COURT OF APPEALS
DECISION
DATED AND FILED

April 6, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP851-CR **Cir. Ct. No. 2006CF2656**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VICTOR T. JACKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM W. BRASH, Judge. *Affirmed*.

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

¶1 CURLEY, P.J. Victor T. Jackson appeals from a judgment convicting him of two counts of repeated first-degree sexual assault of the same child, one count for each of two victims, contrary to WIS. STAT. § 948.025(1)(a)

(2005-06).[1] He also appeals the order denying his request for postconviction relief. Jackson argues that his trial was "tainted" by several errors: (1) the trial court's admission of what he contends was inadmissible hearsay; (2) the State's violation of his statutory discovery rights when it relied on a pretrial telephone recording during trial despite the fact that the recording was not provided to the defense prior to trial; and (3) his trial counsel's deficient performance in a number of respects. Jackson contends that the effect of these errors warrants a new trial. Because we conclude that all of the challenged statements fall within recognized hearsay exceptions and that Jackson's trial counsel was not ineffective, we affirm.

I. BACKGROUND.

¶2 On May 23, 2006, a criminal complaint was filed charging Jackson with two counts of repeated first-degree sexual assault of a child arising out of events that allegedly transpired during the summer of 2005. Prior to the charges being filed, Jackson had an on-and-off relationship with Ann J.[2] Jackson fathered three children with Ann J. and acted like a stepfather to C.H., one of the victims.

¶3 The sexual assault accusations that led to the criminal charges against Jackson came to light on February 6, 2006. On that date, M.C., the three-year-old biological child of Ann J. and Jackson, stated that she had witnessed

[1] The crimes at issue took place during the summer of 2005, prior to the amendment of WIS. STAT. § 948.025(1) in 2006. *See* 2005 Wis. Act 430 & 2005 Wis. Act 437.

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] Due to the sensitive nature of the crimes involved, we refer to Ann J. and Alisha J. by first name and last initial only.

Jackson sexually assaulting her half-sister, C.H., and C.H.'s friend, C.K. Jackson's case proceeded to a jury trial.

¶4 During trial, both C.H. and C.K. testified to being sexually assaulted three or more times by Jackson during the summer of 2005. C.H. was seven years old at the time the assaults took place, and C.K. turned nine that June. The assaults occurred when C.K. stayed overnight at Ann J.'s house with C.H. A number of the State's witnesses testified to out-of-court-statements made by M.C., in which M.C. allegedly said she witnessed Jackson assaulting the victims. M.C. never testified.

¶5 Jackson denied C.H. and C.K.'s accusations. He further testified that he parted ways with Ann J. in May 2005 and never lived with her after that time.

¶6 The jury found Jackson guilty of the charges. On each count, he was sentenced to twenty-five years of initial confinement and ten years of extended supervision, with the sentences to run concurrently. Jackson sought postconviction relief based on claims of ineffective assistance of counsel. Following a ***Machner*** hearing, the court denied Jackson's motion.[3] Jackson now appeals. Additional facts related to the arguments he raises on appeal are provided in the remainder of this opinion.

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

II. ANALYSIS.

A. The trial court properly admitted the statements challenged on appeal, and Jackson forfeited his confrontation clause claim.

i. Hearsay testimony.

¶7 Jackson contends that the trial court erred in allowing inadmissible hearsay, including repeated references to M.C.'s purported eyewitness account of the sexual assaults, to be admitted during his trial. Specifically, he argues that the trial court erred when it allowed the repeated statements to be introduced on the theory that they provided background information and that it was ineffective assistance of counsel not to have preserved objections to the out-of-court statements. In the event that the statements were admissible as non-hearsay background, Jackson argues that the jury should have been instructed not to consider the statements as affirmative evidence of guilt.

¶8 Regarding the admissibility of the hearsay statements, this court reviews evidentiary rulings with deference to the trial court as to whether it properly exercised its discretion, in accordance with the facts and accepted legal standards. ***State v. Tucker***, 2003 WI 12, ¶28, 259 Wis. 2d 484, 657 N.W.2d 374. "As with other discretionary determinations, this court will uphold the decision of the [trial] court to admit or exclude evidence, if the [trial] court examined the relevant facts, applied a proper legal standard, and reached a reasonable conclusion using a demonstrated rational process." ***State v. Muckerheide***, 2007 WI 5, ¶17, 298 Wis. 2d 553, 725 N.W.2d 930. The admissibility of hearsay evidence under particular hearsay exceptions is a question of law, which we review *de novo*. ***State v. Stevens***, 171 Wis. 2d 106, 111-12, 490 N.W.2d 753 (Ct. App. 1992).

The testimony.

¶9 The statements Jackson takes issue with were made during the testimony of Detective Justin Carloni, Alisha J., Police Officer Shemia Watts, C.K.'s mother, and Ann J.

Detective Justin Carloni

¶10 Detective Carloni responded to the scene on February 6, 2006, and was the State's first witness to testify during Jackson's trial. Detective Carloni testified that he interviewed C.K.'s mother and when asked what he learned from her, Jackson's trial counsel objected on hearsay grounds. The trial court overruled the objection based on its conclusion that the "information garnered during the proceeding [was] not offered for the truth of the matter asserted but for background information." Detective Carloni testified that C.K.'s mother relayed that C.K. had told her she had been sexually assaulted by Jackson.

