

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 31, 2012

A. John Voelker
Acting 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. 2011AP746-CR

Cir. Ct. No. 2009CF695

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAWRENCE J. TURNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: JOHN D. MCKAY, Judge. *Affirmed.*

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Lawrence Turner appeals a judgment convicting him of sexual assault of a child and an order denying his postconviction motion in

which he alleged ineffective assistance of counsel.¹ He argues that the trial court erred when it received in evidence at the bench trial a video recording of the six-year-old victim's statement and that his trial counsel was ineffective when dealing with Turner's allegation that someone coached the victim during her trial testimony. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 Turner was charged with sexually assaulting Rebecca A.B. At the preliminary hearing, Rebecca was asked to spell her name. She responded "R-E-B-E-C-C-A." The prosecutor then asked, "Is that right?" Rebecca responded "Yeah." At that point defense counsel objected stating, "I've been observing the mother. She just nodded yes after the question was asked. This is not proper." The court commissioner then instructed Rebecca's mother not to shake her head or indicate anything and to keep a "wooden look" on her face. The court commissioner refused to consider Rebecca's videotaped statement, finding insufficient inquiry into Rebecca's understanding of the consequences of telling a lie.

¶3 During the bench trial, the trial court, recognizing that it was not bound by the commissioner's decision, admitted Rebecca's videotaped statement into evidence "for what it was worth." Rebecca testified that Turner touched her "bottom part" and then pointed to a diagram and identified the spot he touched as her "musn't touch it" rather than her buttocks. She stated that she did not tell anybody about Turner's acts until her mother walked in on them while Turner was

¹ Turner was also convicted of two counts of domestic battery. The issues raised on appeal do not relate to those charges.

pulling down her pants. On cross-examination, the defense attempted to establish whether the assault occurred before or after the Fourth of July. On redirect examination, the prosecutor asked whether the date was just a guess, and Rebecca confirmed that it was. On recross-examination, after Rebecca affirmatively answered the questions: “Some grown-ups told you that you had to come in here and talk to us today, didn’t they?” and “A lot of things you’re saying to us are just a guess, right?” Defense counsel then stated that Turner had just alerted him to the fact that “one of the people in the gallery is coaching by shaking her head.” Counsel indicated that it was a different person than the one accused of coaching during the preliminary hearing. The court indicated that it saw no coaching, but that someone had left the courtroom during the course of the discussion. The court then admonished the spectators not to coach the witness and instructed Rebecca to pay no attention to anybody in the audience.

DISCUSSION

Admissibility of the Recorded Statements

¶4 WISCONSIN STAT. § 908.08(3)² authorizes the court to admit a child’s recorded statement into evidence upon finding that: (1) the trial will take place before the child’s twelfth birthday; (2) the recording is accurate and free from excision, alteration and visual or audio distortion; (3) the statement was made under oath or affirmation or, if the child’s developmental level is inappropriate for the administration of an oath or affirmation in the usual form, upon the child’s understanding that false statements are punishable and of the

² All references to the Wisconsin Statutes are to the 2009-10 version.

importance of telling the truth; (4) the time and circumstances of the statement provide indicia of trustworthiness; and (5) admission of the statement will not unfairly surprise any party or deprive any party of a fair opportunity to meet allegations made in the statement.

¶5 Turner correctly notes that the circuit court did not make specific findings as to these factors. However, the court implicitly made these findings when it considered the commissioner's ruling on these issues. It is not disputed that the trial took place before Rebecca's twelfth birthday. The defense conceded that the recording was accurate and free from excision, alteration or distortion. The commissioner also found that Rebecca understood the difference between the truth and a lie, a finding implicitly accepted by the trial court. The court also considered the commissioner's conclusion that there was insufficient inquiry into Rebecca's understanding of the consequences of telling a lie. The court correctly concluded that it was not bound by the commissioner's decision. The court, based on its review of the recording, implicitly found adequate demonstration that Rebecca was aware of the inter-related concepts of the importance of telling the truth and the consequences of failing to tell the truth. *See State v. Jimmie R.R.*, 2000 WI App 5, ¶41, 232 Wis. 2d 138, 606 N.W.2d 196. Turner's motion to exclude the recording did not challenge the indicia of trustworthiness based on the time and circumstances of the interview or allege any surprise arising from use of the statement. The video recording was admissible based on the court's implicit findings.

Ineffective Assistance of Counsel

¶6 Turner failed to establish ineffective assistance of trial counsel based on counsel's response to Turner's allegation that someone in the audience was

coaching Rebecca during her trial testimony. Turner argues that counsel should have made an effort to ascertain who was coaching Rebecca and whether it was an isolated incident. He argues that his attorney should have requested a mistrial or that the person doing the coaching should have been removed from the proceedings, and suggests counsel should have raised the question by a sidebar conference to give the court an opportunity to observe the coaching.

¶7 A defendant alleging ineffective assistance of counsel must establish both deficient performance and prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The defendant must show that counsel's representation fell below an objective standard of reasonableness. *Id.* at 687-88. Counsel's strategic choices made after thorough investigation of the law and facts are virtually unchallengeable. *Id.* at 690. To establish prejudice, the defendant must show a reasonable probability that, as a result of counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one that undermines this court's confidence in the outcome. *Id.* at 694.

¶8 Turner established neither deficient performance nor prejudice from his counsel's handling of the alleged coaching. There is no evidence that the coaching occurred. Counsel reasonably alerted the court to his client's allegation of coaching and reasonably relied on the court to prevent any further coaching. Counsel testified at the postconviction hearing that he did not request a mistrial because he believed that any potential coaching was advantageous to the defense because it would cast doubt on Rebecca's testimony. The decision not to request a mistrial constitutes a reasonable strategy that cannot be second-guessed on appeal. Turner also failed to establish that his counsel's response to the alleged coaching prejudiced the defense. The key parts of Rebecca's testimony did not consist of

yes or no questions where nodding or shaking one's head could influence her answers. The alleged coaching occurred during testimony about Rebecca's guessing as to whether the assault took place before or after the Fourth of July, which was not essential testimony. The unverified allegation of coaching and counsel's response to the allegation do not undermine this court's confidence in the verdict.

By the Court.—Judgment and order affirmed.

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

