COURT OF APPEALS
DECISION
DATED AND FILED

December 29, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP3072-CR **Cir. Ct. No. 2007CF228**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

DAVID E. SCOTT,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Kenosha County: WILBUR W. WARREN, Judge. *Affirmed*.

Before Neubauer , P.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. The State appeals from an order granting David Scott a new trial on the ground that Scott was denied the effective assistance of trial counsel when convicted of three counts of sexual assault of a child under age thirteen. We agree with the trial court's determination that deficiencies in the

performance of Scott's trial attorneys prejudiced Scott and entitle him to a new trial. We affirm the trial court's order.

¶2 Scott was charged with sexually assaulting his stepdaughter, Bonnie B., and allowing her to see pornographic materials. Bonnie, age nine, disclosed the activity to her two brothers on February 14, 2007 and said Scott had touched her around her private area over the last year. The next morning Bonnie and one brother told their mother, Jeanice. Jeanice was still married to Scott at that time although the marriage was strained. That same day Bonnie reported to her school counselor that Scott had touched Bonnie's chest and vaginal areas over the top of her underwear in May and June of 2006, and "a couple of times before that and after that and around Christmas time." Julie McGuire, a social worker and forensic interviewer from a child advocacy center, interviewed Bonnie on February 16, 2007, and the interview was videotaped. In that interview Bonnie revealed that Scott had exposed his penis to her on more than one occasion.

¶3 At trial McGuire testified about the protocol used to interview children believed to be the victim of sexual abuse. She talked about delayed reporting, piecemeal reporting, and common behaviors of child sexual assault victims. The recorded interview of Bonnie was played for the jury.[1] After the videotape was played, McGuire was subject to cross-examination. She testified about the goal of obtaining information from the child as quickly as possible and before the intervention of other individuals. She indicated that current scholarship reveals false allegations in between three and ten percent of cases. Cross-examination then elicited McGuire's acknowledgement that she had conducted

[1] The taped interview served as Bonnie's direct testimony at trial.

over 1,200 interviews and not once discovered any false allegations. This point was revisited a second time during cross-examination with McGuire explaining that often times she did not know whether charges were filed or not.

¶4 After his conviction, Scott moved for postconviction relief claiming ineffective assistance of defense counsel, Attorneys Gerald Boyle and K. Richard Wells. A ***Machner***[2] hearing was conducted by the judge who presided at the trial. The trial court granted a new trial based on: 1.) the failure to hire an expert to rebut the ***Jensen***-type evidence[3] presented by McGuire; 2.) failure to investigate Jeanice's prior acts involving disorderly conduct and false sexual assault allegations to challenge Jeanice's credibility; 3.) failure to ensure that the officer who first spoke to Bonnie testified at trial; 4.) eliciting testimony from McGuire on cross-examination which violated ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984);[4] and 5.) failure of Attorney Boyle to watch the videotaped interview before trial. We conclude that together deficiencies one and four provide a sufficient basis to sustain the trial court's order for a new trial. We address only those.

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[2] A ***Machner*** hearing addresses a defendant's ineffective assistance of counsel claim. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[3] ***State v. Jensen***, 147 Wis. 2d 240, 257, 432 N.W.2d 913 (1988), holds that "an expert witness may be asked to describe the behavior of the complainant and then to describe that of victims of the same type of crime" and the expert may be allowed "to give an opinion about the consistency of a complainant's behavior with the behavior of victims of the same type of crime" when appropriate to assist the trier of fact.

The trial court found that McGuire's testimony was limited to the behaviors of sexual assault victims in a general sense without relationship to Bonnie's reactive behavior. McGuire was not asked the ultimate question of whether Bonnie's behavior was consistent or inconsistent with the behavior of child sexual assault victims.

[4] A witness may not testify "that another mentally and physically competent witness is telling the truth." ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984).

¶5 To prove ineffective assistance of counsel, a defendant must show that counsel's representation was deficient and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Deficient performance is conduct that falls below an objective standard of reasonableness. ***Id.*** at 687-88; ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. We view the case from counsel's perspective at the time of trial and there is a "strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To satisfy the prejudice aspect of ***Strickland***, 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. The critical focus is not on the outcome of the trial but on "the reliability of the proceedings." ***Thiel***, 264 Wis. 2d 571, ¶20 (citation omitted). We may aggregate the effects of multiple incidents of deficient performance in determining whether the overall impact of the deficiencies satisfy the standard for a new trial. ***Id.***, ¶60.

