

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 20, 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. 2007AP1786-CR

Cir. Ct. No. 2005CF148

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS E. PEARSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Langlade County: FRED W. KAWALSKI, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Dennis Pearson appeals a judgment convicting him of repeatedly sexually assaulting two stepdaughters and an order denying his motion for a new trial. He argues: (1) the court should have declared a mistrial and his counsel was ineffective for not requesting a mistrial after a prospective

juror indicated she was the jail nurse and had treated Pearson; (2) the court denied Pearson his right to be present when the court responded to the jury's requests to see some exhibits; (3) Pearson's trial counsel was ineffective when he failed to object to sending a doctor's cover letter into the jury room along with the medical reports when the letter vouched for the accusers' credibility; and (4) a new trial should be granted in the interest of justice because the real controversy was not fully tried. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 The allegations arose when Pearson's thirteen-year-old stepdaughter reported sexual abuse to a school counselor. The child's mother and fifteen-year-old sister took her to see Dr. Gary Hegranes for an examination. When Hegranes' examination determined the child's vagina was comparable to a mature woman's and consistent with intercourse on many occasions, he informed her mother of his findings. When the fifteen-year-old was informed of the findings, she also indicated that Pearson had intercourse with her since she was in the third grade.

¶3 At trial, both girls testified to numerous instances of intercourse with Pearson. Both girls denied having boyfriends and denied having intercourse with any other person. The older child also presented a note that she found in her room approximately one year before trial. The note was signed "Me," and the child identified Pearson's handwriting. The note states in part:

I'm giving this to you so you know how much you mean to me, and how much I love you very much in every way. I don't try to hurt you, and I try to keep ma off your ass. If you hate me and don't want nothing to do with me let me know by putting something in my truck, but if you have some feelings for me put your holy [sic] jeans on and sleep on the white couch to night.

¶4 On cross-examination, both of the girls indicated Pearson was the family disciplinarian. He would punish the girls by requiring them to wash dishes. He yelled at them and one of the girls indicated he struck her. They testified that Pearson had talked about moving from their farm. The younger girl indicated she did not want to move and would miss the horses. The older girl did not care whether they moved and was only interested in the beef cattle. The older child indicated she had participated in a school program that discussed inappropriate sexual contact with adults, but did not report her stepfather's assaults. She also testified that she did not have a driver's license because Pearson did not pay for the lessons and always came up with some bill to pay instead.

DISCUSSION

¶5 Pearson did not testify. The only defense witness, a State Crime Lab scientist, testified that fabric samples from the girls' mattresses did not reveal the presence of any semen.

¶6 Pearson first argues that the jury pool was contaminated when a prospective juror, the jail nurse, indicated she had treated Pearson. He contends that the jury became objectively biased by hearing the nurse's comments. Pearson's counsel did not request a mistrial at that time. Therefore, he waived that issue for appellate review. *See State v. Thurmond*, 2004 WI App 49, ¶10, 270 Wis. 2d 477, 677 N.W.2d 655.

¶7 Furthermore, Pearson's argument is based on the unsupported assumption that jurors would have thought Pearson was in jail for a crime other than the present offenses. The nurse's statement was entirely consistent with Pearson being confined for the present offenses. There is no reasonable probability that the extraneous information had a prejudicial effect upon a

hypothetical average juror. *See State v. Broomfield*, 223 Wis. 2d 465, 480, 589 N.W.2d 225 (1999). Even if jurors believed Pearson had been incarcerated on any other matter, the jury's knowledge of other crimes or bad acts does not necessarily create objective bias. *Id.* This court must consider the nature of the State's case, the defense presented at trial and the connection between the extraneous information and the material issues in the case. *See State v. Poh*, 116 Wis. 2d 510, 530, 343 N.W.2d 108 (1984). The circumstances under which the victims reported the offenses, the medical reports confirming numerous instances of intercourse, the "love letter" and Pearson's weak evidence of any motive for false accusation provide such overwhelming evidence of guilt that the nurse's comment was inconsequential and provided no basis for granting a mistrial.

¶8 Pearson argues his trial counsel was ineffective for failing to request a mistrial. To establish ineffective assistance of counsel, Pearson must show deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish prejudice, Pearson must show a reasonable probability that but for counsel's unprofessional errors, the outcome would have been different. *Id.* at 695. A reasonable probability is one that undermines our confidence in the outcome. *Id.* Pearson has established neither deficient performance nor prejudice. Pearson's trial counsel appropriately concluded the nurse's comment was not "all that inflammatory." Had counsel moved for a mistrial, there is no basis for believing the motion would have been granted. Therefore, Pearson has not established any prejudice from his counsel's decision. *See State v. Adams*, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998).

¶9 Pearson next argues that the trial court denied him the right to be present at his trial when it responded to the jury's requests for exhibits in his absence. We conclude this error was harmless beyond a reasonable doubt. *See*

State v. David J.K., 190 Wis. 2d 726, 736, 528 N.W.2d 434 (Ct. App. 1994). The only prejudice Pearson identifies is that the cover letters that accompanied the medical reports went into the jury room. He does not indicate how his presence would have made any difference. Pearson was present in the courtroom when the court and counsel addressed the general question of sending exhibits to the jury and Pearson's counsel indicated he had no objection. A short time later, when the jury requested the exhibits, Pearson was not returned to the court room. Pearson's failure to say anything when the discussion first occurred suggests that he would not have noticed or objected to the cover letters if he had been present at the later hearing.

¶10 Pearson did not establish prejudice from his counsel's failure to object to disclosure of the cover letters to the jury. The cover letters impermissibly vouched for the credibility of Pearson's stepdaughters, indicating that Heranes found their accusations "believable." See *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). However, because of the overwhelming evidence of guilt presented at trial, counsel's failure to prevent the jury from seeing the cover letters does not undermine our confidence in the jury's verdicts. See *Strickland*, 466 U.S. at 694. In addition to the circumstances of the girls reporting the offenses, Hegranes' medical examination and the lack of a credible explanation for any false accusation, Pearson offers no explanation for the "love letter" in which he encouraged his stepdaughter, if she has feelings for him, to put on holey jeans and sleep on the couch. In light of this evidence, Pearson has not established any likelihood that the jury was adversely affected by the revelation that Hegranes, after examining the girls, found their accusations "believable."

¶11 Finally, there is no basis for granting a new trial in the interest of justice. To establish that the real controversy was not fully and fairly tried, Pearson must show that the nurse’s comment or the doctor’s cover letter “clouded a crucial issue” in the case. *State v. Cleveland*, 2000 WI App, 142, ¶21, 237 Wis. 2d 558, 614 N.W.2d 543. We conclude the extraneous information did not affect the verdict and the issues were 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.

