COURT OF APPEALS DECISION DATED AND FILED

September 29, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2014AP2675-CR

Cir. Ct. No. 2012CF2162

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA J. FELTZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELLEN R. BROSTROM, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Bradley, JJ.

¶1 BRADLEY, J. Joshua J. Feltz appeals from a judgment entered after a jury found him guilty of two counts of repeated first-degree sexual assault

of the same child, contrary to WIS. STAT. § 948.025(1)(a) (2013-14)[1], and from an order denying his postconviction motion. Feltz argues: (1) the evidence was insufficient to support a conviction on the second count; (2) the police officer's testimony that the victim appeared to be telling the truth violated ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984); and (3) the prosecutor's closing argument referencing the victim's religious schooling improperly enhanced her credibility. We affirm.

BACKGROUND

¶2 This case involved the repeated sexual assault of T.S. that began when she was six years old and continued for about two years. When T.S. was fifteen years old, she reported the assaults to Officer Jody Young, disclosing that Feltz started assaulting her when she was six years old and when Feltz was thirteen years old. Feltz's grandparents lived next door to the victim and Feltz would visit his grandparents regularly. According to the victim, the first incident occurred when Feltz, the victim, and Feltz's younger sister, Ashley, were playing truth or dare inside a playhouse in T.S.'s backyard. Feltz dared the victim to remove her clothes and Feltz removed his. Feltz took the victim's hand and made her grab his penis. Feltz masturbated and ejaculated. Feltz later had the victim put her mouth on his penis two separate times and he put his fingers in her vagina at least two times. T.S. reported that Feltz also rubbed his penis on her chest and ejaculated. After this first time, T.S. said Feltz would do similar things to her

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[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

almost every time he visited his grandparents, either in the playhouse or the guest bedroom at Feltz's grandparents' home.

¶3 The State initially charged Feltz with one count of repeated sexual assault of the same child, but ultimately Feltz was charged with two counts, the first covering the timeframe between May 6, 2003 and September 1, 2004 and the second covering the timeframe between September 2, 2004, and May 5, 2006. Feltz denied ever assaulting the victim and pled not guilty.

¶4 At trial, the victim testified that Feltz sexually assaulted her at least twelve times. The initial episode, which consisted of at least three separate assaults, occurred either the summer before or the summer after first grade, which means it took place between May 2003 and September 2004. T.S. testified the assaults continued during the time she was in second grade and the summer after second grade. This timeframe included September 2004 to September 2005.

¶5 T.S. testified that the first time the assaults occurred she was six years old. They went into the playhouse to cool off and Feltz dared her to take off her clothes, which she did. Feltz was also naked. Then Feltz touched her chest and legs, made her massage his penis and put his penis in her mouth until it got hard, after which he ejaculated on her chest. They then left the playhouse to play tag, but returned later when Feltz made the victim "give him another blow job" after which he ejaculated on her chest and then put his penis inside the victim's vagina. The victim said this hurt her. She then testified that Feltz touched her vagina and was "fingering" her, described as putting his fingers into her vagina. When the victim had her mouth on Feltz's penis, he had his hands on her head pushing her down on his penis and he ejaculated on her face.

¶6 T.S. testified that this happened in the playhouse "many times"—more than five times for sure. Each time Feltz assaulted her, he repeated the pattern of "[b]low job, then fingering, then oral sex." T.S. defined "oral sex" as "his penis was inside my body." She told the jury Feltz assaulted her "pretty much every time" Feltz came to visit his grandparents, either in the playhouse or the guest bedroom of his grandparents' house. T.S. also testified that on more than three separate times, after a blow job, Feltz put his penis in her butt "the place where the poop comes out" and then would make her give him another blow job. This occurred both in the grandparents' guest bedroom and the playhouse. T.S. testified the assaults happened at least six times in the playhouse and at least six times in the grandparents' guest bedroom.

