COURT OF APPEALS
DECISION
DATED AND FILED

September 16, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2779-CR **Cir. Ct. No. 2005CF5915**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

OTIS LEO MOORE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOSEPH R. WALL and JEFFREY A. WAGNER, Judges.[1] *Affirmed.*

Before Fine, Kessler, JJ., and Daniel L. LaRocque, Reserve Judge.

[1] The Honorable Joseph R. Wall presided over the trial and entered the judgment of conviction. The Honorable Jeffrey A. Wagner issued the order denying the postconviction motion.

¶1 FINE, J. Otis Leo Moore appeals a judgment entered after a jury found him guilty of two counts of first-degree sexual assault of a child, *see* WIS. STAT. § 948.02(1), and an order denying his postconviction motion. Moore claims that: (1) he was denied the right to an impartial jury; (2) the trial court erred in admitting expert testimony about why children delay in reporting sexual assaults; (3) the expert improperly gave her opinion on whether the victims were telling the truth; (4) the prosecutor improperly told the jury during closing arguments that Moore made delayed reporting an issue; and (5) there was insufficient evidence to support the jury verdicts. We affirm.

I.

¶2 Moore was charged with sexually assaulting his daughter, Janice M., and his stepdaughter, Linda A. Janice M. and Linda A. reported the assaults after a delay of approximately ten and twenty years, respectively. Before Moore's trial, the State notified the trial court and Moore's lawyer that it intended to introduce expert testimony on why some child sexual-assault victims do not immediately report the assaults. Moore's lawyer did not object.

¶3 During *voir dire*, a potential juror asked the prosecutor when Janice M. and Linda A. had reported the assaults. The prosecutor told the panel that they had reported the assaults approximately one year before the trial, but indicated that the assaults happened some ten years earlier. The potential juror then said that the delay made the case "kind of weak." The prosecutor asked if other members of the venire panel had the same opinion. One responded that he believed that the delay might cause "[s]ome of the details [to] get foggy," but said that he would listen to the testimony and evaluate the witnesses' credibility. Although the trial court told Moore's lawyer that "[t]here is absolutely no limit on

… your questions," the lawyer did not ask the venire panel any questions about delayed reporting.

¶4 Janice M. was sixteen when she testified. She told the jury that Moore had sexually assaulted her many times when she was seven or eight. According to Janice M., she did not tell anyone because she "just didn't know what to say to anybody, and [Moore] told me that I shouldn't, 'cause I wouldn't want him to get in trouble." Janice M. testified that when she was fifteen, however, she told a counselor at her high school about the assaults. At her counselor's urging, she then told her mother, who called the police. On cross-examination, Moore's lawyer asked Janice M. about her failure to contemporaneously tell anyone about the assaults. The lawyer asked Janice M. whether she had made up the accusations so that she would not get in trouble with her mother, who had previously confronted her about being sexually active. Janice M. told the jury that she was telling the truth.

¶5 Linda A. was twenty-five when she testified. She told the jury that Moore had sexually assaulted her many times when she was between five and six. Linda A. testified that she did not contemporaneously tell anyone about the assaults because she was scared of Moore. According to Linda A., Moore said that if she ever told anyone, he would kill her, her mother, and her brother. Linda A. also testified that when she was twelve or thirteen she told a friend that Moore had sexually assaulted her. She also said that when she was sixteen she told an aunt, and when she was nineteen she told her mother. On cross-examination, Moore's lawyer got Linda A. to admit that she did not contemporaneously reveal the assaults to her teachers or any of her childhood doctors. The lawyer asked Linda A. if she "only came forward with these allegations … to back up what [her] sister was saying." Linda A. answered "no,"

and told the jury that she came forward because she was unhappy about what had happened to her sister and she knew that what Moore had done was wrong.

¶6 Elizabeth Ghilardi, a social worker and a specialist on the behavior of sexually-abused children, testified that it is not unusual for children to delay reporting sexual abuse. Ghilardi told the jury that it is often difficult for children to disclose the abuse for a number of reasons:

> Often, if this is someone close to the child or is actually in the child's home … they feel that they can't tell, because that person is right there. It may be someone that they love and care about or provide -- who provides positive interactions with them as well. They often are fearful if there's violence in the home or something negative going on…. [T]hey may not understand that it's wrong or the degree to that it's wrong as in an adult world, and they … often don't have the experience or the language to really be able to explain what is happening, or to put it in some kind of context.

