COURT OF APPEALS
DECISION
DATED AND FILED

March 26, 2008

David R. Schanker
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.

Appeal No. 2007AP169-CR

Cir. Ct. No. 2004CF208

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN BABIAK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: DAVID C. RESHESKE, Judge. *Affirmed*.

Before Brown, C.J., Anderson, P.J., and Neubauer, J.

¶1 PER CURIAM. John Babiak appeals from a judgment of conviction of repeated sexual assault of the same child and from an order denying his postconviction motion. He argues that he was denied the effective assistance of trial counsel, that the prosecutor made improper and prejudical closing

arguments, and that a juror was subjected to improper contacts with the sheriff's department. He seeks a new trial in the interest of justice. *See* WIS. STAT. § 752.35 (2005-06.)[1] We affirm the judgment and order.

¶2 The complaint charged Babiak with touching his son's penis on four or five occasions in the summer of 2000 when the boy was nine or ten years old. The boy did not report the assaults until July 2004, four months into treatment with Dr. Gerald Roherty to address post-divorce interparental conflict and visitation issues, decreased mood and academic performance, and symptoms of anxiety, panic, compulsive self-mutilating behavior, and sleep problems.

¶3 Dr. Roherty testified at trial that his initial diagnosis was that the boy suffered from moderate to medium depression but after the boy's disclosure, he determined the boy suffers post-traumatic stress disorder. He also explained why a child delays in reporting assaults, that it is not unusual to have abuse stop even though the abuser and child still have contact, that child victims display emotional symptoms like depression, agitation, emotional paralysis or shutdown, and that the trauma a child victim suffers makes it difficult for the child to recall details of such events.

¶4 Babiak argues that because Dr. Roherty was not listed as an expert witness, trial counsel should have moved to exclude the ***Jensen***-type[2] expert

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

[2] ***State v. Jensen***, 147 Wis. 2d 240, 256-57, 432 N.W.2d 913 (1988) (an expert witness may describe the behavior of the complainant and that of victims of the same type of crime to assist the jury in understanding a complainant's reactive behavior and to permit a comparison of the complainant's behavior with that of similar victims).

testimony provided by Dr. Roherty. He also believes that had trial counsel consulted a defense expert, counsel could have impeached Dr. Roherty's testimony. Babiak complains that trial counsel did not request a psychological evaluation of the boy by a defense expert. *See* ***State v. Maday***, 179 Wis. 2d 346, 359-60, 507 N.W.2d 365 (Ct. App. 1993) ("When the state manifests an intent during its case-in-chief to present testimony of one or more experts, who have personally examined a victim of an alleged sexual assault, and will testify that the victim's behavior is consistent with the behaviors of other victims of sexual assault, a defendant may request a psychological examination of the victim.") He claims he was denied the effective assistance of trial counsel on these points.

¶5 In order to find that trial counsel was ineffective, the defendant must show that counsel's representation was deficient and prejudicial. ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***Id.*** at ¶21. 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. ***Id.***

¶6 With respect to trial counsel's failure to object to Dr. Roherty's expert-type testimony, there is no dispute that the prosecution failed to comply with WIS. STAT. § 971.23(1)(e), requiring disclosure of an expert's report or summary of the subject matter of the expert's anticipated testimony. However, the trial court found that Attorney Gerald Boyle, one of Babiak's two defense

attorneys,[3] was aware that Dr. Roherty was going to testify as an expert and that Dr. Roherty was more than just a fact witness. Dr. Roherty was listed on the prosecution's witness list. The defense requested and obtained Dr. Roherty's treatment records. Attorney Boyle acknowledged in his ***Machner***[4] testimony that a person who holds a Ph.D would be perceived as an expert. Although both defense attorneys testified that going into the trial they believed Dr. Roherty would testify as a fact witness, the trial court rejected that portion of their testimony as the arbiter of credibility. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶29, 246 Wis. 2d 648, 630 N.W.2d 752. The trial court's finding that the defense team anticipated Dr. Roherty's expert status is not clearly erroneous.

