

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 2, 2002

Cornelia G. Clark
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. 01-3358-CR

Cir. Ct. No. 99-CF-732

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOHN KONAHA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: DENNIS C. LUEBKE, Judge. *Affirmed.*

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

¶1 PETERSON, J. John Konaha appeals his judgment of conviction for first-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(1), and an order denying his postconviction motion for a new trial due to ineffective assistance of counsel. Konaha argues that he was denied effective assistance of counsel because his trial lawyer failed to object to a witness's testimony vouching

for the credibility and honesty of the complaining witnesses. We disagree and affirm the conviction.

BACKGROUND

¶2 On September 8, 1999, Konaha was charged with first-degree sexual assault of a child. The complaint alleged that Konaha pinched twelve-year-old M.S.C.’s “private parts.”

¶3 At trial, the victim’s sister, R.C., testified. She was the first person M.S.C. told about the assault. On cross-examination, Konaha’s lawyer attempted to establish that R.C. had planted the idea in M.S.C.’s mind that Konaha had sexually assaulted her. On redirect, R.C. volunteered: “She never made this up. I don’t know. I don’t think my little sister would make anything up like this.”

¶4 During closing argument, Konaha’s lawyer admitted that M.S.C. was being truthful, but argued that she had misinterpreted an ambiguous event, which was then further misinterpreted by others:

I do not wish to and the district attorney is quite correct, I haven’t introduced anything to contradict [M.S.C.’s] basic story that she was touched in the car or where she was touched for that matter. And I don’t wish to suggest by any stretch of the imagination that she’s being untruthful when she tells you what she now thinks happened, what she thinks was going on at that time. ... [T]he furthest thing from my mind is to suggest to you that the little girl is not telling the truth as she sees it, what she now thinks happened.

The way that came about, though, the way she arrived at the conclusion that she has now with what happened was first responding to questions from her sister, her sister guessing what happened, then speaking to the officers

¶5 The jury found Konaha guilty of first-degree sexual assault. Konaha filed a postconviction motion alleging ineffective assistance of counsel because his lawyer failed to object to R.C.'s statement that M.S.C. "never made this up. I don't know. I don't think my little sister would make anything up like this."

¶6 The court held a *Machner* hearing.¹ At the hearing, Konaha's lawyer testified that he had no recollection of R.C.'s testimony. He did, however, testify about his tactics during closing arguments:

I tried to suggest that [M.S.C.] wasn't upset originally, but only became upset when [R.C.] began questioning her, and because the contact in this case was so brief ... the content was ambiguous, and I tried to argue, I believe, in closing argument, that her family members put into her mind the idea that this was a sexual assault or sexual contact.

I didn't try and challenge that [M.S.C.] was not telling the truth, although, when I remember the closing argument, I think I could have done that a little better, but I tried to argue that the other family members had placed this interpretation on the event and put their interpretation into [R.C.'s] mind.

And I didn't challenge in the closing argument, I don't believe, [M.S.C.'s] truthfulness, but argued the little girl was telling the truth, her family had led to the wrong conclusion, and that was why we were there at trial.

¶7 The trial court concluded that trial counsel's failure to object to R.C.'s testimony was deficient. Because counsel did not recall the testimony and thus could provide no explanation for not objecting to it, the court concluded that it could not assume that counsel had made a strategic or tactical decision. However, the court concluded that the deficiency was not prejudicial because:

¹ *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

(1) counsel did not attack M.S.C.'s credibility and therefore it was not a "crucial" issue; (2) the comment was "in the course of not really lengthy examination, but thrown in as a gratuitous remark"; and (3) the court recalled looking for the jury's reaction to the remark at the time, and noting that they were not "extra alerted" as a result." The court denied Konaha's motion.

DISCUSSION

¶8 Konaha argues that he was denied effective assistance of counsel because his trial counsel failed to object to R.C.'s testimony vouching for M.S.C.'s credibility. To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if the defendant makes an inadequate showing on one. *Id.* at 697. To demonstrate prejudice, the 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. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.* The determination of deficient performance and prejudice are questions of law that we review without deference to the trial court. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985).

¶9 Assuming R.C.'s statement was objectionable, Konaha was not prejudiced. M.S.C.'s credibility was not at issue. Instead of attacking her credibility, Konaha's lawyer was attacking how M.S.C.'s reporting of the event became exaggerated as a result of her family's interpretation of the events. In fact, Konaha's lawyer acknowledged M.S.C.'s truthfulness during closing argument.

¶10 In addition, we note that R.C.'s statement was a short, gratuitous remark made during a two-day trial where six witnesses testified. Any impact was inconsequential. We conclude Konaha has failed to show that he was prejudiced by his lawyer's failure to object.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

