COURT OF APPEALS
DECISION
DATED AND RELEASED

June 8, 1995

No. 94-1426-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FELIPE M. BENITEZ,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Affirmed*.

Before Gartzke, P.J., Dykman and Sundby, JJ.

DYKMAN, J. Felipe M. Benitez appeals from a judgment convicting him of eight counts of sexual assault of a child as a repeater, and from an order denying his postconviction motion. He asserts that he was denied his constitutional right to effective assistance of counsel, that three trial court evidentiary rulings were reversible error, and that he should be given a new trial in the interest of justice.

We conclude that counsel's representation, though in some respects deficient, did not prejudice Benitez. We also conclude that the trial court did not erroneously exercise its discretion as to its challenged discretionary rulings and that Benitez is not entitled to a new trial in the interest of justice. Accordingly, we affirm.

BACKGROUND

Benitez met Sandy in 1985. After they became lovers, Benitez would sometimes stay overnight at Sandy's residence. Sandy was the mother of twin girls, Amy and Andrea, born in October of 1976. Amy testified that between the fall of 1987 and the spring of 1989, when she was eleven and twelve years old, Benitez sexually assaulted her on more than fifty occasions. Some of these assaults took place in the home while the family was present, although Amy did not tell anyone about them at the time. Andrea testified that Benitez sexually assaulted her once in the spring of 1989. Neither of the twins told anyone about the assaults until 1991, when Amy told a friend. Amy ultimately told a social worker about the assaults, and Andrea also revealed the assault against her. In 1993, Benitez was charged with the assaults against Amy and Andrea.

COMPETENCY OF TRIAL COUNSEL

At trial, counsel for Benitez did not object to hearsay testimony from two of Amy and Andrea's friends, from a social worker and from Sandy. Nor did he object to testimony from three social workers who testified as to conversations they had with Amy and Andrea. At the postconviction hearing, Benitez's counsel testified that he did not object to the hearsay testimony because he and Benitez had concluded that the more testimony that came in, the less believable the twins' story became. For example, counsel did not object to testimony that Benitez sexually assaulted Amy immediately outside her mother's open bedroom door while Sandy was sleeping. Though the sexual assaults were numerous and occurred when the whole family was at home, both twins testified that neither one knew of the other's involvement with Benitez. Counsel felt that by letting in evidence of numerous incidents happening without anyone else's knowledge, he would be able to argue that Amy was lying. However, counsel testified that he never considered that this tactic would waive any error in admitting the evidence should Benitez be convicted and appeal.

Strickland v. Washington, 466 U.S. 668 (1984), sets out the federal test for ineffective assistance of counsel under the Sixth Amendment to the United States Constitution. This is a two-pronged test. Counsel's performance must be deficient *and* the deficient performance must prejudice the defendant. ***Id.*** at 687. Both the performance and the prejudice prongs are mixed questions of fact and law. ***Id.*** at 698. We will not reverse a trial court's findings of fact unless they are clearly erroneous. Section 805.17(2), STATS. If the facts have been established, whether counsel's representation was deficient and, if it was, whether it was prejudicial are questions of law which we review *de novo.* ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 715 (1985).

Counsel is presumed to have acted properly. The defendant must show that his counsel's acts were serious mistakes which could not have been undertaken in the exercise of objectively reasonable professional judgment, deferentially considering all the circumstances from counsel's perspective. ***Strickland***, 466 U.S. at 687-91.

Benitez asserts that his trial counsel was ineffective because he failed to object on hearsay grounds to testimony by two of the twins' school friends, by Sandy and by a police detective, that in 1991, Amy told them that Benitez had sexually assaulted her. At the postconviction hearing, counsel testified that he made no objection because he had objected to this kind of evidence many times in the past and he did not "believe that [he] ever came close once to succeeding in that argument." However, he admitted that he never considered that his failure to object would waive the issue on appeal.