¶11 Detective Carloni also testified regarding a conversation he had with Alisha J., C.H.'s older sister and Ann J.'s biological daughter. Jackson's trial counsel again objected on hearsay grounds and was overruled without further explanation by the trial court. According to Detective Carloni, Alisha J. relayed the following:

> M[.C.], who is the three[-]year[-]old sibling of C[.H.], a half[-]sister of C[.H.], was in the residence and had made a comment to Alisha J[.] … that Victor [Jackson] was doing the nasty in the basement with C[.H.] and C[.K.] Alisha [J.] was alarmed by that and had heard it once before from M[.C.] and had questioned C[.H.] about it and at that time there was [sic] some denials on C[.H.]'s part and it was dismissed.
>
> Now [Alisha J.] had heard it for a second time, and Alisha J[.] heard it from the younger sibling, M[.C.], that they were doing the nasty, that C[.H.] and C[.K.] and

> Victor J[ackson] were doing the nasty in the basement. She investigated further and actually called C[.K.] over and talked with the girls independently and found out that there was sexual contact between Victor Jackson and C[.H.] and Victor Jackson and C[.K.]

Alisha J.

¶12 During her trial testimony, Alisha J. relayed that on February 6, 2006, M.C. told her that Jackson was inappropriately touching C.H. The prosecutor asked Alisha J. about the words M.C. used to tell Alisha J. about the incident:

> Q So did [M.C.] use the word inappropriate, or did she use other words?
>
> A No, she said my daddy was putting his dick on her ass or in her booty or whatever.

¶13 Alisha J. testified that she then questioned C.H., who was "unresponsive." This prompted Alisha J. to question C.K., who told her Jackson had touched the girls inappropriately. When Alisha J. followed up with C.H., C.H. confirmed that Jackson "had been touching on them and having them do oral [sex]." According to Alisha J., M.C. had made the same accusations against Jackson approximately one month prior to February 6, 2006, and when questioned, C.H. had denied that the accusations were true.

Police Officer Shemia Watts

¶14 Officer Watts testified that she interviewed C.H., C.K., and M.C. According to Officer Watts, C.K. told her that Jackson "made her perform … mouth to penis oral sex and that he also forced penis to anus sexual intercourse." Officer Watts testified that C.H. relayed a similar version of events. With respect to M.C.'s summary about what happened, Officer Watts said, "I can't remember

the exact word, I think it was something like he put his dick in her butt." The "her" was in reference to C.H. Officer Watts further testified that at the time of the interview, M.C. could not distinguish between telling the truth and telling a lie.

C.K.'s mother

¶15 C.K.'s mother testified that C.K. told her that Jackson "made the girls put his private parts in their mouth. He made them bend over and put it in their bottom…. Put gel stuff on or something, some blue gel stuff, and then put it in their bottom, that's what she told me."

Ann J.

¶16 During trial, the prosecutor questioned Ann J. regarding the accusations that came out on February 6, 2006. As Ann J. began to respond, Jackson's trial counsel objected on hearsay grounds, and the trial court overruled the objection, again without explanation. Ann J. testified that she heard about "oral sex … [a]nd penetration [of the victims'] rectum[s]."

¶17 Ann J. also testified that prior to February 6, 2006, M.C. had accused Jackson of doing "nasty things" to C.H. When Ann J. confronted C.H. and Jackson, they both denied that anything had happened, and Ann J. took no further action with respect to the accusations.

The residual hearsay exception.

¶18 The State argues, and we agree, that the challenged hearsay statements were admissible under the residual hearsay exception. In this case, the

trial court did not consider the admissibility of the out-of-court hearsay statements under WIS. STAT. § 908.03(24).[4] However, we "will not reverse a lower court decision where that court has exercised its discretion based on a mistaken view of the law if the facts and their application to the proper legal analysis support the lower court's conclusion." ***State v. Sorenson***, 143 Wis. 2d 226, 250, 421 N.W.2d 77 (1988). Further, we may uphold a trial court's discretionary decision on a theory or reasoning not presented to the trial court. ***State v. Holt***, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985), *superseded by statute on other grounds by* WIS. STAT. § 940.225(7), *as recognized in* ***State v. Grunke***, 2008 WI 82, ¶33, 308 Wis. 2d 439, 752 N.W.2d 769.

¶19 As a general rule, out-of-court assertions may not be used for their truth at a trial by virtue of the rule against hearsay. *See* WIS. STAT. §§ 908.01, 908.02. One exception to the rule against the admission of such assertions is the residual hearsay exception. *See* WIS. STAT. § 908.03(24) ("The following are not excluded by the hearsay rule, even though the declarant is available as a witness: … **(24)** OTHER EXCEPTIONS. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.").

[4] The record reveals that Jackson's trial counsel objected on hearsay grounds twice during Detective Carloni's testimony and once during Ann J.'s testimony. The trial court denied the first hearsay objection raised by Jackson's counsel during Detective Carloni's testimony based on its conclusion that the testimony was offered for background purposes. Beyond this, the remaining two hearsay objections were overruled by the trial court without explanation by the trial court or argument by the parties. Consequently, we agree with the State that Jackson's argument, that the statements he challenges on appeal were admitted because "[t]he trial court apparently believed that the testimony was admissible as background," is not supported by the record as it is not clear what the trial court's basis was for overruling the objections. In its response brief, the State does not argue that the statements were admissible as background; instead, the State contends that the challenged statements are admissible under the residual hearsay exception.

¶20 In ***Sorenson***, our supreme court set forth five factors to be considered when determining the admissibility of a child's statements under the residual exception. These include the following:

> First, the attributes of the child making the statement should be examined, including age, ability to communicate verbally, to comprehend the statements or questions of others, to know the difference between truth and falsehood, and any fear of punishment, retribution or other personal interest, such as close familial relationship with the defendant, expressed by the child which might affect the child's method of articulation or motivation to tell the truth.
>
> Second, the court should examine the person to whom the statement was made, focusing on the person's relationship to the child, whether that relationship might have an impact upon the statement's trustworthiness, and any motivation of the recipient of the statement to fabricate or distort its contents.
>
> Third, the court should review the circumstances under which the statement was made, including relation to the time of the alleged assault, the availability of a person in whom the child might confide, and other contextual factors which might enhance or detract from the statement's trustworthiness.
>
> Fourth, the content of the statement itself should be examined, particularly noting any sign of deceit or falsity and whether the statement reveals a knowledge of matters not ordinarily attributable to a child of similar age.
>
> Finally, other corroborating evidence, such as physical evidence of assault, statements made to others, and opportunity or motive of the defendant, should be examined for consistency with the assertions made in the statement.

