COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1135-CR **Cir. Ct. No. 99-CF-821**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROSEMARIE PARSONS,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Outagamie County: JAMES BAYORGEON, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Rosemarie Parsons appeals judgments convicting her of two counts of causing mental harm to a child, one count of recklessly causing bodily harm to a child, and one count of failing to prevent bodily harm. She also appeals an order denying postconviction relief. Parsons argues that defense counsel was ineffective for failing to move to strike a juror for cause and

failing to object to hearsay statements of one of the victims. We affirm the judgments and order.

¶2 At the time of the offenses, Parsons and her three children, ages six, eleven and thirteen, were living in an apartment with her boyfriend, Jeff Seguin, and his roommate, Frank Morrissey. Parsons' six- and thirteen-year-old children were boys and the eleven-year-old was a girl. The charges stem from Parsons' roles when, on a number of occasions after consuming beer, Seguin and Morrissey grabbed the boys, turned them upside down, and lowered their heads into the toilet bowl, wetting their hair and flushing the toilet.[1] Morrissey testified that the boys would laugh when the other children were being dunked. The daughter was not dunked because she managed to wrestle free after the three adults grabbed her, held her down and tied her feet with a belt. Parsons did not attempt to interfere with or stop this behavior.

¶3 Parsons' brief characterizes these incidents as harmless pranks, stating: "The Parsons children had heard of 'swirlys' at school, and the prank was of some amusement to them" and "Although reluctant at the time, later, both boys would also laugh about getting 'swirlys.'" The jury took a different view of the facts, apparently assessing greater weight and credibility to testimony that the younger boy was crying, screaming and was afraid. Also, Morrissey testified that on one occasion, Parsons held her daughter in a headlock, Seguin held the girl's arms, and both men attempted to tie her arms and legs with belts. They succeeded in tying her legs but after an estimated thirty minutes of struggling with the adults, she broke free. She was "really mad," upset, and "hollering" to be let go.

[1] The jury acquitted Parsons of one count involving her 13-year-old son.

¶4 An ineffective assistance of counsel claim is reviewed using a two-prong approach described in ***Strickland v. Washington***, 466 U.S. 668 (1984). First, the defendant must show that defense counsel's performance was deficient and, second, that counsel's deficient performance prejudiced her defense to a probability "sufficient to undermine the confidence in the outcome of the case." ***Id.*** at 694. The ultimate determination whether counsel's performance was deficient and, if so, whether it prejudiced the defense, are issues of law we review independently of the trial court's decision. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985).

¶5 Parsons' first claim of error involves jury selection. For defense counsel to move to excuse a juror for cause is a tactical decision. ***State v. Oswald***, 2000 WI App 2, ¶63, 232 Wis. 2d 62, 606 N.W.2d 207. In order for the decision to amount to deficient performance, the defendant must show that it was objectively unreasonable. ***Id.*** Failure to bring a motion without merit is not objectively unreasonable. ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987).

¶6 During voir dire, a prospective juror revealed that she had raised about ten foster children who had suffered from abuse. When asked what sort of things she had done that a child might consider funny but scary, she indicated that they "often threw the children into the water." She expressed her belief that "All kids exaggerate a little bit here and there." She stated that she had been spanked as a child and that she spanked her children.

¶7 She also disclosed that her grandson had once been threatened with a "whirlie." After drinking beer, her former son-in-law and friend picked up her grandson, threatened to give him a swirly and carried him as far as the toilet before

letting him go. He did not think it was funny and wiggled out, but was scared and crying. She did not approve of that conduct and was very upset. He was five years old at the time. When asked how the incident had affected her grandson, whether it made him apprehensive, she responded: "Well no. He's of age now, and he's pretty good, you know."

¶8 At the postconviction hearing, defense counsel testified that he was looking for jurors who had children and who played with children even when the children said no, or had experience playing with children and the children sometimes got hurt. He could not, however, remember his reason for not moving to strike the juror in question.[2]

¶9 Juror bias is characterized as (1) statutory bias, (2) subjective bias or (3) objective bias. ***State v. Oswald***, 232 Wis. 2d 103, ¶4, 606 N.W.2d 238 (Ct. App. 1999). A juror is statutorily biased if "related by blood or marriage to any party or to any attorney appearing in the case" or "has any financial interest in the case." ***Id.*** (citation omitted). Subjective bias refers to the juror's state of mind, revealed through the juror's words or demeanor. ***Id.*** Parsons does not claim statutory or subjective bias.

¶10 Exclusion of a juror for objective bias requires "a direct, critical, personal connection between the individual juror and crucial evidence or a dispositive issue in the case to be tried or the juror's intractable negative attitude toward the justice system in general." ***Id.*** at ¶8. For example, a juror's personal

[2] The State suggests that defense counsel may have strategically selected the prospective juror in order to demonstrate a defense theory that her grandson's experience, while in poor taste, was not criminal. Because defense counsel does not recollect this strategy, it does not support the State's suggestion.

acquaintance with the State's key witness, whom the juror firmly believed "wouldn't lie," established the juror's objective bias. ***Id.*** at ¶9 (citation omitted).

¶11 In contrast, in a sexual assault prosecution, the challenged juror had been a victim of sexual abuse as a child. ***Id.*** (citing ***State v. Erickson***, 227 Wis. 2d 758, 596 N.W.2d 749 (1999)). The juror expressed no direct personal relationship with the victim, her experience was remote in time and she "did not feel that her own experience would make her more likely to believe the victim's testimony …." ***Id.*** The trial court's refusal to strike her for cause was upheld. ***Id.*** at ¶11.