Ghilardi further explained that threats also tend to discourage disclosure: "If a perpetrator would threaten a child overtly, tell them that something bad was going to happen to them, that often is a reason that children won't tell or won't tell for a long time." Ghilardi also testified that "very frequently [child sexual-assault victims] don't tell everything all at once," but reveal "over time, in bits and pieces." Contrary to the contention implicit in Moore's argument, Ghilardi did not opine whether in her view either Janice M. or Linda A. were telling the truth when they said that Moore had sexually assaulted them.

¶7 Moore testified and denied assaulting Janice M. and Linda A. He told the jury that their mother was "bitter" and blamed him for problems in their relationship.

¶8 During summation, Moore's lawyer argued that the failure of Janice M. and Linda A. to contemporaneously complain about the assaults undercut their veracity. He contended that Janice M. and Linda A.'s mother convinced them to falsely accuse Moore because she was angry at him. He also argued that it was essentially the word of Janice M. and Linda A. and their mother against Moore's word:

> You have no physical evidence at all. Not one speck of physical evidence, not one. *You don't have any non-family member, you don't have any family member*, aside from [Janice M. and Linda A.'s mother], *coming forward and saying*, "Yes, we recognized that this was happening. Yeah, *these girls told us what was happening*.

(Emphasis added.) Moore's trial lawyer also reprised the failure of Janice M. and Linda A. to contemporaneously report the assaults: "Maybe they delayed in reporting, maybe they didn't. *They didn't report it for a long time*, but maybe kids do that, maybe they don't. Is there some sort of motive or reason why they didn't do it when it happened? There is." (Emphasis added.) As we have seen, Moore's lawyer blamed the mother of Janice M. and Linda A. for his predicament.

¶9 In her rebuttal summation, the prosecutor said that Moore was "making an issue about the fact that Janice [M.] and Linda [A.] waited so many years to report this." She reminded the jury that Janice M. and Linda A. "testified that they thought they would be killed," if they told anyone about what Moore had done to them and pointed to Ghilardi's testimony, that "it's very common that … sexual assault victims … don't tell anyone." Moore's lawyer did not object to the prosecutor's comments.

II.

¶10 As we have seen, other than Moore's contention that there was insufficient evidence to support the jury's verdicts, Moore's complaints on appeal concern the alleged inability of Moore's trial lawyer to explore during *voir dire* potential juror bias, the trial court's admission of Ghilardi's testimony, and the prosecutor's rebuttal summation comment that Moore had made an issue of the failure by Janice M. and Linda A. to contemporaneously report the assaults. As we have also seen, however, Moore's trial lawyer did not object to any of these matters, and thus we review his appellate complaints about these unobjected-to matters in an ineffective-assistance-of-counsel context. *See* ***Kimmelman v. Morrison***, 477 U.S. 365, 375 (1986) (unobjected-to error must be analyzed under ineffective-assistance-of-counsel standards, even when error is of constitutional dimension); ***State v. Williams***, 2000 WI App 123, ¶21, 237 Wis. 2d 591, 606, 614 N.W.2d 11, 19 (trial lawyer's failure to object or further question potential juror during *voir dire* reviewed as ineffective-assistance-of-counsel claim).

¶11 A defendant claiming ineffective assistance of counsel must establish that: (1) the lawyer was deficient; and (2) the defendant suffered prejudice as a result. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To satisfy the prejudice aspect of ***Strickland***, the defendant must demonstrate that the lawyer's errors were sufficiently serious to deprive him or her of a fair trial and a reliable outcome, ***ibid.***, and "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome," ***id.***, 466 U.S. at 694. We need not address both aspects if the defendant fails to make a sufficient showing on either one. ***Id.***, 466 U.S. at 697.