Id., 143 Wis. 2d at 245-46. The weight to be attributed to the various factors varies depending on the case, with no one factor being dispositive of a statement's trustworthiness. ***Id.*** at 246.

¶21 We now apply these factors to the out-of-court statements by C.H., C.K., and M.C. First, we agree with the State that C.H.'s and C.K.'s attributes support the reliability of their statements. C.H. was seven years old when the assaults occurred, eight years old when she reported the abuse, and nine years old at the time of trial. C.K. turned nine during the summer of 2005, when the assaults occurred, and was ten years old at trial. During trial, both C.H. and C.K. explained that they understood the difference between telling the truth and telling lies. The record reflects that C.H. and C.K. were able to verbally communicate and comprehend the questions asked of them.

¶22 As to the second factor, both C.K. and C.H. ultimately confided in Alisha J. and later in Officer Watts. C.K. also confided in her mother. There is nothing in the record that would indicate a possible motive for any of these individuals to fabricate or distort the statements made by C.K. and C.H. Thus, this factor also supports the admissibility of the statements.

¶23 Although the accusations made in 2006 related to assaults that took place during the summer of 2005, we conclude that the circumstances under which C.K. and C.H.'s statements were made lend support for the trustworthiness of the hearsay. "Contemporaneity and spontaneity of statements are not as crucial in admitting hearsay statement of young sexual assault victims under the residual exception." ***Id.*** at 249. C.K. testified that she and C.H. did not tell anyone about the assaults immediately after they occurred because they were scared of Jackson, who had threatened them.

¶24 As to the content of C.K. and C.H.'s statements, their descriptions of the incidents appear to have been consistent in all relevant respects.[5] Although there was no physical evidence corroborating the assault, trial testimony revealed that this was to be expected given the lapse of time between when the assaults occurred and when they were reported.

¶25 We next apply the ***Sorenson*** factors to M.C.'s out-of-court statements. M.C. was three years old at the time she made accusations against Jackson, who is her father. *Cf.* ***id.*** at 246 (analyzing statements made by a child who was mentally and emotionally at about a four-year-age level and noting "that a child at such a young age is unlikely to review an incident of sexual assault and calculate the effect of a statement about it"). As relayed above, the jury heard Officer Watts' testimony that at the time of the interview, M.C. could not distinguish between telling the truth and telling a lie. Notwithstanding, we agree with the State:

> There is no indication that, at three[]years[]old, [M.C.] had avenues to sexual knowledge other than by some sort of firsthand knowledge. The content of the statements fails to disclose any sign of deceit or falsity. Her description of specific incidents of sexual assault, and her familiarity with crude terminology for body parts, indicate knowledge well beyond the ordinary familiarity of a child her age…. The

[5] Jackson points out inconsistencies such as C.H.'s testimony on direct examination that Jackson had assaulted her and her testimony on cross-examination that prior to the incident, she had truthfully told her sister that Jackson had not assaulted her, and C.K.'s testimony that Jackson assaulted her on more than five separate nights, while on cross-examination, C.K. said that all of the assaults happened on a single night. Jackson's argument in this regard misses the mark. He focuses on inconsistencies in C.H.'s and C.K.'s trial testimony, when such issues are left to the jury to resolve, rather than focusing on whether there are inconsistencies in the out-of-court statements at issue. *See* ***Kohlhoff v. State***, 85 Wis. 2d 148, 154, 270 N.W.2d 63 (1978) ("Inconsistencies and contradictions in a witness' testimony are for the jury to consider in judging credibility and the relative credibility of the witnesses is a decision for the jury.").

> statements also were corroborated by the facts as testified to by C.H. and C.K.

This factor favors the admission of M.C.'s out-of-court statements.

¶26 As to the second factor, M.C. made statements to Alisha J., Ann J., and Officer Watts. We are not aware of anything in the record that would indicate a possible motive for any of these individuals to fabricate or distort the statements made by M.C. Thus, this factor also supports the admissibility of the statements.

¶27 The circumstances under which the statements were made also weigh in favor of their admissibility. Both Alisha J. and Ann J. testified that approximately one month prior to February 6, 2006, M.C. had made the same accusations against Jackson. Again, we agree with the State's position that "[i]t would be highly unusual for a three-year-old to fabricate a graphic story about sexual abuse [and] it would be even more unusual for her to do so on two separate occasions, one month apart." Although there was a significant delay between when the assaults occurred and when M.C. made the out-of-court statements at issue, we are not convinced that the lapse of time suggests that M.C.'s statements were untrustworthy. *See* ***id.*** at 245 ("Use of the residual exception in child sexual assault cases is even less reliant upon immediacy of statements because other indicia of reliability support its trustworthiness."); *see also* Judicial Council Committee's Note, 59 Wis. 2d R301 (1974) ("The requirements of contemporaneity and spontaneity are modified in the special situation of a child

victim of a sexual assault or traumatic experience.") (referencing WIS. STAT. § 908.03(24).[6]

¶28 Based on our review of the applicable factors, we conclude that the out-of-court statements challenged by Jackson bear sufficient guarantees of trustworthiness to have been admissible at his trial under the residual hearsay exception.[7] Although Jackson contends that this holding violates the premise "that the residual hearsay exception rule will be used very rarely, and only in exceptional circumstances," *see* ***Stevens***, 171 Wis. 2d at 120, and will result in the residual hearsay exception "allowing almost any hearsay in a child sexual assault case," we are not convinced. Application of and the weight assigned to the ***Sorenson*** factors "may vary given the circumstances unique to each case … [and] court[s] must evaluate the force and totality of all these factors to determine if the

[6] Jackson cites ***State v. Gerald L.C.***, 194 Wis. 2d 548, 535 N.W.2d 777 (Ct. App. 1995), to support the proposition that the substantial delay in M.C.'s reporting weighs against the reliability of her statements. In ***Gerald L.C.***, the court acknowledged that "use of the residual exception in child sexual assault cases is even less reliant upon immediacy of statements because other indicia of reliability support its trustworthiness." ***Id.*** at 562. Notwithstanding, given that other indicia of reliability were lacking in the case before it, the court concluded that a two-week delay amounted to "an extended length of time [that] weigh[ed] against trustworthiness." ***Id.*** at 562-63. Here, unlike in ***Gerald L.C.***, the other indicia of reliability are present with respect to M.C.'s out-of-court statements.