The State asserts that had trial counsel objected to the testimony, the objection would have been overruled because a prior consistent statement is not hearsay. *See* § 908.01(4)(a)2, STATS.[1] The State argues that the prior consistent statement need not predate the alleged recent fabrication to be admissible under this statute. It also contends that the "rule of completeness" found in ***State v. Sharp***, 180 Wis.2d 640, 653-57, 511 N.W.2d 316, 322-24 (Ct. App. 1993), permits the admission of this evidence.

We have repeatedly stated:

> The allegation must be that the fabrication is recent or based upon an improper influence or motive. This requirement exists because the prior consistent statements must predate the alleged recent fabrication or improper influence or motive before they have probative value.

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[1] Section 908.01(4), STATS., provides:

> A statement is not hearsay if:
>
> (a) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:
>
> ....
>
> 2. Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive ....

State v. Mainiero, 189 Wis.2d 80, 103, 525 N.W.2d 304, 313 (Ct. App. 1994) (quoting ***State v. Peters***, 166 Wis.2d 168, 177, 479 N.W.2d 198, 201 (Ct. App. 1991)).

And, the United States Supreme Court has recently concluded that under FED. R. EVID. 801(d)(1)(B):

> Our holding is confined to the requirements for admission under Rule 801(d)(1)(B). The Rule permits the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive only when those statements were made before the charged recent fabrication or improper influence or motive.

Tome v. United States, 513 U.S. ___, ___, 115 S. Ct. 696, 705 (1995). Rule 801(d)(1)(B) is identical to § 908.01(4)(a)2, STATS. The rulings of federal courts can be persuasive on the interpretation of the Wisconsin Rules of Evidence. ***State v. Schindler***, 146 Wis.2d 47, 54, 429 N.W.2d 110, 113 (Ct. App. 1988).

We conclude that ***Mainiero***, the reasoning of ***Tome***, and the statement in ***Peters***, 166 Wis.2d at 177, 479 N.W.2d at 201, that "the prior consistent statements must predate the alleged recent fabrication or improper influence or motive before they have probative value" lead to our rejection of the State's assertion that statements made after the recent fabrication or improper influence or motive are admissible under § 908.01(4)(a)2, STATS. And ***Mainiero*** also holds that the "rule of completeness" exception to § 908.01(4)(a)2 is inapplicable where, as here, no partial or incomplete statement was introduced. ***Mainiero***, 189 Wis.2d at 103 n.6, 525 N.W.2d at 313.

We conclude that trial counsel's failure to object to the admission of prior consistent statements constituted deficient performance. ***Peters*** was decided nineteen months before the Benitez trial. Counsel's explanation that he did not object to the prior consistent statements on hearsay grounds was that he had done so unsuccessfully in previous cases, and he did not believe that he would be successful in this case. But counsel did not consider that by failing to object, he would waive the issue on appeal. Though we can sympathize with

counsel's contention that he did not want to tilt at windmills,[2] the only way to test what one believes to be trial court error is to object. Had counsel done so, citing ***Peters***, the trial court might have sustained his objection. If the trial court overruled his objection, the issue would have been preserved for appeal.

But was trial counsel's deficient performance prejudicial? The test for prejudice is whether "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Strickland***, 466 U.S. at 687.

We conclude that Benitez's trial counsel's deficient performance was not prejudicial. The trial court noted:

> To put it very bluntly, but still somewhat delicately, Mr. Benitez was not a very good witness in his own defense....
>
> [Defense counsel] is right when he talks about one of the girls being a much better witness than the other one. She was. She was an excellent witness.
>
> I remember thinking to myself after we took—after her testimony was over, taking one of our breaks and thinking that was enough to convict him. All the rest of it was just basically so much fluff.
>
> It boiled down to you either believed that girl, and her testimony was so credible about events, about places, about things that she remembered, things that would just not be consistent at all if she was making it up.

