

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 18, 2009

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. 2008AP1863-CR

Cir. Ct. No. 2006CF1308

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GREGORY TYRONE STORKS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Gregory Storks appeals from a judgment of conviction for one count of first-degree sexual assault of a child, and from an order denying his motion for postconviction relief. Storks asserts trial counsel was ineffective by failing to object to certain hearsay testimony and the trial court

erred by admitting the challenged statements. We reject Storks' arguments and affirm.

BACKGROUND

¶2 Storks allegedly had sexual intercourse with then-twelve-year-old Natasha W. in his basement. When she was first questioned by her mother and the police, Natasha initially denied having intercourse with Storks because she was afraid she would get in trouble. Eventually, she told her mother and the police what had happened. No semen or DNA was found in Natasha's vaginal area, although Storks' DNA was found on her neck. Storks waived his right to a jury trial. His defense was not to deny meeting Natasha, but to deny any sexual contact with her. The State presented multiple witnesses, including Natasha, her mother Patricia E., and Officer Shemia Watts. The court, based largely on witness credibility, convicted Storks and sentenced him to five years' initial confinement, plus seven years' extended supervision, consecutive to any other sentence.

¶3 Storks moved for postconviction relief, seeking to have his conviction vacated and requesting a *Machner*¹ hearing. He alleged counsel was ineffective for failing to object to certain testimony from Patricia and Watts and claimed the court erroneously admitted the testimony. Specifically, as Patricia was discussing taking Natasha for treatment, she testified that Natasha eventually admitted having intercourse with Storks.

¹ See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[THE STATE:] How did that come out?

A. My father was a minister and he was there and *she just confided and she said, I'm scared mom is going to get me but we had sex.*

....

[THE STATE:] Did you hear what your daughter said?

A. *She said I did have sex with him, Ma.*

Q. What was she like when she said that?

A. She just start crying.

....

Q. When did she start crying?

A. As soon as she started talking.

Q. Talking about what?

A. She was like, you're not going to get me. I said, no I'm not going to get you. Just tell me what happened. *She said, Ma I had sex with him and she said that it hurted her. She said that he asked her a question she didn't know. He hit her in her face.*

(Emphasis added.) Counsel objected only after the first quoted statement, and the court did not make a ruling.

¶4 Officer Watts had interviewed Natasha before going to the residence. Watts testified that Natasha stated she had been in the basement of the house when she “engaged in sexual intercourse.” Watts then testified that Natasha recalled a pool table, a punching bag, sofas, an area rug, a television, a drum set, and a hockey game in that basement. These items were later photographed in the basement. Watts also stated Natasha told her she had spent the night with someone known as “Little G,” a nickname ultimately established to refer to Storks.

Storks complains this evidence establishes Natasha's presence in Storks' residence without her having to testify directly.²

¶5 The State conceded Patricia's and Watts' testimony was hearsay but argued counsel was not deficient or prejudicial. As to Patricia's testimony, the State argued it would have been admissible under the excited utterance exception to the hearsay exclusion, so counsel was not deficient for failing to object. The State further argued that had an objection to Watts' testimony been made and sustained, Natasha, who testified after Watts, would have been able to offer the same evidence. Further, Storks was not challenging the fact that Natasha had been in his basement. The court adopted the State's brief in its entirety and rejected Storks' motion.

DISCUSSION

¶6 The decision to admit or exclude evidence is normally discretionary. *See State v. Weber*, 174 Wis. 2d 98, 106, 496 N.W.2d 762 (Ct. App. 1993). The exercise of discretion must be founded upon proper legal standards. *State v. Burton*, 2007 WI App 237, ¶13, 306 Wis. 2d 403, 743 N.W.2d 152. Hearsay is normally inadmissible, WIS. STAT. § 908.02 (2007-08), although there are exceptions to or exceptions from this rule.³ *See* WIS. STAT. §§ 908.03, 908.045. Unobjected-to hearsay *is* admissible for its truth. *State v. Heredia*, 172 Wis. 2d 479, 482 n.1, 493 N.W.2d 404 (Ct. App. 1992). Therefore, Storks

² Storks does not, in his appellate argument, challenge the statements that Natasha engaged in intercourse or that she identified Little G.

³ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

cannot fault the court for “erroneously” admitting unobjected-to hearsay statements and, with a single exception discussed below, Storcks’ challenge on appeal is confined to the ineffective assistance of counsel framework.

¶7 To demonstrate ineffective assistance of counsel, Storcks must show that trial counsel’s performance was deficient and that the deficiency prejudiced his defense. See *State v. Jeannie M.P.*, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. The issues of deficient performance and prejudice present mixed questions of fact and law. *Id.* We will not upset the trial court’s factual findings unless clearly erroneous, although the ultimate determinations of whether counsel’s performance was deficient or prejudicial are questions of law we determine *de novo*. *Id.* The court may deny a postconviction motion based on ineffective assistance of counsel without a *Machner* hearing if the record conclusively demonstrates the defendant is not entitled to relief. *State v. Roberson*, 2006 WI 80, ¶43, 292 Wis. 2d 280, 717 N.W.2d 111.