¶7 Police Officer Young also testified that she interviewed T.S., created a police report, called the grandparents to get contact information for Feltz and his sister, and tracked down Feltz and his sister Ashley to interview them. Young scheduled several appointments to speak with Ashley at her home, but when Young arrived at the scheduled time, Ashley either would not answer or would be leaving the house. Young was finally able to interview Ashley by showing up unannounced at MATC where Ashley was in class. Ashley was pulled out of class and spoke to Young but did not remember what the victim reported. Young was unable to locate Feltz and had to have a detective find him. Young also testified about T.S.'s notebook where she wrote down everything that had happened to her, and a picture of the playhouse T.S. had provided. Young explained to the jury the reasons child victims often delay reports of sensitive crimes and testified to the specific reasons T.S. delayed reporting here: she did not know at the time the assaults happened that it was wrong and when she learned in fifth grade health class that it was wrong, there were problems in the family and T.S. did not want to

add to them. On cross-examination, Feltz's attorney asked a series of questions that Feltz now claims elicited answers from Young about T.S.'s truthfulness.

> [DEFENSE COUNSEL]: Does the word disclosure suggest that an event is being revealed that actually happened as opposed to events?
>
> ….
>
> [THE WITNESS]: I asked- - I ask- - When I talk to somebody, I ask questions because, you know, we're seeking the truth. That's what we're trying to get out of this- -
>
> [DEFENSE COUNSEL]: So is there a point in your investigation when you stop and say, could this - - this information be false, inaccurate?
>
> ….
>
> A … Can you repeat that again?
>
> Q I think the first question was about the word disclosure and whether that isn't is a word that implies not just an accusation, but the revelation of fact?
>
> A When I interview victims, I explain that they're- - you know, it's very important everything they tell is the truth. There are consequences to lying to the police. She gave me the information.
>
> When she was done giving me the information, if I had questioned anything in what she said, that's part of my interview process. But when I'm done with my interview and I collected the information, it appeared that she was being truthful when- -

At this point, Feltz's attorney objected, but the trial court overruled the objection, saying "Counsel, you asked the question." Officer Young finished her answer:

> It did appear that she was being truthful, but when I'm done with it, I don't say, you know, for example, are you sure you're telling me the truth? I don't do that.

> I get a feel for people when I'm talking to them, and the information she was giving to me appeared to be truthful.

Feltz's attorney then moved for a mistrial "based on the officer testifying that she believed [T.S.] to be truthful." The trial court denied the motion, ruling:

> I would deny the mistrial. I think your questions absolutely sort of boxed her in. You know, it would have been [I] presume an acceptable answer that she didn't believe the victim and, therefore, took various action, but you were not preparing to get the opposite answer which was, in fact, the truthful answer.
>
> I frankly thought your questions were dangerous. I thought that they actually elicited the kind of response we ultimately got. She did attempt to answer numerous ways from a more process-based standpoint, but you kept asking and kept asking. Eventually you got kind of the obvious truthful answer.
>
> In addition, to the extent that that created any prejudice against Mr. Feltz, it certainly [is only] one ioda [sic--iota] of evidence among lots and lots of evidence, and certainly no grounds for mistrial.

¶8 Feltz called his sister to testify in his defense. Ashley denied any knowledge of her brother assaulting T.S. in the playhouse. Ashley testified the playhouse was "icky" and she only went into the playhouse with T.S. on two occasions to look at a bird's nest. Ashley testified about her interview with Officer Young and testified that before meeting with Officer Young, her grandparents told her "Josh was being charged for sexually offending [T.S.]." Officer Young testified in rebuttal that this information had not been revealed to anyone in the Feltz family. Young said only that she wanted to speak with Ashley about an investigation she was conducting regarding what happened when Ashley was a child visiting her grandparents' neighborhood.

¶9 Both of Feltz's grandparents testified. Feltz's grandmother testified that Feltz visited their home four times per year between 2003 and 2006. Feltz also testified that he visited his grandparents four times a year.

