

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 30, 2002**

Cornelia G. Clark  
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. 02-0565**

**Cir. Ct. No. 00 JV 2402**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**IN THE INTEREST OF EDWARD H.,  
A PERSON UNDER THE AGE OF 17:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**v.**

**EDWARD H.,**

**RESPONDENT-APPELLANT.**

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APPEAL from orders of the circuit court for Milwaukee County:  
CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.<sup>1</sup> Edward H. appeals from a dispositional order adjudging him guilty of two counts of first-degree sexual assault of a child,

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (1999-2000).

contrary to WIS. STAT. § 948.02(1) (1999-2000).<sup>2</sup> He also appeals from a postdisposition order denying his motion for a new trial based upon a claim of ineffective assistance of trial counsel. Edward raises two issues of error: (1) whether trial counsel provided ineffective assistance by failing to object to an inadmissible hearsay statement made by his brother to a police detective that he witnessed Edward committing one of the charged assaults; and (2) whether he should be granted relief because admitting the hearsay statement prevented the real controversy from being tried. Because Edward was not prejudiced by his trial counsel's performance and the real issue was tried, this court affirms.

## I. BACKGROUND

¶2 Between June and August 2000, sixteen-year-old Edward sexually assaulted eleven-year-old Billy T. by having oral sex (mouth-to-penis contact) with him. On November 22, 2000, Edward sexually assaulted nine-year-old Kimani R. by having oral sex (mouth-to-penis contact) with him. On December 5, 2000, the State filed charges in juvenile court against Edward as a result of these incidents. The case was tried to the court.

¶3 During the trial, Kimani testified that on the day before Thanksgiving 2000, behind a vacant house located at 2438 North 34th Street in the City of Milwaukee, Edward sucked on Kimani's penis and then told Kimani not to tell anyone. Kimani reported the incident to his mother, who contacted the police. Kimani's seven-year-old brother, Antoine, also testified that Edward "sucked my

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<sup>2</sup> All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

brother's stuff" and did the same thing to him.<sup>3</sup> Police Officer David Fuerte, who had interviewed Kimani and Antoine, also testified at trial about their reports.

¶4 Edward testified in his own defense and denied assaulting Kimani. Edward also denied making any confession to the police relating to the assault on Kimani. He presented an alibi, claiming that he was at the home of Michael Robbins on the day before Thanksgiving helping to prepare for the following day's activities. Robbins testified at trial as well, but his alibi testimony was discounted by the trial court because he had told a detective that a boy other than Edward had been at his home the day before Thanksgiving.

¶5 During the trial, the court conducted a *Miranda/Goodchild* hearing.<sup>4</sup> After hearing testimony from both Edward and Police Detective Brian Reilly, it concluded that Edward's confession was voluntarily made. Detective Reilly then testified that Edward had admitted having oral sex with Kimani on the Wednesday before Thanksgiving at about 5:00 p.m. The trial court assessed the credibility of the witnesses, and determined that the version of events as recounted by Kimani and Antoine was more credible than that of Edward. The trial court found Edward guilty of oral sexual assault (mouth-to-penis) as charged in both counts. Edward now appeals. The issues raised, however, relate only to Edward's conviction on the charge involving Kimani.

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<sup>3</sup> Although the State initially charged Edward with sexually assaulting Antoine, the charge was dismissed before trial.

<sup>4</sup> See *Miranda v. Arizona*, 384 U.S. 436 (1966); *Goodchild v. Burke*, 384 U.S. 1017 (1966).

## II. ANALYSIS

¶6 The analytical framework that must be employed in assessing the merits of a defendant's claim of ineffective assistance of counsel is well-known. To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's errors were prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. *Id.* at 697.

¶7 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). The trial court's determination of what the attorney did or did not do, and the basis for the challenged conduct are factual, and will be upheld unless they are clearly erroneous. *See id.* at 634. The ultimate conclusion, however, of whether the conduct resulted in a violation of defendant's right to effective assistance of counsel is a question of law for which no deference to the trial court need be given. *State v. Harvey*, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987).

¶8 To prove deficient performance, a defendant must show trial counsel's conduct was unreasonable under all the circumstances of the case. *State v. Oswald*, 2000 WI App 2, ¶49, 232 Wis. 2d 62, 606 N.W.2d 207. To prove prejudice, the defendant 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." *Strickland*, 466 U.S. at 694.

¶9 The basis for Edward's claim of ineffective trial counsel is the failure to object to a portion of the testimony of Police Detective Michael Braunreiter. Braunreiter testified that Edward's ten-year-old brother, Marcell, "told me that Edward -- that he seen Edward with Antoine and Kimani's penis in his mouth." Edward asserts that this is clearly hearsay and should not have been admitted. At the postdisposition motion hearing, the State conceded that Braunreiter's testimony regarding Marcell's statements to him were hearsay, and did not fall under any applicable statutory exceptions. Edward contends therefore, that counsel's failure to object was deficient performance and that the admission prejudiced the case. This court disagrees.

¶10 As noted above, in an ineffective assistance case, this court does not have to address both performance and prejudice if the defendant fails to satisfy his burden on one factor. Here, this court need not address the performance factor because this court concludes that Edward suffered no prejudice by the failure of his counsel to object to the hearsay statement.

¶11 When the trial court, as the finder of fact, determined that the testimony of Antoine and Kimani was more credible than that of Edward and his alibi witness, it did so based mainly upon the concurrence of certain details of Kimani's account of what transpired and portions of Edward's confession as to time, location, and the conduct involved. To be sure, the court assigned greater credit to Edward's confession than he did to his denials in open court. At no point in its oral decision, did the trial court allude to the statement that Marcell gave to Detective Braunreiter. This circumstance is further reinforced by the trial court's written decision denying Edward's postdisposition motion where it declared: "I specifically relied on factors other than Marcell's inadmissible hearsay statement in resolving the ultimate credibility dispute between Edward and the victims." As

the trial court correctly emphasized: “Sufficient prejudice is not established if the evidence did not affect the outcome of the trial ....” *See id.*

¶12 This court agrees that Edward failed to establish he was prejudiced as a result of the admission of the hearsay. The trial court did not rely on the hearsay statement in rendering its decision, and there is a multitude of other evidence in the record to support the trial court’s finding that Edward was guilty. Accordingly, Edward has failed to demonstrate that there is a reasonable probability the outcome of the trial would have been different if the hearsay had been excluded. Accordingly, the dispositional order and the postdisposition order are affirmed.<sup>5</sup>

*By the Court.*—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

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<sup>5</sup> Edward raises a second issue—that the real controversy was not tried. However, this issue is wholly dependent on the admission of the hearsay statement. Because this court has concluded that Edward was not prejudiced by the admission of this statement, this court is not inclined to exercise its discretionary authority pursuant to WIS. STAT. § 752.35. This court concludes that the admission of the hearsay statement did not prevent the real controversy in this matter from being tried. Accordingly, this court summarily rejects Edward’s claim on this issue.

