COURT OF APPEALS
DECISION
DATED AND FILED

October 29, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP366-CR **Cir. Ct. No. 2011CF442**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STANLEY J. MADAY, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Columbia County: W. ANDREW VOIGT, Judge. *Reversed and cause remanded with directions*.

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Stanley J. Maday, Jr. appeals his conviction for three counts of first-degree sexual assault of a child, in violation of WIS.

STAT. § 948.02(1)(b) and (e) (2013-14),[1] and an order denying his motion for postconviction relief. Maday contends that his trial counsel was ineffective. Maday argues that trial counsel performed deficiently by failing to object to testimony that he asserts was impermissible expert opinion testimony to the effect that the victim was telling the truth when the victim made a statement incriminating Maday, and that Maday was prejudiced by the expert's impermissible testimony. Maday raises other issues that we need not address because we agree with Maday that his trial counsel was ineffective.

BACKGROUND

¶2 Maday was charged with three counts of first-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(1)(b) and (e). K.L. informed her mother that Maday had touched her breasts and vagina on three occasions between approximately June 2011 and November 2011, at times when she was spending the night at Maday's home.

¶3 At trial, K.L. testified that in November 2011, she spent the night at Maday's home. K.L. testified that she woke up to find Maday rubbing her vagina, that he eventually penetrated her vagina with his finger, and that he rubbed her breast before he left the room where she was sleeping. K.L. testified that she had pretended to be asleep while Maday was touching her because she was afraid he would hurt her, but that she was positive that it was him who touched her. K.L. testified that prior to the November 11 sexual assault, in June and sometime

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

"about" July 2011, Maday had rubbed her breast on one occasion and had rubbed her vagina on one occasion.

¶4 The defense called Katherine Gainey, a social worker who interviewed K.L. after K.L. reported the sexual assaults, who also testified. In response to questions from defense counsel during her relatively brief testimony, Gainey testified that she is trained to use a highly structured interview process with children, called the cognitive graphic interview, in order to avoid conducting leading interviews and to make answers more reliable.

¶5 On cross-examination by the State, Gainey testified that the interview techniques she used are designed to "kind of open the door for children to talk about if something has happened to them," and to avoid leading questions and to make the answers more reliable. Gainey testified that she utilized this technique when interviewing K.L. Gainey then testified, without objection by the defense, as follows:

> [Prosecutor] Have you had experiences in the past where children have been essentially prompted by an adult to give a certain type of answer during this interview?
>
> [Gainey] Yes.
>
> [Prosecutor] And does that become apparent when you use the proper interview techniques?
>
> [Gainey] Yes.
>
> [Prosecutor] So using these interview techniques is a way to insure that a child who has been coached does not continue with the false allegations during the interview?
>
> [Gainey] Yes.
>
> [Prosecutor] Was there any indication that [K.L] had been coached in any way during her interview?
>
> [Gainey] No.

> [Prosecutor] Was there any indication that [K.L.] was not being honest during her interview with you?
>
> [Gainey] No.

This was the final passage of Gainey's cross-examination. On redirect examination by defense counsel, Gainey was asked only briefly to clarify an aspect of the oath given to the victim as part of the interview, and did not directly address coaching or honesty issues.

¶6 The jury found Maday guilty of all charges. Maday moved the circuit court for postconviction relief on the basis of ineffective assistance of trial counsel. Following a ***Machner***[2] hearing, the circuit court denied Maday's motion. Maday appeals.

DISCUSSION

¶7 As pertinent to the issue we resolve on appeal, Maday contends that his trial counsel was ineffective for failing to object to testimony by Gainey that he asserts constituted expert opinion testimony that K.L. was telling the truth. We agree.

¶8 Our review of a claim of ineffective assistance of counsel presents a mixed standard of review. The circuit court's factual findings will be upheld unless clearly erroneous, however, we review independently the application of legal principles to those facts. ***State v. Manuel***, 2005 WI 75, ¶26, 281 Wis. 2d 554, 697 N.W.2d 811.

[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶9 To establish that his or her trial counsel was ineffective, the defendant must demonstrate that counsel's performance was deficient and that he or she was prejudiced by this deficient performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To show that counsel's performance was deficient, the defendant must point to specific acts or omissions by her attorney that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To show prejudice, a 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." ***Id.*** at 694. If the defendant fails to establish either prong of the ***Strickland*** test, this court need not determine whether the other prong is satisfied. ***Id.*** at 697.

