COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2605-CR **Cir. Ct. No. 2007CF222**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WAYNE A. WALDMANN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: RANDY R. KOSCHNICK, Judge. *Affirmed*.

Before Lundsten, Higginbotham and Bridge, JJ.

¶1 PER CURIAM. Wayne Waldmann appeals a judgment convicting him of first-degree sexual assault of a child and an order denying his motion for postconviction relief. We affirm for the reasons discussed below.

BACKGROUND

¶2 The State filed an information charging Waldmann with repeated sexual assault of a child based upon allegations that he had on one occasion kissed and on two other occasions touched the breasts and vaginal area of Sylvia L., a girl for whom his wife babysat.

¶3 At trial,[1] the State introduced a videotaped forensic interview in which Sylvia described the three times that Waldmann had touched or kissed her. The social worker who conducted the interview testified that she used a protocol known as the "Step Wise" method that uses open-ended questions "in order to elicit information from a child that's accurate" without "asking leading questions" or "suggesting information to the children." The State called another forensic interviewer as an expert witness who testified that she had reviewed the interview of Sylvia, and that all the steps of the Step Wise method were followed.

¶4 Sylvia testified in person about Waldmann touching her on multiple occasions, but gave a different timeline of events with some variations in the number and details of the incidents. The State also produced testimony from a friend of Sylvia's and school counselor who said that Sylvia had told them about various touching incidents.

¶5 The defense presented evidence that Sylvia's brother had a collection of pornography that might have served as an alternate source for her knowledge of sexual matters, and that Sylvia had also watched movies with naked

[1] The matter was consolidated for trial with another case in which Waldmann was accused of having sexual contact with a different girl under his wife's care. Waldmann was acquitted of that charge, however.

people in them with her parents. It also produced testimony from Waldmann's wife to the effect that she had never left Sylvia alone with her husband during the alleged timeframe; that the layout of the furniture was not as Sylvia described due to remodeling; and that Sylvia had told Waldmann on one occasion that she could tell lies about him.

¶6 After the third day of trial, the defense moved for a directed verdict on the grounds that kissing did not constitute a sexual assault, and therefore there were only two incidents at issue. In response, the State successfully moved to amend the information from repeated sexual assault of a child to a single count of sexual assault of a child. Defense counsel did not request either a unanimity instruction or a limiting instruction regarding other acts evidence already admitted. The jury found Waldmann guilty of the amended sexual assault charge involving Sylvia.

¶7 The matter proceeded to sentencing without a presentence report. The circuit court sentenced Waldmann to seven years of initial confinement and thirteen years of extended supervision.

¶8 Waldmann filed a postconviction motion challenging the sufficiency of the evidence and counsel's performance in relation to jury instructions, and in the alternative seeking resentencing based upon a psychosexual evaluation and risk assessment of Waldmann which was performed after the sentencing. The circuit court denied relief following an evidentiary hearing, and Waldmann appeals.

DISCUSSION

JURY INSTRUCTIONS

¶9 Waldmann first contends that he was entitled to jury instructions informing the jury that it must be unanimous as to what specific act formed the basis for his conviction, and that it should limit its consideration of other acts evidence to the purpose for which it was admitted. *See* WIS JI—CRIMINAL 275 and WIS JI—CRIMINAL 517. Because no contemporaneous objection was raised to the lack of these jury instructions, Waldmann presents his arguments in the context of ineffective assistance of counsel and whether the real controversy was tried.

¶10 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.

¶11 Here, assuming for the sake of argument that counsel should have requested the unanimity and limiting instructions, we conclude that Waldmann has failed to demonstrate prejudice. Waldmann offers no plausible explanation for why the evidence presented would lead the jury to believe that one of the vaginal touching incidents had occurred, but the other had not. Either the jury believed Sylvia or it believed Waldmann's wife. If it believed Sylvia, there is no reason why it would not have done so with respect to both vaginal touching incidents. We therefore have no basis to conclude that the absence of a unanimity instruction resulted in a non-unanimous verdict or that a limiting instruction on other acts evidence would have altered the jury's evaluation of whether a sexual assault had occurred within the alleged timeframe.

¶12 For similar reasons, we conclude that the interests of justice do not warrant a new trial for failure to fully try the real controversy. *See generally* WIS. STAT. § 752.35 (2007-08).[2] In order to establish that the real controversy has not been fully tried, a party must show "that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998). Again, the absence of unanimity and limiting instructions did not preclude the jury from

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

considering the relative credibility of Sylvia or Waldmann's wife, or otherwise cloud any critical issue in the case.

EXPERT TESTIMONY

¶13 Waldmann argues that the testimony of the sociologist who conducted Sylvia's interview and the expert who testified about the procedure used in the interview violated the longstanding prohibition against having one witness give an opinion that another is telling the truth. *See* ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984). We do not agree with Waldmann's characterization of the relevant testimony. Rather, we are satisfied that both experts were testifying generally about the interviewing process and its purpose, not vouching for the veracity of the complaining witness in this case. In short, there was no ***Haseltine*** violation.

SENTENCING

¶14 Finally, Waldmann claims that the psychosexual evaluation and risk evaluation performed after his sentencing constituted a new factor entitling him to be resentenced. A new sentencing factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing," which operates to frustrate the purpose of the original sentence. ***State v. Champion***, 2002 WI App 267, ¶4, 258 Wis. 2d 781, 654 N.W.2d 242 (citation omitted). Whether a particular set of facts constitute a new factor is a question of law which we review de novo. ***Id.*** However, whether a new factor warrants a modification of sentence is a discretionary determination to which we will defer. ***Id.***

¶15 Here, we agree with the circuit court that the postconviction evaluation did not constitute a new sentencing factor because it did not frustrate the court's purpose in imposing the sentence. In explaining its sentence, the court noted that the crime was egregious and had lifelong implications for the victim, that Waldmann was unlikely to get any type of meaningful treatment while he continued to deny the offense had occurred, and that Waldmann posed a significant risk to the community while untreated. While the postcommitment evaluation did conclude that Waldmann fell in the low range for actuarial risk of reoffending and could be treated more effectively in the community, it also supported the circuit court's original observation that sex offender treatment is not effective when the perpetrator is in denial. Therefore, the circuit court properly denied the motion for resentencing.

By the Court.—Judgment and order affirmed.

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