¶10 During the State's closing argument, the prosecutor in discussing T.S.'s credibility referred to the fact that T.S. attended a religious school:

> So [T.S.] is just making this all up. Let's go with that. Let's analyze that.
>
> That would mean that she would have some reason to make up a very, very, very detailed story about acts that she could barely speak about, which is a mighty odd thing to decide to do. I think I'll make something up that I can't actually say these words very well and that are mortally embarrassing to have to say that you did, and that - -
>
> You know, we're talking about a girl who is at a Christian school, went to a Christian school - -

¶11 Feltz's attorney objected and in a sidebar expressed concern that the prosecutor was going to argue that because T.S. went to a Christian school, she would not lie. The prosecutor explained she was not going to say T.S. would not lie because of the school she attended, but that T.S. would take the oath seriously. The parties agreed to remove the religious aspect and use the language "school where moral guidance is provided." The prosecutor then continued the closing argument:

> I'll just rephrase that.
>
> She goes to a school where moral guidance is provided and has done so for her life.
>
> She takes the oath seriously in front of you. She understands that this is a big deal for this man who she has no apparent ax to grind against.

¶12 During jury instructions, the trial court gave a curative instruction in regard to Officer Young's testimony that T.S. appeared to be telling the truth:

> Officer Jody Young testified that she concluded that [T.S.] seemed truthful during Officer Young's investigation. Regardless of Officer Young's impression of [T.S.], truthfulness or untruthfulness of any witness is a matter solely for you the jury to determine.

¶13 The jury returned guilty verdicts on both counts and Feltz was sentenced to sixteen years on each count, concurrent, consisting of six years' initial confinement and ten years' extended supervision. The trial court, however, stayed the sentence and placed Feltz on eight years' probation. Feltz filed a postconviction motion raising the same three issues he argues in this appeal. The trial court denied the motion, ruling: (1) there was sufficient evidence to support the conviction on count two; (2) Officer Young's testimony did not violate ***Haseltine***, and the curative instruction removed any prejudice; and (3) the use of the language "moral guidance" instead of Christian school eliminated the religious aspect, and Feltz was not prejudiced by the comment made in closing argument. Feltz now appeals.

DISCUSSION

A. *Sufficiency of the Evidence*.

¶14 Because a jury is better able to assess testimonial evidence, our review on a sufficiency of the evidence claim is limited:

> When reviewing the sufficiency of the evidence, we will reverse a conviction only if "the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." Thus,

> an appellate court must "search the record to support the conclusion reached by the fact finder."

State v. Schulpius, 2006 WI App 263, ¶11, 298 Wis. 2d 155, 726 N.W.2d 706 (citations omitted). Facts can be established by direct testimony and by any reasonable inferences derived from it. ***State v. Perkins***, 2004 WI App 213, ¶14, 277 Wis. 2d 243, 689 N.W.2d 684.

¶15 Feltz challenges only count two, which alleged he violated WIS. STAT. § 948.025(1)(a) between September 2, 2004 and May 5, 2006. WISCONSIN STAT. § 948.025(1)(a) requires proof that Feltz committed three or more violations under WIS. STAT. § 948.02(1)(am), which is "sexual contact or sexual intercourse with a person who has not attained the age of 13 years and causes great bodily harm."

¶16 T.S. testified that Feltz assaulted her at least twelve times and that each time consisted of three separate sexual acts. That is a minimum of thirty-six sexual assaults. She said that the sexual assaults continued through the time she was in second grade and the summer after second grade, which would be September 2004 to September 2005. T.S. testified that Feltz sexually assaulted her almost every time he visited his grandparents. The record reflects that at a minimum, Feltz went to his grandparents four times a year. Based on this evidence, a jury could have reasonably found that Feltz repeatedly sexually assaulted T.S. at least three times during the time period set forth in count two. There is sufficient evidence to uphold the conviction.

B. *Officer Young's Testimony that T.S. Appeared to be Truthful.*

¶17 Next, Feltz complains Young's testimony that T.S. appeared to be truthful was improper opinion testimony contrary to the holding in ***Haseltine*** that

bars witnesses from giving opinions as to whether other witnesses are telling the truth. *See* ***id.***, 120 Wis. 2d at 93. We reject Feltz's claim.

¶18 Feltz's attorney asked the questions that resulted in Young's answer that T.S. appeared to be giving truthful information when T.S. reported the crimes to Young. Because Feltz's attorney's questions prompted the challenged answers, our review is limited to whether Feltz's attorney gave him ineffective assistance by asking questions that elicited the challenged responses.