¶10 In ***State v. Krueger***, 2008 WI App 162, ¶¶10-13, 314 Wis. 2d 605, 762 N.W.2d 114, we reviewed case law regarding the admissibility of evidence bearing on the credibility of witnesses. In particular we focused on what the case law teaches about expert testimony involving the credibility of alleged child sexual assault victims. *See, e.g.*, ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984) (holding "[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth"); ***State v. Jensen***, 147 Wis. 2d 240, 256, 432 N.W.2d 913 (1988) (holding that although a witness may not testify that a complainant is telling the truth, a witness may testify about the consistency of a complainant's behavior with the behavior of victims of the same crime); ***State v. Romero***, 147 Wis. 2d 264, 277-78, 432 N.W.2d 899 (1988) (holding that a witness may not give an opinion that a complainant is truthful in his or her accusations). Based on this case law, we stated in ***Krueger***:

> [E]xpert testimony [may be admissible] on typical signs of whether a child has been coached or evidences suggestibility and whether the complainant child exhibits such signs. Both address behavioral manifestations of external influences or events impacting upon the complainant. However, … [such testimony must] stop[] short of an impermissible opinion that the child is telling the truth about the specific allegation.
>
> ….
>
> … [T]estimony about a child's consistency, when coupled with testimony regarding the behavior of like-aged children, could serve a legitimate purpose and be a permissible means of explaining the parameters of the interview, understanding the interview, and rebutting the defense's theory of coaching or suggestion. Signs of coaching or suggestion could fall into the realm of knowledge that is outside that of a lay-person jury. [Footnote 10]
>
> > [Footnote 10] We note that testimony regarding coaching may more readily border on truthfulness, as compared to the analysis of reactive behavior….. However, … appropriate testimony addresses objective signs or behavior indicative of whether the child's rendition is of the child's own making—whether truthful or not…. [I]n addition to patterns of consistency, examples of objective behaviors in assessing coaching or suggestion found in sources identified by the State include the child's ability to supply peripheral details of the alleged incident, the use of language that reflects the word usage of an adult, or the reporting of information not appropriate for the developmental level of the child.
>
> … [T]estimony [is not admissible that is] tantamount to an opinion that the complainant had been assaulted—that she was telling the truth…. [Such] testimony simply [goes] too far, and its effect [is] to usurp the role of the jury in determining credibility.

Krueger, 314 Wis. 2d 605, ¶¶14-16 and n.10 (internal citations omitted).

¶11 In ***Krueger***, the witness was asked whether the complainant "'was the product of any suggestibility or any coaching,'" to which the witness

responded that she "'did not get that'" from the victim. ***Id.***, ¶15. The witness elaborated that she "did not get a sense from [the complainant] that she demonstrated a level of sophistication that would be able to maintain some sort of fabricated story … [s]he did not appear to me to be highly sophisticated so that she could maintain that kind of consistency throughout *unless it was something that she had experienced*." ***Id.*** We held in ***Krueger*** that this opinion testimony went beyond permissible limits. We concluded that, through the emphasized testimony, the witness testified that the complainant had to have experienced the alleged contact with the defendant, which "was tantamount to an opinion that the complainant had been assaulted." ***Id.***, ¶16.

¶12 We quote above in ¶5 the series of questions and answers at issue here, which were posed to Gainey by the State during cross-examination. Using one-word answers, Gainey testified that, in the words of the questioner, Gainey had used interview techniques that would "insure that a child who has been coached does not continue with the false allegations during the interview," that there was no "indication that [K.L.] had been coached in any way during her interview," and that there was no "indication that [K.L.] was not being honest during her interview."

¶13 This has become an exceedingly nuanced area of the law in Wisconsin. *See* 7 Daniel D. Blinka, *Wisconsin Practice Series: Wisconsin Evidence* § 608.3 (3d ed. 2008) (noting that the "distinctions are subtle," and describing the "harder form of ***Jensen*** evidence," which "occurs when the expert testifies to an opinion about whether the particular victim's behaviors were 'consistent' with that of" a "class" of persons). However, in light of ***Krueger***, we conclude that Gainey's testimony crossed the line into ***Haseltine*** evidence, and did not constitute a supported opinion from which the jury had an opportunity *to draw*

its own conclusions about whether particular behaviors of K.L. in her interview with Gainey were consistent with that of similarly situated children who have been sexually assaulted.