[7] The State concedes there are multiple layers of hearsay with respect to Detective Carloni's testimony relaying what Alisha J. told him that M.C. had told her (i.e., that Jackson "was doing the nasty in the basement with C[.H.] and C[.K.]"). The State nevertheless contends that Alisha J.'s statement to Detective Carloni was admissible under the excited utterance exception. *See* WIS. STAT. § 908.03(2) ("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 startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."). Jackson apparently concedes this issue because he does not respond to the State's excited utterance argument in his reply brief. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

statement possesses the requisite 'circumstantial guarantees of trustworthiness.'"[8] ***Id.***, 143 Wis. 2d at 246. Given the case-specific analysis required by ***Sorenson***, today's holding will not have the blanket effect that Jackson predicts.

ii. Right to confrontation.

¶29 Jackson further contends that the use of M.C.'s out-of-court statements violated his confrontation rights. He points out the importance of M.C.'s statements in that she was an eyewitness under the State's version of events and it was her statements to Alisha J. that ultimately resulted in the charges against him.

¶30 Jackson's trial counsel did not object to the admission of M.C.'s out-of-court statements based on a violation of Jackson's right to confrontation. *See* WIS. STAT. § 901.03(1) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and (a) *Objection*. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection…."). Although he objected on hearsay grounds, "an objection on the grounds of hearsay does not serve to preserve an objection based on the constitutional right to confrontation." ***State v. Nelson***, 138 Wis. 2d 418, 439, 406 N.W.2d 385 (1987); *see also* ***State v. Marshall***, 113 Wis. 2d 643, 653, 335 N.W.2d 612 (1983). Unless an objection on confrontation grounds is made at trial "with sufficient

[8] Although our analysis is under WIS. STAT. § 908.03(24) (pertaining to hearsay exceptions where the availability of the declarant is immaterial) rather than WIS. STAT. § 908.045(6) (pertaining to hearsay exceptions where the declarant is unavailable), which was analyzed in ***State v. Sorenson***, 143 Wis. 2d 226, 421 N.W.2d 77 (1988), the same factors apply in weighing the admissibility of a child's statements under either statute. ***Id.*** at 250 & n.9.

particularity," the issue is forfeited. ***State v. Gove***, 148 Wis. 2d 936, 941, 437 N.W.2d 218 (1989).

¶31 Although Jackson claims that his trial counsel was ineffective for failing to object on grounds that the use of M.C.'s out-of-court statements violated Jackson's right to confrontation, Jackson did not question his trial counsel on this issue at the ***Machner*** hearing. ***Machner*** requires the preservation of trial counsel's testimony to determine whether a particular decision was a deliberate and reasonable trial strategy. ***Id.***, 92 Wis. 2d at 804 (holding that "it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel"). Thus, Jackson has forfeited the opportunity to argue on appeal that his trial counsel was ineffective for failing to object to the use of M.C.'s out-of-court statements based on a violation of Jackson's right to confrontation.

¶32 Because we have concluded that out-of-court statements were admissible under the residual hearsay exception and that the confrontation objection and related ineffective assistance of counsel claim were forfeited, we need not address Jackson's contentions that if the statements were admissible as non-hearsay background, the jury should have been instructed not to consider the statements as affirmative evidence of guilt or that his trial attorney was ineffective for failing to adequately object to the hearsay statements.

B. Pretrial telephone recording.

¶33 Next, Jackson challenges the State's use of a pretrial telephone recording during trial, in violation of his statutory discovery rights. Jackson contends that his trial counsel performed deficiently in failing to object to the

State's use of the statements on the recordings, and in failing to request a jury instruction informing the jury of the State's discovery violation.

¶34 "The issue of whether a person has been deprived of the constitutional right to the effective assistance of counsel presents a mixed question of law and fact." ***State v. Trawitzki***, 2001 WI 77, ¶19, 244 Wis. 2d 523, 628 N.W.2d 801. The trial court's findings of fact, that is, "the underlying findings of what happened," will be upheld unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Whether counsel's performance was deficient and prejudicial to his or her client's defense is a question of law that we review *de novo*. ***Trawitzki***, 244 Wis. 2d 523, ¶19.

¶35 In ***Strickland v. Washington***, 466 U.S. 668 (1984), the United States Supreme Court set forth a two-part test for determining whether counsel's actions constitute ineffective assistance. ***Id.*** at 687. First, the defendant must demonstrate that counsel's performance was deficient. ***Id.*** Next, the defendant must demonstrate that counsel's deficient performance was prejudicial to his or her defense. ***Id.*** This requires a showing that counsel's errors were "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** We need not address both deficient performance and prejudice if the defendant does not make a sufficient showing on either one. ***Id.*** at 697.

¶36 During her cross-examination of defense witness Luz Torres, who was Jackson's fiancée, the prosecutor asked whether Jackson had ever told Torres that he was "on the run from the police." Torres acknowledged that during a phone conversation while Jackson was in jail, the two discussed the fact that Jackson had been on the run for several months prior to his arrest.