¶6 The determination of deficient performance and prejudice both present mixed questions of fact and law. ***Id.***, ¶21. We will uphold the trial court's findings of fact unless they are clearly erroneous, but whether trial counsel's performance was deficient or prejudicial is a question of law we review de novo. ***Id.***

¶7 The State first argues that the defense team was not deficient in failing to present expert testimony to rebut McGuire's ***Jensen***-type evidence

because both attorneys testified it was a strategic decision not to obtain an expert.[5] The trial court was not required to accept defense counsels' testimony as dispositive of an ineffective assistance claim. ***State v. Kimbrough***, 2001 WI App 138, ¶35, 246 Wis. 2d 648, 630 N.W.2d 752. Here the court rejected the explanation for not hiring an expert because on the first scheduled trial date the defense team objected to McGuire giving expert testimony based on the late notification that she was more than an authentication witness. The defense argued that the late notice precluded the preparation of a defense witness that might compete with McGuire's testimony. The trial court found that there are experts who would come to court and say things contrary to McGuire's intended testimony and that the late notice was a detriment to the defense. The court ruled that McGuire would not be allowed to testify and denied the State's request for an adjournment. The State then moved to dismiss without prejudice indicating that it was unable to proceed with the exclusion of its expert.[6] Not only did this exchange at the adjourned trial date establish the defense's desire to retain an expert to rebut McGuire's intended expert testimony, but it also highlighted the import of the ***Jensen***-type evidence since State would not proceed without it. The defense also moved to exclude McGuire's expert testimony on relevancy grounds at the start of the jury trial. Again the defense exhibited concern about the expert testimony. The later explanation that the evidence was not significant or that no countervailing expert was necessary rang hollow in light of the previous defense

[5] Attorney Wells testified that presenting a defense expert would not have been helpful to the defense. Attorney Boyle testified he did not believe that there was a need for an expert and it was counterproductive to the defense to make the case one of expert versus expert.

[6] Ultimately the trial was adjourned on the agreement of the parties.

position. The trial court's finding that the failure to hire an expert was not a strategy decision is not clearly erroneous.

¶8 At the ***Machner*** hearing the theory of defense was explained as "basically a he-said/she-said type of case." Bonnie's delayed reporting and changing story which increased the frequency and type of conduct that occurred played a role in the theory of defense. The defense also wanted to suggest that due to discord in the martial relationship, Bonnie's mother had set Bonnie in motion to make false accusations against Scott.

¶9 McGuire's testimony related to the theory of defense. She explained how the interview protocol she utilized was designed to provide the most reliable and untainted information. She explained why children delay in disclosing abuse and make piecemeal disclosures. She explained how fear of the reaction of family members can make a child ambivalent about disclosure. Why a child can remember "who" and "where" but not "what" and "when" of an assault was also explained. The defense did not have its own expert to speak to these common behaviors of child victims. Rather on cross-examination of McGuire the defense attempted to elicit an expert's acknowledgement that false reporting occurs. It was untested cross-examination and it backfired on the defense. Questions about false reporting allowed McGuire to explain how the protocol she followed reduces false allegations to between three and ten percent of cases. That led to further questions which ultimately elicited responses that, as discussed later in this opinion, violate ***Haseltine***. That the defense was attempting to use McGuire as its expert is further exhibited by questions put to her about alternative hypotheses for the child's accusation, including the possibility that the child had been influenced to make added allegations or false allegations to serve the needs or purposes of somebody else. When the defense questioned whether a child would make false

allegations as a "pity-poor-me syndrome," McGuire indicated that was beyond the scope of her expertise. Similarly, McGuire was unable to speak to a "reinforcement process" that the defense suggested can occur during an interview with a child. The defense threw in possible alternative explanations for false allegations that tied into the theory of defense but left them unsupported by expert testimony.

¶10 The State also contends that because Scott did not establish that there was an expert available and what would have been said to rebut McGuire, he has not shown ineffective counsel. *See* ***Thiel***, 264 Wis.2d 571, ¶44 (defendant alleging a failure to investigate by counsel must allege with specificity what the investigation would have revealed). The trial court found pretrial that an expert to rebut McGuire could be found. In a motion for postconviction discovery, the testimony of Dr. David Thompson, a certified forensic child psychologist, was presented. Dr. Thompson explained how he would evaluate Bonnie's videotaped interview and her delayed and piecemeal reporting. He suggested other possible reasons for a child victim over time to expand the type of conduct that occurred.[7] The record establishes that an expert in the field of child psychology could have offered information to compete with McGuire's explanation of victim behavior.

¶11 For a lack of its own expert, the defense attempted to elicit from McGuire information bearing on the theory of defense. Cross-examination of

[7] Dr. Thompson also acknowledged that prior literature spoke of the concept of accommodation—where a victim tries to offer information to please examiners, parents, or people in authority—but that after further research it was no longer an accepted concept. The trial court denied Scott's motion to have Dr. Thompson interview or examine the victim to explore the possibility that the child's changing disclosure of the frequency and nature of conduct was due to prompting.