¶12 Parsons argues that the "unusual similarity between the facts of this case and those experienced by the juror in question demonstrates a 'direct or personal connection' with the evidence in this case." She contends that a reasonable person in the prospective juror's position could not be impartial.

¶13 The record fails to show objective bias. The mere fact that the prospective juror's grandson had a similar experience many years ago does not demonstrate a direct or personal connection with crucial evidence or a dispositive issue. There is no evidence that she had formed an opinion about the case. The only arguable connection occurred many years before. It is inevitable that a juror will occasionally have life experiences that bear some resemblance to evidence at trial. We are satisfied that a reasonable person in the juror's position could fairly and impartially decide the case. Consequently, Parsons' contention fails to support her ineffective assistance of counsel claim.

¶14 Next, Parsons argues that defense counsel was ineffective because he failed to object to hearsay testimony. Parsons argues that while the court correctly held that failure to object to the testimony was deficient, it erroneously concluded that Parsons was not prejudiced. She points out that the State referred

to this testimony to support the element of bodily harm, an element of two of the charges against Parsons. For the reasons that follow, we conclude that because the December 10 statements were admissible as excited utterances, counsel's failure to object at trial was not deficient. Also, because the victim's subsequent statements were merely cumulative, no prejudice resulted.

¶15 Police officer Kelly Gady testified that on December 10, during morning recess, while working as a liason officer on an elementary school playground, she was approached by Parsons' daughter:

> She walked up to me by herself.
>
> ….
>
> She was very upset; she was crying and said that she needed to talk to me right away.
>
> ….
>
> [S]he was crying quite a bit.

¶16 Gady testified that the girl told her that she was concerned about the heavy drinking by the adults in the home, and that her mother's boyfriend moved back in despite a restraining order. The girl told Gady that she was very scared because her mother threatened that she would send the girl to foster care or to live with her dad in another state if she spoke to the officer.

¶17 Later that day, Gady again met with the girl and asked her if she knew anything about "swirlies." The girl "became visibly upset. … she looked very upset." She told Gady that her mom had her in a headlock, that Seguin and Morrissey tied her ankles together and tried to tie her hands together. The girl told Gady that it had hurt her, that she was gouged or scratched from trying to get away

from her mom and that she had a mark on her ankle from the belt. She said that the adults planned to dunk her in the toilet after they tied her up.

¶18 WISCONSIN STAT. § 908.03, entitled "Hearsay exceptions; availability of declarant immaterial" provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> ….
>
> (2) EXCITED UTTERANCE. A statement relating to a starting event or condition made while the declarant was under the stress of excitement caused by the event or condition.

¶19 In order for this exception to apply, there must have been a startling event or condition, the out-of-court statement must relate to the startling event or condition, and the statement must be made while the declarant is still under the stress of excitement caused by the event or condition. ***Muller v. State***, 94 Wis. 2d 450, 466-67, 289 N.W.2d 570 (1980).

> The time period between the triggering event and the utterance is the key factor, and under sec. 908.03(2), Stats., time is measured by the duration of the condition of excitement rather than mere time elapse from the event or condition described. The significant factor is the stress or nervous shock acting on the declarant at the time of the statement. A statement of a declarant whose condition at the time of his declaration indicates that he is still under the shock of his injuries or other stress due to special circumstances will be admitted.

Id. at 467 (citations omitted).

¶20 It cannot seriously be argued that a child who was put in a headlock and had her legs tied while attempting to fight off three adults did not experience a startling event or condition. Gady's testimony that Parsons' daughter was visibly

upset recounting the abuse endured the night before supports the criteria that the daughter was under stress due to the assault. Based upon the timing of the statement and the daughter's demeanor, as recounted by Gady, the officer's testimony regarding the December 10 statements would have been properly admitted as excited utterances. We conclude that counsel's lack of objection at trial does not amount to deficient performance.[3]

¶21 Parsons further argues that a later statement was too removed from the assault to be admissible as an excited utterance. At a December 15 followup interview at the human services building, the daughter told Gady that during the incident, "she was scared and that it did hurt her." She also said that while in the headlock she had great difficulty breathing.

¶22 We conclude that the admission of this testimony, if error, would not have prejudiced the defense. The jury had already heard details about the assault. The additional facts that the headlock hurt or interfered with breathing would have been implied by Gady's earlier testimony. We are unconvinced that defense counsel's failure to object to the December 15 account prejudiced Parsons' defense to a probability "sufficient to undermine the confidence in the outcome of the case." ***Strickland***, 466 U.S. at 694.

¶23 Because counsel's motion to strike the juror and objection to Gady's testimony of the victim's December 10 statement would have been without merit, counsel's failure to make the motion or objection does not support a claim of deficient performance. Additionally, counsel's failure to object to the

[3] That counsel's objection at the preliminary hearing was sustained does not change our analysis.

December 15 account was not prejudicial. Consequently, we reject Parsons' claim of ineffective assistance of counsel.[4]

By the Court.—Judgments and order affirmed.

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

[4] We note that Parsons' statement of facts is written argumentatively. Argument does not belong in the fact section of an appellate brief. *See* WIS. STAT. RULE 809.19(1). Also, "[a] lawyer must distinguish a fact from an inference he seeks to press on the court. It is unprofessional conduct to represent inferences as facts. ... Misleading representations, whether deliberate or careless, misdirect the attention of other lawyers and the … judge," ***Skycom Corp. v. Telstar Corp.***, 813 F.2d 810, 819 (7th Cir. 1987), and waste the court's time spent distinguishing facts from inferences.