¶37 During her cross-examination of Jackson, the prosecutor questioned him about statements he made during pretrial phone calls from jail:

> Q And, Mr. Jackson, since you've been in custody since May of 2006, you've talked to Luz Torres, your fiancée or girlfriend, several times over the phone; is that correct?
>
> A Yes.
>
> Q Did you ever make threats to anyone when you talked to her on the phone?
>
> A I don't recall.
>
> Q It is possible that you made threats to somebody when you've talked to her on the phone?
>
> A I don't remember.
>
> Q Are you aware that your phone calls that are placed through the House of Corrections are recorded?
>
> A Yes.
>
> Q Do you remember telling Luz Torres during a phone conversation, "You need to find out what class of sexual assault it is and find out how many years it carries"? [sic] And then do you remember further saying, "Fuck this dog. I'll have someone mark that bitch"? [sic] Do you remember saying that to Luz?
>
> A No.
>
> Q And do you remember when Luz said, "Don't say that on the phone" to you?
>
> A No.
>
> Q Well, now that I'm refreshing your recollection with the phone conversation, do you remember who you were referring to when you said, "I'll have someone mark that bitch"? [sic]
>
> A Me and her have a lot of conversations. A lot of conversations didn't have nothing to do with Ann [J]. I know those phone calls are recorded. My phone calls have nothing to do with Ann [J.] or C[.H.] or C[.K.], none of that.

No objections were raised by Jackson's trial counsel to this line of questioning.

¶38 Outside the presence of the jury, the prosecutor advised that she intended to call Torres on rebuttal to testify regarding the phone call that was placed. If Torres did not testify that the phone call had been made, the prosecutor intended to play the recording for the jury. Following the court's inquiry, the State conceded that it had not disclosed these statements to the defense before using them at trial. It was at this point that defense counsel objected to the use of the recording. Although the court did not allow the recording to be introduced during trial because it had not been turned over in compliance with the discovery statute, it did allow the prosecutor to ask questions about the conversation, stating:

> Now, conversely, Counsel, when [the prosecutor] started to ask your client about this conversation and go through the conversation, there was no objection to the admissibility of that information. There was no objection raised. So the fact that she asked about that question, that she talked to him about that conversation, that information came in, it came in without objection.

Consequently, the State was allowed to question Torres on rebuttal about the telephone conversation. In addition, the prosecutor referenced the statements during her closing argument.

¶39 The State concedes that the prosecutor's use of statements made during the pretrial telephone recording constituted a discovery violation under WIS. STAT. § 971.23.[9] The State further concedes that Jackson's trial counsel's failure to object to the testimony based on the discovery violation was deficient.

[9] WISCONSIN STAT. § 971.23 provides, in relevant part:

(continued)

¶40 In light of these concessions, the question before us is whether Jackson's trial counsel's deficient performance was prejudicial. *See* ***Strickland***, 466 U.S. at 687.

> Under ***Strickland***, a defendant is not required to show that counsel's deficient conduct was outcome determinative. *See* ***id.*** at 693-94. Rather, "[t]he 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. In making this determination, reviewing courts are to consider the totality of the evidence before the trier of fact. ***Id.*** at 695.

State v. McDowell, 2004 WI 70, ¶54, 272 Wis. 2d 488, 681 N.W.2d 500.

¶41 Upon consideration of the totality of the evidence before the trier of fact, we are satisfied that Jackson suffered no prejudice as a result of his trial counsel's deficient performance. The references to statements Jackson made during the pretrial phone recording may have cast Jackson's character in a negative light. However, we agree with the State that Jackson's character had already been "seriously damaged" as a result of the following:

> by virtue of testimony describing his forcing anal and oral sex on seven- and eight-year-old girls; by his admission of having been convicted twelve times in the past; by his admission that he hid from police for three months while

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> **Discovery and inspection. (1)** WHAT A DISTRICT ATTORNEY MUST DISCLOSE TO A DEFENDANT. Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney and permit the defendant or his or her attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody or control of the state:
>
> (a) Any written or recorded statement concerning the alleged crime made by the defendant….

> they were looking for him in connection with these assaults; and by his unimpressive explanation for why he was being accused of these crimes ("you can give [C.H.] some money, and she'll lie about anything").

(Record citations omitted.) Consequently, Jackson's trial counsel's deficiency was not so prejudicial that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694.

C. Alibi witnesses.

¶42 In addition, Jackson challenges as ineffective assistance his trial counsel's decision not to call his sister and his ex-girlfriend during his trial. He contends that both women would have corroborated where he was living at the time of the alleged assaults; thus, bolstering his credibility and undermining the theory that he had the opportunity to assault the victims. Jackson asserts that such testimony would have conflicted with Ann J.'s testimony that he was living with her during the period when the assaults occurred and that even if it was not "a complete alibi"—as there would have still been time and opportunity for Jackson to be at Ann J.'s home—it nevertheless was testimony that should have been presented.

¶43 At the ***Machner*** hearing, Jackson's sister testified that Jackson lived with her during the months of July and August, and "maybe" the beginning of September 2005. Jackson's sister worked forty-five hours a week during that timeframe and was unable to recall how much time during a typical day Jackson would be at her house when he was living with her. Jackson's sister further acknowledged that she could not say whether Jackson visited his children at Ann J.'s home during the time he was living with her.

¶44 Jackson's ex-girlfriend also testified at the ***Machner*** hearing. She testified that Jackson lived with her from "[a]pproximately the end of May to the beginning of July." During that period, Jackson's ex-girlfriend acknowledged that she was not in a position to account for Jackson's whereabouts for all hours of the day and that she did not remember whether there were times when Jackson did not spend the night at her home.