¶7 That Attorney Boyle did not object to or move to exclude Dr. Roherty's expert-type testimony was not deficient performance. During trial, the trial court determined that Dr. Roherty did not give ***Jensen*** evidence. That determination is not challenged on appeal.[5] Any objection to Dr. Roherty's testimony would have been overruled. Counsel does not render deficient performance by declining to make an objection that would not have been successful. *See* ***State v. Bellows***, 218 Wis. 2d 614, 625, 582 N.W.2d 53 (Ct. App. 1998).

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[3] Attorney Richard Wells acted as co-defense counsel. Attorney Boyle was the primary trial attorney and responsible for trial strategy.

[4] 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).

[5] Based on the trial court's determination that ***Jensen*** testimony was not presented, there was no basis for Babiak to request a psychological evaluation of the boy by a defense witness under ***State v. Maday***, 179 Wis. 2d 346, 359-60, 507 N.W.2d 365 (Ct. App. 1993). Trial counsel does not perform deficiently for not bringing a motion that would have been unsuccessful. ***State v. Bellows***, 218 Wis. 2d 614, 625, 582 N.W.2d 53 (Ct. App. 1998).

¶8 Moreover, Attorney Boyle explained that based on his experience and judgment, it was not prudent to object repeatedly in front of the jury. He opted to subject Dr. Roherty to rigorous cross-examination. Indeed his cross-examination portrayed Dr. Roherty as biased since he refused to talk to defense counsel the day before trial, he accepted everything the boy told him without question, he accepted every bad thing the boy's mother said about Babiak without question, and he failed to talk to Babiak until after the disclosure. Cross-examination also pointed out that the boy's extreme display of emotion was out of line with various tests Dr. Roherty administered and Dr. Roherty's initial diagnosis. It was a matter of trial strategy to use cross-examination to address Dr. Roherty's testimony. We are not to second-guess trial counsel's selection of trial tactics or the exercise of professional judgment after weighing the alternatives. *See* ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983).

¶9 The same is true with respect to the claims that defense counsel should have consulted with an expert to impeach Dr. Roherty and called his own expert. Attorney Boyle made a strategic decision not to do that even though he anticipated that Dr. Roherty would be perceived as an expert and would give more than just factual testimony. That strategic choice was reasonable and based on consideration of the facts. *See* ***Felton***, 110 Wis. 2d at 502 (we examine counsel's conduct to be sure it is more than just acting upon a whim). The defense team consulted with a forensic psychologist before Dr. Roherty's reports were disclosed and decided not to pursue psychological evidence further. Attorney Boyle expressed experience and knowledge of the utilization of expert witnesses in sexual assault cases from past cases where he acted as defense counsel. Attorney Boyle acknowledged that obtaining an adverse psychological evaluation of the boy was tantamount to walking into a mine field. He also explained that he did not

want to the turn the case into an expert witness battle and that is often a counterproductive way to defend a case such as this.[6] The theory of defense focused on the boy's late reporting and the term used to describe the assaults as having been suggested by an adult. Attorney Boyle did not find expert testimony necessary to present that theory of defense. He stated that he would not have used learned treatises or expert testimony to undermine Dr. Roherty's testimony about a child's "snapshot memory" because it would have been counterproductive to the defense and alienated the jury. Trial counsel need not undermine the chosen strategy by presenting inconsistent alternatives. *See* ***State v. Hubanks***, 173 Wis. 2d 1, 28, 496 N.W.2d 96 (Ct. App. 1992). Trial counsel need not present impeaching evidence that he believes would alienate the jury. *See* ***State v. Goetsch***, 186 Wis. 2d 1, 18, 519 N.W.2d 634 (Ct. App. 1994). Merely because counsel's strategy was unsuccessful does not mean that his performance was legally insufficient. *See* ***State v. Teynor***, 141 Wis. 2d 187, 212, 414 N.W.2d 76 (Ct. App. 1987). We conclude that Babiak's defense counsel was not constitutionally ineffective.