¶14 First, Gainey gave what amounted to largely conclusory testimony as background, instead of the sort of concrete background about Gainey's actual experience interviewing children that could have supported a legitimate use of her testimony, as ***Krueger*** defines legitimate uses of such testimony. The jury learned only the following potentially pertinent facts before it heard the challenged testimony: that Gainey used an interview technique called "cognitive graphic interview," in which Gainey was trained and had experience; that this "technique is to make sure the child fully understands the difference between truth and lies so they understand if they are making up allegations, there are consequences"; that this technique is "to make sure that there is consistency between what they are telling me or have told other people"; that Gainey tries to avoid using leading questions; that it has "become apparent when [Gainey] use[s] the proper interview techniques" that children have been prompted by an adult to give certain answers. In sum, Gainey essentially testified only that she is an expert interviewer who tries to get, and usually succeeds in getting, reliable testimony from children using non-leading questions.

¶15 This largely conclusory testimony does not give the jury, as discussed in ***Krueger***, information about "typical signs of whether a child has been coached or evidences suggestibility and whether the complainant child exhibits such signs." *See* ***Krueger,*** 314 Wis. 2d 605, ¶14. Nor does it provide the jury with information about the degree to which K.L. testified consistently, as compared with whatever Gainey might be able to testify is like behavior of children of a similar age or capacity, again as referenced in ***Krueger***.

¶16 Second, during direct examination questioning, Maday's trial counsel did not challenge Gainey, for example, by attempting to call into question her qualifications, experience, or interviewing methodology. To the contrary, whatever the defense theory was, the defense line of questioning amounted to series of respectful questions that, if anything, implied support for Gainey's work in the case. Thus, the State was not in a difficult or unfair position of needing to try to rehabilitate Gainey on the topics of her methodology or her conclusions without running afoul of the ***Haseltine*** rule. It is entirely unclear to us why the prosecutor made a sharp turn into ***Haseltine***-type testimony, without setting up that testimony with the necessary context that might justify this type of testimony under the law explained in ***Krueger***.

¶17 Third, after having provided little background information and with no rehabilitation of Gainey's testimony needed, Gainey was asked to give, and gave the following, global, essentially unsupported, opinions: that her technique would "insure" that no "false allegations were made; that there was no indication of coaching; and that there was no indication of a lack of honesty.

¶18 One problem here is that even Gainey's largely conclusory testimony was to the effect that she had used techniques to expose coaching, not that she had used techniques that would allow her to generally assess K.L.'s veracity. By testifying that there was no indication that K.L. was not honest, Gainey effectively told the jury that K.L. was being truthful in her statements that Maday had sexually assaulted her. In presenting this testimony without facts or expertise to support it, the State invited the jury to ignore its obligation to determine for itself whether K.L. was truthful, which is an invitation specifically prohibited by ***Haseltine***.

¶19 In sum, as in ***Haseltine***, ***Romero***, and ***Krueger***, the testimony in this case "went too far, and its effect was to usurp the role of the jury in determining credibility." ***Id.***, ¶16. Accordingly, we agree with Maday that his trial counsel was deficient in failing to object to Gainey's testimony, which violated the rule that no witness should be permitted to give an opinion that another witness is telling the truth. *See* ***id.***, ¶20.

¶20 We also agree with Maday that he was prejudiced by his trial counsel's deficiency. As in ***Krueger***, K.L.'s account of the sexual assault was not corroborated by independent evidence. *See* ***id.***, ¶18. Thus, the issue at trial was one of credibility, with Maday's conviction dependent upon the jury believing K.L. ***Id.***; *see* ***Haseltine***, 120 Wis. 2d at 96. As we stated in ***Krueger***,

> Under [this] circumstance, the expert's opinion, "with its aura of scientific reliability, creates too great a possibility that the jury abdicated its fact-finding role to the [expert] and did not independently decide [the defendant's] guilt." … This possibility gives rise to the reasonable probability that, but for trial counsel's error, the jury would have had a reasonable doubt respecting guilt.

Krueger, 314 Wis. 2d 605, ¶18 (quoting ***Haseltine***, 120 Wis. 2d at 96). It is true that Gainey gave only one-word answers to the key questions posed by the prosecutor, which in itself could have drained this testimony of some of the impact that it might have had if Gainey had given more complete testimony to the same effect. However, by the same token, these answers were not even slightly qualified or explained. The questions, and the one-word answers, were lacking in the necessary context. Because counsel's error in not objecting to Gainey's

testimony was sufficient to undermine our confidence in the outcome of Maday's trial, we conclude that Maday was prejudiced.[3]

CONCLUSION

¶21 For the reasons discussed above, we conclude that the circuit court erred in denying Maday's motion for postconviction relief on the ground of ineffective assistance of counsel, and reverse the judgment of conviction and remand for a new trial.

By the Court.—Judgment and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

[3] Because our conclusion that Maday's trial counsel was ineffective for failing to object to Gainey's testimony is dispositive, we do not reach Maday's other arguments. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (appellate court need only address dispositive issues).