¶45 During the hearing, Jackson's trial counsel explained that he did not call Jackson's sister or ex-girlfriend to testify during trial because "they were not able to confirm … Jackson's whereabouts during long periods of the critical period of the Summer of 2005." Given that Jackson was moving around during the summer of 2005 and because he had access to Ann J.'s home, his trial counsel concluded that the testimony from the alibi witnesses would not support a defense theory that Jackson did not have the opportunity to assault the victims. The investigator hired by Jackson's trial counsel confirmed that he interviewed Jackson's sister and his ex-girlfriend and that there were "holes" in the alibis they offered.

¶46 We agree with the trial court that the decision not to call Jackson's sister or his ex-girlfriend to testify does not constitute deficient performance. Based on the specific and credible testimony Jackson's trial counsel provided at the ***Machner*** hearing, we conclude that the decision not to call alibi witnesses was a reasonable strategic choice and does not constitute ineffective assistance of counsel. Matters of reasonably sound trial strategy, without the benefit of hindsight, are "virtually unchallengeable," and do not constitute ineffective assistance. ***Strickland***, 466 U.S. at 690-91; *see also* ***State v. Harper***, 57 Wis. 2d 543, 557, 205 N.W.2d 1 (1973) ("[O]ne should not by hindsight reconstruct the ideal defense. The test of effectiveness is much broader and an accused is not

entitled to the ideal, perfect defense or the best defense but only to one which under all the facts gives him reasonably effective representation.").

D. Reference to expert testimony during opening statement.

¶47 Finally, Jackson contends his trial attorney was ineffective for making an "unfulfilled promise" to the jury that that it would hear from Dr. Michael Kotkin and then later deciding not to call Kotkin upon finding out that Kotkin could be cross-examined about a prior fourth-degree sexual assault, for which Jackson had been convicted. Jackson "does not challenge counsel's decision not to call Kotkin; rather, the problem is that counsel had not properly analyzed *whether* to call Kotkin before promising the jury his testimony in opening statement."

¶48 In his opening statement, Jackson's trial counsel referenced testimony he intended to present from Kotkin:

> Finally, we intend to present testimony from Dr. Michael Kotkin, a psychologist expert who speciali[zes] in sexual assault matters, who meet [sic] with Mr. Jackson, went through various testing procedures with him and so forth, and he will tell you in detail about his findings and his opinion regarding Mr. Jackson.

The State subsequently put the defense on notice that if Kotkin testified, it would open the door to Jackson's criminal history, which included a conviction for fourth-degree sexual assault. At this point, Jackson's trial counsel advised the court that the defense "might" waive Dr. Kotkin's testimony. After the court informed counsel that the door to Jackson's criminal history would, in fact, be opened with the admission of Kotkin's testimony, Jackson's trial counsel elected not to introduce it.

¶49 During the ***Machner*** hearing, trial counsel testified that at the time he made his opening statement, he believed the evidence of Jackson's prior sexual assault, referenced in Kotkin's report, would not be allowed because it was prejudicial. However, once the court ruled that Kotkin's entire report would be admissible, Jackson's trial counsel made the strategic decision not to have him testify for two reasons:

> One, Doctor Kotkin's opinion was not able to assert with any certainty that Mr. Jackson did not commit this act. The best he could do, which I thought would be okay in the beginning, would indicate that he does not fit the profile of a person that likes sex with young kids.
>
> The second reason …, which was more important, I did not want the jury to know that he had been convicted of a prior sexual assault. Even though it was fourth-degree, I didn't think the jury would make any big distinction about that, and I thought that would be damaging.

¶50 Jackson's trial counsel believed the evidence of Jackson's prior sexual offense, referenced in Kotkin's report, would not be allowed because it was prejudicial. It is not deficient performance *per se* for counsel to promise something in opening statements, but fail to deliver on that promise during the defense case. ***Turner v. Williams***, 35 F.3d 872, 903-04 (4th Cir. 1994), *overruled in part on other grounds by* ***O'Dell v. Netherland***, 95 F.3d 1214 (4th Cir. 1996). "[A]ssuming counsel does not know at the time of the opening statement that he will not produce the promised evidence, an informed change of strategy in the midst of trial is 'virtually unchallengeable.'" ***Id.*** at 904 (quoting ***Strickland***, 466 U.S. at 690).

¶51 Even if counsel's performance was deficient in this regard, we again conclude, after considering the totality of the evidence before the trier of fact, that Jackson suffered no prejudice. As previously detailed, C.H. and C.K. were

consistent in their testimony relaying the circumstances surrounding the assaults. We agree with the State that their testimony was "highly damaging" to Jackson's case. Consequently, we are not convinced that Jackson's trial counsel's deficiency was so prejudicial that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694.

¶52 The dissent finds deficiency and prejudice from the trial court's unfulfilled promise to the jury that he would call Dr. Kotkin to tell them "in detail about his findings and opinion regarding Mr. Jackson." By not calling the doctor as a witness, the dissent contends that the jury was left with only two inferences, both prejudicial to the defendant. While the dissent notes that there is a strong presumption that trial counsel rendered adequate assistance, *see* ***Strickland***, 466 U.S. at 690, and it cites to no Wisconsin law supporting its conclusion, it relies on ***Anderson v. Butler***, 858 F.2d 16, 17 (1st Cir. 1988), for its conclusion of prejudice.

¶53 We are unpersuaded. First, trial counsel's promise of Dr. Kotkin's testimony was vague, and therefore, its omission was not significant. Trial counsel merely said that the doctor would tell the jury his "findings and opinion" without saying what those were and how they supported the defense. The promise in ***Anderson*** is quite different. Trial counsel there described in detail what the psychologist and psychiatrist would testify to and explicitly linked that testimony to Anderson's NGI plea. When counsel rested without calling the doctors, the court concluded Anderson had been prejudiced because "[t]he promise was dramatic, and the indicated testimony strikingly significant." ***Anderson***, 858 F. 2d at 17.