¶10 Babiak raises four points in the prosecutor's rebuttal closing argument that he claims were improper and denied him a fair trial. Only two contemporaneous objections were made during the prosecutor's rebuttal argument and we address those two points first. It is within the trial court's discretion to determine the propriety of counsel's statements and arguments to the jury. ***State v. Wolff***, 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992). We will affirm

[6] The affidavit of Dr. Phillip Esplin offered in support of Babiak's postconviction motion does not vitiate Dr. Roherty's testimony but demonstrates, at best, that there are competing conclusions under scientific research which would create a battle of experts.

the trial court's ruling unless there has been a misuse of discretion that is likely to have affected the jury's verdict. ***State v. Bjerkaas***, 163 Wis. 2d 949, 963, 472 N.W.2d 615 (Ct. App. 1991).

> 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. ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784, 789 (1979). 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." ***State v. Wolff***, 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992) (quoted source omitted). Whether the prosecutor's conduct affected the fairness of the trial is determined by viewing the statements in context. ***Id.*** at 168, 491 N.W.2d at 501. 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).

¶11 Babiak challenges the prosecutor's invitation to jurors to consider the boy's emotionally fragile condition. The prosecutor argued:

> And while what Mr. Boyle said about the fact that the interest on the defendant's part in the outcome of this case is obvious, I would ask, too, that you keep in mind that there are other people who will leave this courtroom changed, and your verdict will have an impact on them too. *Is [the victim] going to leave this courthouse believing that what his father said about him, which he doesn't know yet thankfully, and I don't whether he will or not, but is [the victim] going to leave this experience thinking that what his father said about this actually is true and? That people on a jury in Washington County agreed with that? That [the victim's] a liar and that he's a faker?* (Emphasis added.)

¶12 Babiak's objection at this point was overruled on the ground that the prosecutor's statement was in the context of Babiak's testimony that the boy was lying. Babiak's postargument motion for a mistrial was denied. The court concluded that the prosecutor's argument was in response to Babiak's argument

that the jury consider the great effect the case would have on him. The court noted that technically Babiak's argument was also improper since the jury is supposed to consider only facts but that neither argument was unduly prejudicial.

¶13 An "invited reply" or "measured response" rule exists which permits a prosecutor to respond to defense counsel's argument or offset possible missteps in the defense argument. *See* ***Wolff***, 171 Wis. 2d at 168-69. The relevant inquiry is whether the prosecutor's response, "taken in context, unfairly prejudiced the defendant." ***Id.*** at 169. Here just before completing his argument, defense counsel stated, "Because basically your decision is going to have a great impact on the defendant. It's on the defendant. This is him in this courtroom saying to you folks: I didn't do that." The prosecutor's argument pointing out that the case impacts the victim as well was a fair response. As the trial court observed, both sides ever so slightly appealed to the jury to consider the impact on the people involved and those comments offset each other. Babiak was not unfairly prejudiced.

¶14 An objection was also made at the following point in the prosecutor's rebuttal argument: "And the fact, again, that this wasn't reported for a long period of time should not be surprising, especially if you follow the news. All of these prosecutions for priests in the Catholic surely are not contem--." The trial court directed the prosecutor to move on to another context. Babiak's post-argument motion for a mistrial on this point was denied. The trial court observed that delayed reporting was classic in cases involving Catholic priests and the prosecutor's reference to it was not prejudicial.

¶15 Even accepting Babiak's undeveloped contention that reference to reports of sexual assaults by priests impermissibly asked the jury to decide on

factors outside of the evidence, we conclude that the prosecutor's brief reference in rebuttal argument did not infect the trial with unfairness. The prosecutor's remark was interrupted in midsentence and the thought was not completed. It was but an isolated blip in the entire argument and not significant enough to suggest that the jury was influenced to decide the case on considerations outside of the evidence.

¶16 Babiak suggests that the prosecutor also improperly vouched for the victim and gave her personal opinion of Babiak's guilt.[7] He also contends that the prosecutor made an improper "Golden Rule" argument by asking the jurors to consider how difficult it would be for them to discuss in graphic detail the nature of their own sexual experiences on the witness stand as the victim was required to do.[8] No objection was made to the arguments Babiak cites to. Babiak waived his claim that those arguments were improper. *See* ***State v. Opalewski***, 2002 WI App 145, ¶29, 256 Wis. 2d 110, 647 N.W.2d 331. We deem it sufficient to observe that closing argument is the opportunity for the prosecutor to tell the jury how he or she views the evidence. ***State v. Adams***, 221 Wis. 2d 1, 19, 584 N.W.2d 695

[7] Babiak relies on the following comments by the prosecutor: "This defendant is guilty" (at close of initial closing argument), "Mr. Babiak is on trial because he sexually assaulted his son" (in rebuttal argument), "He did commit these crimes. [The victim] is not lying" (in rebuttal argument), and "This Defendant is guilty" (at close of rebuttal argument).

