleen initiated divorce proceedings sometime after the disclosure.

¶6 The defendant did not testify or present any witnesses. Defense counsel argued to the jury that Alissa had fabricated the molestation allegations to shift attention away from the fact that she had been smoking and because there were "bad feelings" among the family members. Counsel said Alissa's claim that she had been smoking as a response to abuse just did not make any sense. Counsel further suggested that the mother had motive to support the allegations in order to obtain custody in the subsequently initiated divorce proceeding.

¶7 After the jury returned guilty verdicts on all counts, Frederick moved for a new trial on the grounds of ineffective assistance of counsel. The trial court denied the motion following an evidentiary hearing, and Frederick appeals.

STANDARD OF REVIEW

¶8 Claims of ineffective assistance of counsel present mixed questions of law and fact. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). We will not set aside the circuit court's findings about counsel's actions and the reasons for them, unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's constitutional right to the effective assistance of counsel is ultimately a legal determination, which this court decides *de novo*. ***Id.***

> The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them.

State v. Swinson, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12 (citations omitted).

DISCUSSION

¶9 Frederick alleges that trial counsel provided ineffective assistance by: (1) failing to object to the prosecutor's opening remarks that the case was about a violation of family, trust, parental responsibility and innocence; (2) failing to object on the grounds of improper vouching contained in the mother's testimony—that she could tell by looking at her daughter and husband that the allegations were true and that she told her husband she knew it was true; and (3) failing to request a limiting instruction regarding the other acts evidence that Frederick had hit his daughter and wife on numerous occasions. We will briefly address the deficient performance aspect of each claim before discussing the prejudice prong with respect to all of the claims.

¶10 First, we are not persuaded professional norms should have compelled defense counsel to object to the prosecutor's opening comments. As the trial court correctly noted, an incest case is essentially by definition about violations such as the prosecutor described. The prosecutor was merely giving a brief rhetorical characterization of the offenses at issue before going into specifics about the evidence the State would present. We do not view such general prefatory comments as suggesting that the jury should arrive at its verdict by considering factors other than the evidence. *See generally* ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995) (explaining the line between permissible and impermissible argument).

¶11 Second, we agree with the defendant that the admissibility of some of the mother's comments was questionable. While it was certainly permissible for the mother to describe the physical reactions of her husband she observed when the allegation was made, and perhaps permissible to relate the out-of-court statement she made to her husband that she believed her daughter in the context of the conversation they had, her testimony that, "I've known him so long I knew it

was true" might be impermissible vouching. We need not, however, decide whether counsel's failure to object to this testimony constituted deficient performance in light of our conclusion discussed below that there was no resulting prejudice.

¶12 Third, we agree with Frederick that counsel's failure to request a limiting instruction constituted deficient performance. Frederick did not object to the admission of other acts evidence that he had beat his wife and children because he wanted to argue that tension in the dysfunctional household motivated the false molestation allegation. However, when evidence has been admitted for a limited purpose, a defendant is entitled upon request to have a cautionary instruction about the use of that evidence. WIS. STAT. § 901.06; WIS JI—CRIMINAL 275 n.1 (2003). Here, there was extensive other act evidence admitted and, if counsel had asked, Frederick would have been entitled to an instruction cautioning the jury that the evidence of physical abuse could not be used to show he was the sort of person who would commit the charged crime. We conclude, however, as explained below, that counsel's error was nonprejudicial.

¶13 The key evidence demonstrating Frederick's guilt was his admission to his wife that he put his hand down his daughter's pants. The suggestion that the mother would have lied about her husband's admission in order to obtain custody was inherently weak given that the mother did not file for divorce until after the abuse allegations were made and, so far as the jury knew, it was the mother's belief that Frederick sexually assaulted their daughter that triggered the divorce proceeding. Furthermore, none of the alleged errors by counsel would have had an effect on the jury's view of the mother's credibility. In short, given Frederick's highly incriminating behavior when accused of the crime, we have no doubt that

he would have been convicted even if the mother had not testified that she knew it was true and the trial court had given the jury a cautionary instruction.

By the Court.—Judgment and order affirmed.

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