¶54 Unlike in ***Anderson***, trial counsel for Jackson never told the jury what Dr. Kotkin's testimony would be or how it would support the defense. There was no promise of "strikingly significant" testimony that went unfulfilled. Accordingly, the absence of that testimony cannot be said to have changed the result of the trial. *See* ***id.***

¶55 Secondly, the inferences the jury may have drawn from the doctor's absence are not limited to the two posited by the defense and include benign inferences as well. For example, the jury may have speculated the doctor was unavailable—doctors are busy people—or they may have assumed that his testimony was no longer important. It is also possible that the jury may not have even remembered Dr. Kotkin was going to testify.

¶56 Given the definition of prejudice in ***Strickland*** ("a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"), ***id.*** at 694, and the court's direction to reviewing courts to consider the "totality of the evidence" in making a determination of prejudice, ***id.*** at 695, we do not see how can we conclude that allowing the jury to speculate why Dr. Kotkin did not give his non-specific "findings and opinion" creates a "reasonable probability" that Jackson would have been acquitted, *see* ***id.*** The totality of the evidence here included the testimony of both child sexual assault victims corroborated by other relatives and after full opportunity for cross-examination. Given the strong State case, Jackson has not shown that, but for the jury's speculation about why Dr. Kotkin did not testify, he would have been acquitted.

¶57 Additionally, even if trial counsel had done everything that the dissent suggests he should have done, Dr. Kotkin's testimony was of mixed value,

at best, to Jackson. The best the defense would get from his testimony was that in the doctor's opinion, Jackson did not fit the profile of a sex offender who liked children. But with that positive opinion the jury would also hear the negative fact that Jackson had a prior sexual assault conviction and the doctor's ultimate conclusion that he could not say whether or not Jackson committed these sexual assaults. Consequently, the doctor's testimony was of marginal value to Jackson and therefore its absence cannot be said to have prejudiced Jackson.

¶58 Based on our resolution of the preceding issues, we decline Jackson's request that we invoke our discretionary authority under WIS. STAT. § 752.35 to grant him a new trial in the interest of justice.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

¶59 KESSLER, J. (*concurring in part, dissenting in part*). I concur with all of the majority opinion except Section D, which concludes that Jackson was not denied the effective assistance of counsel despite trial counsel's unfulfilled promise to call "a psychologist expert who speciali[zes] in sexual assault matters, who [met] with Mr. Jackson" and who would "tell [the jury] in detail about his findings and his opinion regarding Mr. Jackson." Because I conclude that trial counsel's performance was both deficient and prejudicial as defined by ***Strickland v. Washington***, 466 U.S. 668 (1984), I would reverse and remand for a new trial.[1]

¶60 With respect to trial counsel's performance, I recognize that there is a strong presumption that counsel rendered adequate assistance. *See* ***id.*** at 690. Professionally competent assistance encompasses a "wide range" of behaviors and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Id.*** at 689. Thus, we have held that we "will not second-guess a trial attorney's 'considered selection of trial tactics or the exercise of a

[1] It is worth noting, as Jackson points out in his brief, that no published Wisconsin case has addressed whether an unfulfilled promise to the jury that a particular witness will be called can form the basis of a claim for ineffective assistance of counsel. The federal cases cited by both Jackson and the State—some of which have found ineffective assistance and some of which have not—appear to recognize that "the determination of inefficacy is necessarily fact-based." *See* ***United States v. McGill***, 11 F.3d 223, 227 (1st Cir. 1993). Because there is no controlling case law and the cases are so fact-specific, I will not discuss the federal cases cited in the briefs.

professional judgment in the face of alternatives that have been weighed by trial counsel.'" ***State v. Elm***, 201 Wis. 2d 452, 464, 549 N.W.2d 471 (Ct. App. 1996) (citation omitted). On the other hand, appellate courts "will in fact second-guess a lawyer if the initial guess is one that demonstrates an irrational trial tactic or if it is the exercise of professional authority based upon caprice rather than upon judgment." *See* ***State v. Felton***, 110 Wis. 2d 485, 503, 329 N.W.2d 161 (1983).

¶61 Applying these standards, I conclude that trial counsel's performance was deficient—but not because he ultimately decided not to call Dr. Michael Kotkin after the trial court ruled that the State would be permitted to ask him about the impact of Jackson's prior fourth-degree sexual assault on his opinion. Rather, I conclude trial counsel performed deficiently when he promised the jury it would hear testimony from Dr. Kotkin without first seeking a ruling from the trial court on an issue that trial counsel should have known would be decided against him or, at the very least, would be a difficult argument to win based on existing case law and statutes.

¶62 It is undisputed that trial counsel received Dr. Kotkin's report nine months prior to trial and was aware of references to Jackson's criminal history in the report. Trial counsel said that even with this knowledge, he did not even consider not telling the jury that Dr. Kotkin would testify, because he had a "good faith belie[f]" that the State would not be able to ask about the prior sexual assault disclosed in the report.

¶63 At the ***Machner*** hearing trial counsel testified that "early in the game" he formed his opinion that the criminal history described in the report

would not be admissible because it was "prejudicial."[2] However, trial counsel did not argue unfair prejudice when the trial court considered whether the State would be able to ask Dr. Kotkin about past crimes, or at the ***Machner*** hearing. Indeed, trial counsel cited neither statutes nor case law in support of his "good faith belie[f]" that the State should not be able to ask Dr. Kotkin about Jackson's conviction for sexual assault.

¶64 It was unreasonable for trial counsel to believe that the State would be denied the right to ask about Jackson's prior assault. While it has long been held that a defendant may offer expert testimony to describe character traits inconsistent with the charged conduct, *see* ***King v. State***, 75 Wis. 2d 26, 39, 248 N.W.2d 458 (1977), it is also well-established that the expert may be asked how his expert opinion would be altered by specific instances of conduct by the defendant, *see* ***id.*** at 39-40; *see also* ***State v. Richard A.P.***, 223 Wis. 2d 777, 795 n.9, 589 N.W.2d 674 (Ct. App. 1998). Consistent with Wisconsin case law, Wisconsin statutes outline the reciprocal rights to introduce and rebut an expert's opinions about a criminal defendant's character traits. Expert testimony relating to a defendant's "pertinent" character traits is admissible under WIS. STAT. § 904.04(1)(a)[3] if "*offered by an accused, or by the prosecution to rebut the*

[2] Although trial counsel used the term "prejudicial" rather than "unfairly prejudicial," I assume he was referring to the fact that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *See* WIS. STAT. § 904.03.