[8] The prosecutor argued in rebuttal:

> It was obviously very difficult for [the victim] to share this information. It was painful to get the words out. And think about this. If any of us in this room, and we are all adults in this room, if any of us were asked to discuss in graphic detail the nature of our own last consensual sexual experiences, that would be a mighty burden for most of us. Think about what it must be like for a 12-year-old boy to talk about what his father did to his penis…

(Ct. App. 1998). The prosecutor is permitted to comment on the credibility of witnesses as long as that comment is based on evidence presented and may state an opinion on the appropriate conclusion to be drawn from the evidence.[9] ***Id.*** at 17, 19.

¶17 On the second day of trial, one of the jurors was late. Sheriff's deputies located the juror asleep in his home and smelling of intoxicants. The deputies provided the juror transportation to the courthouse. A preliminary breath test was administered but did not reflect any impairment. Babiak moved for a mistrial on the ground that the juror might feel compelled to "vote on the side of the State" because the juror was forced to show that he was fit for jury service. When the trial court indicated that the issue of prejudice could be argued either way, Babiak sought the opportunity to voir dire the juror. The juror indicated that he had no problem with taking the breath test and the experience did not cause him to view the case differently. He apologized for the upset. The trial court found that the juror was sincerely remorseful that he had overslept and did not appear to be nervous or under stress about what occurred. Babiak renewed his motion for a mistrial arguing that any contact with law enforcement while the juror was "in effect sequestered" was improper. The motion for a mistrial was denied.

¶18 We review a decision on a motion for a mistrial for an erroneous exercise of the trial court's discretion. ***State v. Bunch***, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995). The trial court must determine, in light of the whole

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[9] Although we are not convinced that the comments Babiak cites infected the trial with unfairness, we caution the assistant district attorney to be circumspect in closing argument so as to avoid even approaching the line of impermissible argument. Emotional argument serves no purpose but to put the jury's verdict in peril.

proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial. ***Id.*** at 507.

¶19 Babiak argues that the deputies' contact with the juror was presumptively prejudicial. He cites ***Remmer v. U.S.***, 347 U.S. 227, 229 (1954), which held:

> In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties.

Remmer does not apply here. The deputies' contact with the tardy juror did not involve content "about the matter pending before the jury." The contact was related to the juror's failure to timely appear. No presumption of prejudice applies. Moreover, an adequate inquiry was conducted to see if the juror was affected by what transpired with the deputies. *See* ***Smith v. Phillips***, 455 U.S. 209, 215-16 (1982) (the presumption of prejudice triggers the defendant's right to have the trial court conduct an inquiry into whether the incident had an impact on the juror). The juror confirmed that his impartiality had not been compromised. The trial court properly exercised its discretion in denying Babiak's motion for a mistrial.

¶20 The final appellate claim is that a new trial should be granted under WIS. STAT. § 752.35, in the interest of justice. We exercise our discretionary power to grant a new trial infrequently and judiciously. *See* ***State v. Ray***, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992). A new trial may be ordered where the real controversy has not been fully tried or there was a probable miscarriage of justice with a different result likely on retrial. *See* ***State v. Wyss***,

124 Wis. 2d 681, 735-36, 370 N.W.2d 745 (1985), *overruled on other grounds*, ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990).

¶21 Babiak argues that the real controversy was not tried because he did not have the opportunity to offer counter evidence to the misleading testimony of Dr. Roherty. He also suggests that all the claims of error on appeal demonstrate a miscarriage of justice and a substantial probability of a different result on retrial. We have not found any compelling error in the trial. A final catch-all plea for discretionary reversal based on the cumulative effect of non-errors cannot succeed. ***State v. Marhal***, 172 Wis. 2d 491, 507, 493 N.W.2d 758 (Ct. App. 1992). We decline to grant 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.