COURT OF APPEALS
DECISION
DATED AND RELEASED

September 17, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 96-1950-CR
96-2614-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT G. HARKEY,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Robert G. Harkey appeals from a judgment of conviction of four counts of first-degree sexual assault and from an order denying his postconviction motion. He argues that trial counsel was ineffective and that evidence was improperly admitted. We reject his claims and affirm the judgment and the order.

Harkey's first claim is that trial counsel was constitutionally deficient in advising Harkey not to testify, for failing to object to the victim's use of a teddy bear during her testimony, for failing to vigorously cross-examine the victim, for failing to meaningfully cross-examine other witnesses, and for failing to object to incompetent and irrelevant testimony. "There are two components to a claim of ineffective trial counsel: a demonstration that counsel's performance was deficient, and a demonstration that such deficient performance prejudiced the defendant. The defendant has the burden of proof on both components." ***State v. Smith***, 207 Wis.2d 259, 274, 558 N.W.2d 379, 386 (1997) (citation omitted). The trial court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. *See* ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. *See* ***id.***

On the performance prong, we determine whether trial counsel's performance fell below objective standards of reasonableness. *See* ***State v. McMahon***, 186 Wis.2d 68, 80, 519 N.W.2d 621, 626 (Ct. App. 1994). This standard encompasses a wide range of professionally competent assistance. *See* ***id.*** We presume that counsel's performance was satisfactory; we do not look to what would have been ideal, but rather to what amounts to reasonably effective representation. *See* ***id.***

The allegations were that Harkey had sexual contact with the three-year-old daughter of his girlfriend. The contact occurred between March 1 and March 25, 1995, when the victim resided with her mother, infant brother and Harkey at a residence in Delavan, Wisconsin. The contact was revealed by the victim to her great-grandmother after the victim returned to live with her father in

Texas. Harkey presented an alibi defense. He presented employer's records and testimony that he did not have the opportunity to be alone with the victim during the time of the alleged contact.

Harkey argues that because he was using an alibi defense, his testimony was critical to support that defense and the advice of counsel was unreasonable. The trial court found that Harkey himself made the decision not to testify.[1] A deliberate and knowing election between alternative courses of action as a matter of strategy does, in effect, estop the defendant from claiming error. *See* ***State v. Ruud***, 41 Wis.2d 720, 726, 165 N.W.2d 153, 156 (1969). Even if trial counsel advised Harkey not to testify because Harkey had a prior conviction for delivering marijuana, the advice was reasonable. *See* ***State v. Flynn***, 190 Wis.2d 31, 52, 527 N.W.2d 343, 351 (Ct. App. 1994), *cert. denied,* 514 U.S. 1030 (1995) (advice not to testify was good advice and does not entitle defendant to "second roll of the dice"). Moreover, we reject the notion that as a matter of law a defendant's testimony is necessary to present an alibi defense. Here, written records and testimony established the alibi defense. Harkey's testimony was not critical to the defense. Harkey's claim that trial counsel performed deficiently with respect to not presenting Harkey's testimony fails.

At trial the victim was four years old. She held her teddy bear while on the stand and pretended the bear was giving the testimony. Harkey claims that

[1] Harkey finds fault with the trial court's colloquy with Harkey at the beginning of trial in which the court advised Harkey of his right to testify or his right to waive his testimony. The trial court simply made clear to Harkey that the prosecution could not call him to the stand. The colloquy was consistent with making a record that the waiver of the right to testify is knowing and voluntary. *See* ***State v. Wilson***, 179 Wis.2d 660, 671-72, 508 N.W.2d 44, 48 (Ct. App. 1993), *cert. denied*, 513 U.S. 829 (1994).

trial counsel should have objected to the victim's use of the bear. However, such an objection lacked merit and the failure to make it did not prejudice Harkey.