[3] WISCONSIN STAT. § 904.04 provides in relevant part:

> **Character evidence not admissible to prove conduct; exceptions; other crimes. (1)** CHARACTER EVIDENCE GENERALLY. Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(continued)

same." (Emphasis added.) Additional Wisconsin statutes allow the State, on cross-examination, to require an expert to disclose the bases underlying an opinion, *see* WIS. STAT. § 907.05,[4] and allow a party to request that an expert read all or part of his or her report to the jury, *see* WIS. STAT. § 907.07.[5] It is plain from the language of § 907.05 that Dr. Kotkin could be cross-examined on "the underlying facts or data" in his report, which would include Jackson's prior convictions mentioned in the report. It is also apparent from the plain language of § 907.07 that the State might have been able to require Dr. Kotkin to read all or portions of the damaging information in the report to the jury, unless prohibited by the court.

> (a) *Character of accused.* Evidence of a pertinent trait of the accused's character offered by an accused, or by the prosecution to rebut the same.

[4] WISCONSIN STAT. § 907.05 provides:

> **Disclosure of facts or data underlying expert opinion.** The expert may testify in terms of opinion or inference and give the reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. *The expert may in any event be required to disclose the underlying facts or data on cross-examination.*

(Emphasis added.)

[5] WISCONSIN STAT. § 907.07 provides:

> **Reading of report by expert.** *An expert witness may at the trial read in evidence any report which the witness made or joined in making except matter therein which would not be admissible if offered as oral testimony by the witness.* Before its use, a copy of the report shall be provided to the opponent.

(Emphasis added.)

¶65 If trial counsel believed—despite the existing case law and statutes—that there was any potential basis to prohibit the State from asking Dr. Kotkin about the prior sexual-assault conviction mentioned in his report, trial counsel should have filed a pretrial motion in limine to get the matter decided. He did not, even though he filed other motions on unrelated issues.

¶66 Furthermore, even if trial counsel decided not to seek a ruling prior to trial, he should not have promised the jury it would hear from Dr. Kotkin, given the existence of the undecided issue that Jackson had little chance of winning. Trial counsel should have recognized that if the legal issue was decided against Jackson, he would be forced to either call Dr. Kotkin as a witness and have the prior sexual assault made known to the jury, or decline to call Dr. Kotkin, which would contradict what he promised the jury.

¶67 For the foregoing reasons, I conclude that trial counsel performed deficiently when he promised the jury that it would hear testimony from Dr. Kotkin without first seeking a ruling from the trial court on an issue that trial counsel should have known would be difficult to win. Furthermore, I conclude that this deficient performance was prejudicial.

¶68 To satisfy the prejudice prong of ***Strickland***, the defendant must demonstrate that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.***, 466 U.S. at 687. In other words, "[t]he 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. "The focus of this inquiry is not on the

outcome of the trial, but on 'the reliability of the proceedings.'" ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted).

¶69 I conclude that Jackson has met his burden. The defense theory was that the assaults never happened, and that the girls were being coached by their mother to falsely accuse Jackson. There was no physical evidence to support the girls' testimony—the physical examinations revealed no physical injuries, despite the fact that the girls alleged repeated anal penetration. The case hinged on the credibility of the girls and Jackson, and trial counsel recognized that evidence of Jackson's character—specifically his lack of propensity to be sexually involved with children—was a significant part of his defense, as evidenced by trial counsel's decision to hire an expert to form an opinion on Jackson's character.

¶70 Consistent with trial counsel's recognition of the importance of Jackson's credibility and character, trial counsel told the jury the defense would call three witnesses: Jackson, the mother of one of the girls and Dr. Kotkin. The jury was told the theory of defense and was promised that "a psychologist expert who specializes in sexual assault matters who [met] with Jackson" would "tell [the jury] in detail about his findings and his opinion regarding Mr. Jackson." Two days later, trial counsel presented his closing argument, never having called a psychologist. The jury was not given any explanation for the failure to produce that witness and was therefore left with two possible inferences: the witness suddenly did not support the theory of defense, or trial counsel did not tell the jury the truth when he promised a psychologist would testify on Jackson's behalf. Under the facts in this case, either inference is so highly prejudicial that I must conclude the prejudice prong of ***Strickland*** was satisfied when trial counsel first

promised a psychologist would testify on Jackson's behalf and then failed to call the psychologist as a witness or offer any explanation as to his absence.[6]

¶71 In conclusion, I respectfully dissent from Section D of the majority opinion. Based on trial counsel's constitutional ineffectiveness, I would reverse and remand for a new trial.

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[6] As previously noted, whether prejudice exists is dependent on the unique facts of each case. Nonetheless, the following discussion from ***Anderson v. Butler***, 858 F.2d 16, 17 (1st Cir. 1988), aptly identifies many of the same concerns that have led me to conclude that Jackson is entitled to a new trial based on ineffective assistance of counsel:

> Two members of this panel have long held the opinion that little is more damaging than to fail to produce important evidence that had been promised in an opening. This would seem particularly so here when the opening was only the day before, and the jurors had been asked on the voir dire as to their acceptance of psychiatric testimony. The promise was dramatic, and the indicated testimony strikingly significant. The first thing that the ultimately disappointed jurors would believe, in the absence of some other explanation, would be that the doctors were unwilling, viz., unable, to live up to their billing. This they would not forget.