A. Patricia’s Testimony

¶8 Storcks objects to three instances where Patricia relayed that Natasha had reported having intercourse. He contends this testimony allowed Patricia to corroborate Natasha’s version of events.

¶9 There are multiple hearsay exceptions. One is the excited utterance exception, which permits a witness to testify about a statement “relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” WIS. STAT. § 908.03(2). The State asserts Patricia’s testimony would have been admissible under this exception, and because that means a hearsay objection would have been overruled, trial counsel was not deficient for failing to raise it. See *State v. Wheat*, 2002 WI App 153,

¶14, 256 Wis. 2d 270, 647 N.W.2d 441. To the extent that one objection was raised, but the court neglected to rule, Storks presents this as a “defacto denial” of his objection. Assuming this to be true, we may search the record to determine whether the court’s discretionary decision to admit the evidence was appropriate. See *Randall v. Randall*, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737.

¶10 When the trial court adopted the State’s brief in its entirety, the court effectively ruled Patricia’s statements were in fact admissible under the excited utterance exception. On appeal, Storks acknowledges the court could have “evaluated the applicability” of the exception, but evidently believes it should have happened at trial; he does nothing to explain why the court’s postconviction determination is in error. An issue not briefed is deemed abandoned. *Reiman Assocs., Inc. v. R/A Adver., Inc.*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981). Further, Storks did not file a reply brief and therefore did not respond to the State’s appellate contention that Patricia’s statements were admissible under a hearsay exception. Arguments not refuted are deemed admitted. *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶11 In any event, the record reveals that Natasha initially did not report what had happened because she was afraid she would be in trouble for having intercourse. When she was ultimately convinced she would not be in trouble, Natasha started crying and admitted the assault. Although Natasha’s reporting was not immediately after the event, contemporaneity is not a condition precedent to finding excited utterance. See *State v. Padilla*, 110 Wis. 2d 414, 420, 329 N.W.2d 263 (Ct. App. 1982). There is adequate testimony in the record to conclude Natasha’s statements were the byproduct of “nervous stress” such that her statements were excited utterances and not fabrications. See *id.* at 418-22.

The statements fulfill an exception to the hearsay exclusionary rule; therefore, the court did not erroneously exercise its discretion in admitting the testimony and counsel was not deficient for failing to raise an objection that would have been overruled. *Wheat*, 256 Wis. 2d 270, ¶14.

¶12 Alternatively, there is no prejudice. To demonstrate prejudice, a defendant must show that but for counsel's error, there is a reasonable probability that the results of the proceedings would have been different. *Jeannie M.P.*, 286 Wis. 2d 721, ¶26. A reasonable probability is one that undermines our confidence in the outcome. *Id.* Here, Patricia's testimony confirms only that Natasha told her mother she had intercourse. Patricia never testified that Natasha provided the man's identity, nor are there any particular details about the intercourse in Patricia's testimony, and Storks never disputed that Natasha told her mother what had happened. Patricia's testimony does not undermine our confidence in the outcome.

B. Watts' Testimony

¶13 Watts testified about Natasha's description of Storks' basement. Storks claims that this testimony ultimately bolstered Natasha's credibility, a fatal error given that the trial court made its ruling based on credibility. However, even if counsel were deficient for failing to raise an objection to Watts' testimony, there is no prejudice.

¶14 Watts testified before Natasha did. Thus, the State points out, even if an objection to Watts' testimony had been made and sustained, Natasha herself could have described the basement. Storks does not respond to this argument.

¶15 Moreover, Watts' testimony offers no evidence that Storks assaulted Natasha, only that she was in his home. Storks never disputed that Natasha had been in the basement.⁴ Rather, his defense was that any contact with Natasha was not sexual. Watts' testimony offers no evidence suggesting Storks assaulted Natasha, only that she was in his house.

¶16 Although the trial court did acknowledge Natasha's accurate description of the basement, as reported to Watts, this was not the sole basis for the court's verdict. The court noted Storks' DNA on Natasha's neck which, although it did not prove sexual contact, provided a sort of context in which the court could evaluate Natasha's narrative. The court also noted Natasha's demeanor during her testimony. Given that Watts' testimony went to an undisputed fact, we cannot say the court's use of that testimony undermines our confidence in the outcome. *See Jeannie M.P.*, 286 Wis. 2d 721, ¶26.

¶17 Counsel was not deficient for failing to object to Patricia's testimony, and there was no prejudice from counsel's failure to object to Patricia's or Watts' testimony. The record demonstrates Storks would not be entitled to relief, so the court appropriately denied his postconviction motion without a hearing.

By the Court.—Judgment and order affirmed.

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

⁴ Such a dispute likely would have been fruitless. Storks' sister-in-law, who evidently owns and lives in the home, acknowledged Natasha had been in the house, although she was not called to testify by either side.