A trial court is obligated to and has the power to alter courtroom procedures to eliminate or lessen the impact in-court testimony has on the emotional well-being of a young witness so that the criminal justice system does not further traumatize the child victim. *See* ***State v. Gilbert***, 109 Wis.2d 501, 517, 326 N.W.2d 744, 751-52 (1982). Even the United States Supreme Court has given its "imprimatur to the utilization of unusual procedures when found to be necessary to protect child witnesses from the trauma of usual courtroom testimony." ***State v. Thomas***, 150 Wis.2d 374, 381, 442 N.W.2d 10, 14 (1989) (explaining the consensus of the Supreme Court in ***Coy v. Iowa***, 487 U.S. 1012 (1988), which struck down a statute permitting the use of a screen to shield child witnesses from defendants because only a fact specific reason and not a generalized legislative policy can support an infringement on a defendant's right to face-to-face confrontation). When necessary, our courts have approved of the use of a screen to shield the child victim from viewing the defendant while the victim's testimony is videotaped for trial. *See* ***Thomas***, 150 Wis.2d at 387-94, 442 N.W.2d at 16-20; ***State v. Street***, 202 Wis.2d 534, 554, 551 N.W.2d 830, 840 (Ct. App. 1996).

The trial court found that the victim was very young, shy and having difficulty understanding the questions and presenting substantive testimony. The victim's use of her bear was a vehicle to facilitate her testimony and minimize the

potential trauma caused by her court appearance.[2] It was a less intrusive tool than using a screen and did not affect the integrity of the proceeding. Given the trial court's findings regarding the victim's difficulties at trial, an objection to the use of the bear would have been properly overruled.

Harkey faults trial counsel for failing to attack the victim's credibility on cross-examination. At the postconviction hearing, counsel testified that as a matter of strategy he avoided aggressive cross-examination of the young victim to prevent alienating the jury. We are not to second-guess trial counsel's selection of trial tactics or the exercise of professional judgment after weighing the alternatives. *See* ***State v. Felton***, 110 Wis.2d 485, 502, 329 N.W.2d 161, 169 (1983). A strategic or tactical decision must be based upon rationality founded on the facts and law. *See* ***id***

The decision to not extensively cross-examine the victim was reasonable. There is no doubt that the jury was aware of the difficulties the victim was experiencing giving trial testimony. Her testimony was broken up by two breaks. When pressed for details of the assaults, she became fidgety and distracted. Cross-examination has been recognized as potentially the most emotionally damaging aspect of a child's participation in a trial. *See* ***State v. Pulizzano***, 155 Wis.2d 633, 647, 456 N.W.2d 325, 331 (1990). The cross-

[2] In his statement of facts, Harkey implies that the prosecutor's use of leading questions was not objected to by trial counsel. The record reflects that trial counsel made appropriate objections in an attempt to limit the prosecution's use of leading questions. Harkey claims that the use of leading questions, coupled with the victim's use of her teddy bear, constitute reversible error. However, the trial court properly granted the prosecution leniency with respect to the use of leading questions. *See* ***State v. Gilbert***, 109 Wis.2d 501, 515, 326 N.W.2d 744, 751 (1982) (use of leading questions to protect the child witness); ***State v. Barnes***, 203 Wis.2d 132, 140, 552 N.W.2d 857, 860 (Ct. App. 1996) (leading questions of a child witness is a well-recognized exception to the prohibition on the use of leading questions).

examination that Harkey suggests was necessary to attack the victim's credibility would have required the victim to recount details of the sexual contact. The potential to turn the jury against Harkey for such prolonged cross-examination was real. *See* ***State v. DeLeon***, 127 Wis.2d 74, 85, 377 N.W.2d 635, 641 (Ct. App. 1985) (impeachment of a child witness may cast both defendant and defense counsel in a negative light). Moreover, defense counsel may not treat a child witness in a callous manner and must act responsibly to minimize a child's trauma. *See* ***Gilbert***, 109 Wis.2d at 517-18, 326 N.W.2d at 752. In this instance, trial counsel was able to minimize the victim's trauma and still bring to light inconsistencies in her testimony through other witnesses. Trial counsel was not deficient with respect to his cross-examination of the victim.