¶12 First, Moore contends that he was denied the right to an impartial jury because neither the trial court nor the prosecutor introduced Ghilardi to the panel as an expert witness on delayed reporting and that therefore his trial lawyer was, according to Moore's argument on appeal, not able to explore either Ghilardi's qualifications or any juror bias on the delayed-reporting issue. We disagree. As we have seen, the State told Moore's lawyer that it intended to call an expert on delayed reporting and Moore's lawyer was given unfettered opportunity to question the jurors during *voir dire*. Accordingly, Moore must show that he was prejudiced. He has not done so.

¶13 During *voir dire*, the trial court read Ghilardi's name to the panel. None of the potential jurors recognized it. Moreover, as we have seen, the prosecutor explained on *voir dire* that neither Janice M. nor Linda A. reported the assaults contemporaneously, and asked the potential jurors if this would affect their ability to evaluate Janice M. and Linda A.'s credibility. None of the potential jurors indicated that it would. *See* ***State v. Migliorino***, 150 Wis. 2d 513, 537, 442 N.W.2d 36, 46 (1989) ("[g]eneral questions" about abortion sufficient to establish whether prospective jurors could remain impartial). Moore has submitted nothing to show that any potential juror knew Ghilardi or was biased one way or the other regarding delayed reporting. *See* ***State v. Louis***, 156 Wis. 2d 470, 478, 457 N.W.2d 484, 487 (1990) (prospective jurors presumed impartial and challenger has burden of proving bias).

¶14 Second, Moore contends that the trial court erred when it admitted Ghilardi's testimony about why some children do not contemporaneously report having been sexually assaulted. As noted, Moore's trial lawyer did not object at trial to the admission of this evidence, and thus, under the ***Strickland*** analysis, Moore must show that he was prejudiced as a result.

¶15 Admission of evidence is vested in the trial court's reasoned discretion. ***State v. Sullivan***, 216 Wis. 2d 768, 780, 576 N.W.2d 30, 36 (1998). "An appellate court will sustain an evidentiary ruling if it finds that the circuit court examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." ***Id.***, 216 Wis. 2d at 780–781, 576 N.W.2d at 36. WISCONSIN STAT. RULE 907.02 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Ghilardi's testimony clearly was admissible under this rule. Contrary to Moore's contention on appeal, Ghilardi did not invade the province of the jury by assessing the credibility or veracity of either Janice M. or Linda A. *See* ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673, 676 (Ct. App. 1984) (Witness may not testify "that another mentally and physically competent witness is telling the truth."). Accordingly, Moore has not shown prejudice. *See* ***State v. Huntington***, 216 Wis. 2d 671, 698, 575 N.W.2d 268, 279 (1998) (expert's opinion that child's delayed reporting was consistent with what is expected in child sexual-abuse cases not inadmissible comment on victim's credibility).

¶16 Third, Moore contends that the prosecutor improperly told the jury in her rebuttal closing argument that Moore made delayed reporting an issue at trial. As noted, his trial lawyer did not object. Moore has not shown that he was prejudiced because it is evident that Janice M. and Linda A.'s failure to contemporaneously report the assaults *was* a matter that Moore contended showed that the assaults did not happen. Thus, Moore has not shown that he was

prejudiced by his trial lawyer's failure to object to the prosecutor's comment during her rebuttal summation.

¶17 Finally, Moore claims that the evidence is insufficient to support the jury verdicts. We disagree.

¶18 When reviewing the sufficiency of the evidence, we will reverse a conviction only if "the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752, 755 (1990). Moore purports to recognize this standard that governs our review because he does not claim that Janice M. and Linda A.'s testimony did not support the elements of first-degree sexual assault of a child. Rather, he contends that Janice M. and Linda A.'s testimony was facially incredible. This is a non-starter.

¶19 The jury is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. ***State v. Daniels***, 117 Wis. 2d 9, 17, 343 N.W.2d 411, 415 (Ct. App. 1983). We will not substitute our judgment for the jury's unless the jury relied on evidence that is inherently or patently incredible. ***Id.***, 117 Wis. 2d at 17, 343 N.W.2d at 415–416. That is not the situation here. There was more than enough evidence upon which the jury could reasonably rely to support the verdicts.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.