¶19 To establish constitutionally ineffective representation, Feltz must show: (1) deficient representation; and (2) resulting prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient representation, he must point to specific acts or omissions by his lawyer that are "outside the wide range of professionally competent assistance," *see* ***id.*** at 690, and to prove resulting prejudice, he must, in the context of this case, show that what his trial counsel did deprived him of a fair trial, *see* ***id.*** at 687. To establish prejudice, Feltz "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." *See* ***id.*** at 694. We do not need to address both ***Strickland*** factors if Feltz does not make a sufficient showing on either one. *See* ***id.*** at 697.

¶20 Here, Feltz cannot show that the questions and answers prejudiced him. First, Young did not testify that T.S. *was* telling the truth in her trial testimony. She did not vouch for T.S.'s credibility at trial. Rather, Young testified that T.S. *appeared* to be giving truthful information during the police interview. This mitigates any prejudice. Second, the trial court specifically told the jury to disregard Young's impression as the jury is *solely* responsible for

determining who is telling the truth. We presume juries follow instructions. *See* ***State v. Marinez***, 2011 WI 12, ¶41, 331 Wis. 2d 568, 797 N.W.2d 399. Therefore, Feltz was not prejudiced by Young's testimony solicited by his trial lawyer.

C. *Prosecutor's Closing Argument Reference to Christian School.*

¶21 Feltz claims the prosecutor's statements during closing argument about T.S. attending a school where moral guidance is provided unfairly bolstered T.S.'s credibility. We disagree.

¶22 When the prosecutor started to talk about T.S.'s religious education, his trial attorney immediately objected. During the sidebar, everyone agreed that the prosecutor could not say that attendance at the religious school meant T.S. would not lie. Instead, all parties agreed to the use of the language "where moral guidance is provided." Because Feltz's attorney agreed to the use of this language, Feltz waived any objection to it. Thus, our review of this claim is again limited to determining whether Feltz's trial lawyer gave him ineffective assistance by agreeing to the use of the "moral guidance" argument.

¶23 As noted, in order to prevail on an ineffective assistance claim, Feltz must prove both that his trial lawyer acted "outside the wide range of professionally competent assistance," *see* ***Strickland***, 466 U.S. at 690 and that his lawyer's conduct caused prejudice. We are not convinced that Feltz's trial lawyer acted deficiently. His lawyer immediately objected when the prosecutor started talking about T.S.'s religious school, and although he agreed to use of the language "moral guidance," any objection to this language would have been appropriately overruled.

¶24 Although WIS. STAT. § 906.10 prohibits a witness's religious beliefs or opinions being used to enhance credibility, the language "moral guidance" is not a religious belief or opinion. Rather, "moral" is "of or relating to principles or considerations of right and wrong action." *See Moral*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993). Thus, use of the language "moral guidance" was proper and any further objection by Feltz's trial lawyer would have been overruled.

¶25 Moreover, the prosecutor is allowed to argue that a witness is credible in closing argument, *see* ***State v. Lammers***, 2009 WI App 136, ¶16, 321 Wis. 2d 376, 773 N.W.2d 463, the closing argument is not evidence, and the ultimate determination of credibility is for the jury to decide based on the actual evidence, *see* ***State v. Mayo***, 2007 WI 78, ¶44, 301 Wis. 2d 642, 734 N.W.2d 115. Feltz's trial lawyer did not act deficiently in not objecting to the prosecutor's closing argument.

¶26 Finally, Feltz cannot prove that he was prejudiced by the prosecutor's argument. The jury heard T.S. testify in person and it was instructed by the court that it must decide the case based on the evidence, that closing arguments are not evidence, and that it is the sole decider of credibility and truthfulness. We presume the jury followed these instructions, *see* ***Marinez***, 331 Wis. 2d 568, ¶41, and conclude the prosecutor's argument did not render the trial unfair or make the resulting conviction a denial of due process. *See* ***State v. Davidson***, 2000 WI 91, ¶88, 236 Wis. 2d 537, 613 N.W.2d 606 ("[T]he test we apply is whether the [prosecutor's] statements 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'") (citations and quotation marks omitted).

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.