Harkey also challenges the quality of trial counsel's cross-examination of other witnesses at trial. He first suggests that trial counsel should have challenged the competency of Kamie Haase, a registered nurse who conducted a sexual assault examination of the victim, to give an opinion as to the source of the victim's physical injury. However, "[t]he law ... does not recognize any gradation of experts based on specialized training or practice. So long as [the witness] qualifies as an expert the weight to be accorded his [or her] testimony is for the [fact-finder]." ***Riehl v. De Quaine***, 24 Wis.2d 23, 32, 127 N.W.2d 788, 793 (1964).

Harkey contends that Haase should have been asked on cross-examination whether the injury she discovered to the victim's hymen could have been self-inflicted. Trial counsel testified that he had a medical expert review Haase's report and his expert confirmed that the injury was consistent with sexual assault and that it was unlikely it was self-inflicted because it would have been

very painful. Based on that information, it would have been ineffective for counsel to ask whether the injuries were self-inflicted.

Harkey next implies that trial counsel should have objected to the opinion of Dr. Ruth McHugh that, in Harkey's words, "something could have happened to [the victim's infant brother] but did not show up in any examination."[3] Harkey misrepresents the doctor's testimony. She never testified that it was possible that the infant had been subjected to an assault even in the absence of physical injuries. She first testified in the context of her expertise that it is uncommon to have physical findings of sexual assault of children and that the absence of physical damage does not necessarily mean that no abuse occurred. Several questions later, she reported that there was no physical injury to the infant. The two facts were never linked together as Harkey suggests and there was no basis for an objection. Harkey does not suggest, nor do we discern from the record, any basis to challenge on cross-examination McHugh's testimony about her examination of the victim or recitation of the history provided to her.

Harkey suggests that Peggy Hill, a Texas child protective services case worker, was improperly allowed to testify that it was her opinion that the victim knew the difference between telling the truth and telling a lie. He claims that trial counsel was deficient for not challenging Hill's qualifications for making an assessment of the child's intelligence level. We summarily reject his claim because there was no prejudice in light of the experience and qualifications Hill gave at the start of her testimony. The weight of her testimony was for the jury.

[3] The victim had said that Harkey put his finger in her infant brother's anus.

A similar challenge is mounted to trial counsel's cross-examination of Carmen Connelly, a counselor of sexual abuse victims. Connelly testified as to the behavior of children in not reporting sexual assault, in delayed reporting once the child feels safe, and the counseling techniques used with children. Harkey implies that trial counsel should have objected to leading questions and that Connelly's opinions about the reluctance of a child to report sexual contact were without a proper foundation. Connelly was qualified as an expert in the field of child sexual assault counseling. There was no basis for an objection or to challenge Connelly's assessment. Harkey claims that during cross-examination, trial counsel should have highlighted Connelly's opinion that children under the age of seven are unreliable in their trial testimony because of stress. However, such unreliability does not work entirely in Harkey's favor because unreliability at trial can render more credible the child's initial reports of abuse. This is particularly true here where the victim had obvious difficulty in giving her trial testimony. Avoiding the question was reasonable representation.

The final complaint about trial counsel is that counsel failed to object to much of the testimony of police officer Gregory Strohm. Harkey fails to provide record citations to objectionable testimony or a legal analysis of any basis for an objection.[4] We will not address arguments inadequately briefed and which lack citation to proper legal authority. *See* ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992). Our review of the officer's testimony does

[4] We note that when trial counsel testified, Harkey did not ask counsel any questions about the cross-examination of Strohm. In order to obtain appellate review of an ineffective assistance of counsel claim, trial counsel must testify in the trial court and explain his or her conduct in the course of the representation. *See* ***State v. Krieger***, 163 Wis.2d 241, 253, 471 N.W.2d 599, 603 (Ct. App. 1991). In the absence of a proper record, we have nothing to review. *See* ***id.*** at 254, 471 N.W.2d at 603.

not reveal any basis for the objections Harkey suggests. Trial counsel was not deficient in any respect.