McGuire produced testimony that she had not uncovered any false allegations in any of more than 1,200 interviews. "The question of whether a witness has improperly testified as to the credibility of another witness is a question of law which we review independently." ***State v. Huntington***, 216 Wis. 2d 671, 697, 575 N.W.2d 268 (1998). To determine whether testimony violates the ***Haseltine*** rule, we examine the testimony's purpose and effect. ***State v. Tutlewski***, 231 Wis. 2d 379, 388, 605 N.W.2d 561 (Ct. App. 1999).

¶12 The State's position that McGuire's testimony that she had not uncovered any false allegations did not violate ***Haseltine*** is untenable. It is true that McGuire did not directly testify that Bonnie was telling the truth. However, the implication from her testimony was clear—Bonnie was just one of many other children McGuire had interviewed that were truthful. Although the intended purpose of the cross-examination was to emphasize the possibility that children do make false allegations, the effect of McGuire's answer was far afield from that point. "The testimony was tantamount to an opinion that the complainant had been assaulted—that she was telling the truth." ***State v. Krueger***, 2008 WI App 162, ¶16, 314 Wis. 2d 605, 762 N.W.2d 114. This is particularly true when the testimony came on the heels of McGuire's explanation that the child advocacy center's process was designed to ferret out the truth.[8] It was not reasonable for

[8] The following excerpt from McGuire's cross-examination shows the context of the ***Haseltine*** violation:

> Q. You would like to think you are essentially preventing false allegations?
>
> A. I would like to.
>
> Q. You know that there have been any number of false allegations that have occurred in our system of justice that involve sexual assaults, right?
>
> A. Historic -- In the past, historically, there were.

(continued)

trial counsel to pursue cross-examination which tended to and in fact did elicit the offending response. The defense team's failure to present its own expert and proceeding blindly in trying to elicit favorable expert testimony from McGuire was deficient performance in these circumstances.

Q. And there still are?

A. That's possible.

Q. Well, you know that from current history that there are false allegations that occur on any number of times, not just in the past. Or if the past means yesterday, I'll accept that, but you know that that's going on?

A. The whole point of the Child Advocacy Center process, though, is because in the past things happened much more often than they do now and current scholarship tells us that there are false allegations in somewhere between three and 10 percent of cases.

Q. Fair enough. But there are still false allegations?

A. Correct.

Q. And I think that you told us in direct testimony but if I'm misstating this, forgive me, that you've interviewed about a thousand people since you've been employed with the Child Advocacy Center. Is that correct?

A. Yeah. A little more than that but --

Q. Okay. Do you have a number?

A. It's over 1,200.

Q. And of those who you have interviewed, have you discovered any false allegations?

A. Um, not to my recollection.

Q. Have you believed every child you've interviewed since you began working with the Child Advocacy Center?

R. A.When I follow the process -- I have to really think on this. I can't remember of a child that clearly lied to me.

¶13 We turn to consider whether Scott was prejudiced by deficient performance. The failure to present an expert witness may not alone have been prejudicial because, as the defense team testified, the battle of experts can some times have no impact on the jury. Here the absence of a defense expert led the defense to utilize McGuire as its expert and an attempt to elicit from her field-based recognition that children make false accusations. In turn it led to the testimony violating ***Haseltine***. The implication that Bonnie, like the 1,200 other children McGuire had interviewed, was telling the truth was highly prejudicial to the defense. It came from a person considered an expert in working with child victims and the only expert in the case.

¶14 The trial court observed the entire trial. It summed up the combined effect of what it observed as deficient performance:

> That isn't to say that in a he-said/she-said case juries are not permitted to ignore evidence they don't accept and give more weight to certain other items of evidence they do accept. But the important part is that every defendant is entitled to their day in court with the effective assistance of counsel. And because of those misgivings, shortcomings, omissions and oversights of defense counsel here, I think Mr. Scott did not receive a full and fair trial in this matter.

We agree; the combined effect of deficient performance regarding the lack of a defense expert and eliciting testimony violating ***Haseltine*** shakes our confidence

in the outcome.[9] We affirm Scott's right to a new trial because of ineffective assistance of counsel.

By the Court.—Order affirmed.

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

[9] We also share the trial court's strong reaction to Attorney Boyle's failure to view the videotaped interview before trial. Attorney Boyle was responsible for the cross-examination of the child. Although Attorney Boyle read a transcript of the interview before trial, he did not observe the body language and voice inflections a witness displays in live testimony. Those attributes of live testimony are observed by the jury and utilized in determining credibility. *See* ***Soo Line R. Co. v. DOR***, 97 Wis. 2d 56, 59, 292 N.W.2d 869 (1980) ("factual determinations are made on the basis of the factfinder's observations of the witnesses as they relate their version of the events in question," and a witness's "demeanor on the stand and the manner in which he answers questions are indications of truthfulness which cannot be conveyed in a written record"). It is advantageous to view the visual clues more than once.