Harkey argues that hearsay evidence from the victim's paternal grandmother, paternal great-grandmother, Hill and Connelly should not have been admitted under the residual hearsay exception, § 908.03(24), STATS. An evidentiary ruling is reviewed for an erroneous exercise of discretion. *See* ***State v. Sorenson***, 143 Wis.2d 226, 240, 421 N.W.2d 77, 82 (1988). We will not find an erroneous exercise of discretion if any reasonable basis exists for the decision based on accepted legal standards and the facts of record. *See* ***id.***

Use of the residual hearsay exception is an appropriate method to admit statements from young sexual assault victims if the statements are otherwise proven sufficiently trustworthy. *See* ***id.*** at 243, 421 N.W.2d at 84. The trial court is to consider the attributes of the child making the statement, including age, ability to communicate verbally, to comprehend statements or questions of others, to know the difference between truths and lies, and any fear of punishment, retribution or other personal interest, such as a close family relationship, which might affect the child's motivation to tell the truth. *See* ***id.*** at 245, 421 N.W.2d at 84. Additionally, the court should examine the relationship to the child of the person to whom the statement was made and any motivation of the recipient of the statement to fabricate or distort its contents; the circumstances under which the statement was made, including the availability of a person in whom the child might confide; the content of the statement itself for any sign of deceit or falsity and whether it reveals knowledge of matters not ordinarily attributable to a child of similar age; and other corroborating evidence, such as physical evidence or opportunity or motive of the defendant consistent with the occurrence the statement describes. *See* ***id.*** at 245-46, 421 N.W.2d at 84-85.

Harkey claims that the trial court did not make findings on any of the factors which constitute guarantees of trustworthiness. Even in the absence of specific findings, a reviewing court is obliged to uphold a discretionary determination if it can independently conclude that the facts of record applied to the proper legal standard support the trial court's decision. *See* ***In re Stephanie R.N.***, 174 Wis.2d 745, 767, 498 N.W.2d 235, 242 (1993).

The facts here support admission of the statements. The victim was very young; the sexual contact involved familial relationships; for the most part the statements, particularly the first revelation of the assaults, were unsolicited and were made to persons the child trusted and at a time when the child was away from her mother; the manner in which the statements were expressed was age appropriate; and finally, the statements were corroborated by physical evidence and the victim's residence in Wisconsin with Harkey. The admission of the testimony of the victim's paternal grandmother, paternal great-grandmother, Hill and Connelly as to statements the victim made to them was a proper exercise of discretion.[5]

In a summary fashion, Harkey contends that it was improper to allow Hill to testify that the victim's mother told her that Harkey had admitted that with respect to his prior marriage "the police had come out to his home on prior occasions for domestic violence." Harkey claims that the testimony was triple hearsay, but he does not provide any discussion of the issue. We do not address

[5] Harkey includes the victim's mother in his list of witnesses who allegedly gave impermissible hearsay testimony. He gives no citations to the record in his argument and we are unable to discern what possible hearsay evidence from the victim's mother he objects to. We need not sift the record to ascertain the basis for the appellant's contention. *See* ***Fuller v. Riedel***, 159 Wis.2d 323, 330 n.3, 464 N.W.2d 97, 100 (Ct. App. 1990).

appellate issues presented in such summary fashion. *See* ***Pettit***, 171 Wis.2d at 646, 492 N.W.2d at 642. We note that the trial court exercised its discretion in admitting the testimony as other acts evidence and to impeach the victim's mother.

By the Court.—Judgment and order affirmed.

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