We agree with the trial court. A paper record shows an articulate sixteen-year-old with a remarkable sense of continuity in her testimony. And that record shows Benitez as being the less-than-consistent witness the court

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[2] *See* 1 MIGUEL DE CERVANTES SAAVEDRA, DON QUIXOTE 59-68 (James Fitzmaurice-Kelly ed. & Charles Jervas trans., Oxford University Press 1929).

described. We also note that Benitez's version of the facts suffered from a logical *non sequitur*. He testified that the twins made-up their stories of sexual assault because they wanted him out of the house so that their parents could reconcile. But he admitted that he stopped seeing the family in the fall of 1990, at least as far as the twins knew, and that the allegations of sexual assault were not made until about a year later. He also admitted that the twins' mother discovered him in their bedroom while they were asleep, although he testified that he was attempting to retrieve some of his compact discs.

We conclude that trial counsel's deficient performance was not prejudicial because it did not deprive Benitez of a trial whose result is reliable. The trial court noted that the real question for the jury was whether it accepted the twins' testimony, and rejected Benitez's testimony. That question was decided by what the jury heard and saw when the twins and Benitez testified. That other witnesses testified that the twins made similar statements to them did not change the outcome of the trial. The twins were either telling the truth on several occasions, or they were lying on several occasions. The jury's verdict would have been the same with or without counsel's deficient performance.

EVIDENTIARY RULINGS

Benitez asserts that the trial court made three erroneous and prejudicial evidentiary rulings which require that we remand for a new trial. First, he argues that the trial court erred by refusing to permit him to cross-examine the twins about their juvenile court status. Next, he asserts that the trial court erred by refusing to allow him to play answering machine tapes which would impeach Amy's testimony that she was fearful of Benitez. Finally, he contends that the trial court erred by allowing testimony that the twins were truthful and that the sexual assaults had occurred.

We first note that Benitez's arguments are based on a misunderstanding of our standard of review of a trial court's evidentiary rulings. He couches his argument in terms of a *de novo* review: "The trial court committed reversible error when it ...." Even when the State argued that the three asserted errors were subject to a review for erroneous exercise of discretion, Benitez did not take issue with that argument in his reply brief. He could have hardly done so. The admission of evidence is generally within the discretion of the trial court. ***Pophal v. Siverhus***, 168 Wis.2d 533, 546, 484

N.W.2d 555, 559 (Ct. App. 1992). If the trial court examined the relevant facts, applied a proper standard of law, and used a rational process to reach a rational result, we will affirm. ***Id.***, 484 N.W.2d at 560. Only if the court relied on an erroneous understanding of an evidentiary rule will we reverse. ***Id.***

Benitez proposed to introduce evidence that the twins were under formal supervision in the juvenile court in May of 1993. From this, he could then argue that because a condition of the dispositional order was that the twins had to address the sexual abuse, they did so by falsely testifying against him. The trial court reasoned that this evidence was not relevant because the complaint against Benitez was filed on May 7, 1993, and the juvenile court order was not filed until May 10, 1993. Thus, by the time the order with the asserted coercive language was entered, the Benitez prosecution was already underway, and the twins had already cooperated with the prosecutor. Additionally, the record shows that they had complained to social workers about Benitez's sexual assaults nearly two years before the complaint was filed.

Other than arguing that he had a right to present his "defense" to a jury, Benitez does not complain that the trial court failed to examine the relevant facts or did not use a rational process to reach a rational result. He argues only that ***Davis v. Alaska***, 415 U.S. 308 (1974), requires that a defendant be allowed to show that a prosecution witness had been adjudicated a juvenile delinquent.

Davis held only that an Alaska statute barring release of a juvenile record denied a defendant his Sixth Amendment right to confront the witnesses against him. ***Id.*** at 320. That is not the case here. Benitez does not argue that Wisconsin law prohibited the introduction of the evidence he sought. The trial court denied Benitez's request because the evidence he sought to admit was not relevant, not because a statute prohibited its release. Benitez has therefore failed to show that the court used an incorrect standard of law. The test for a proper exercise of discretion having been met, we affirm the trial court's decision that evidence of the twins' juvenile adjudication was not relevant.

Next, Benitez argues that the trial court erred by refusing to allow him to play answering machine tapes showing that Amy was not fearful of him, contrary to her trial testimony. Again, he erroneously uses a *de novo* standard of review in his argument.

We do not agree that the trial court refused to permit Benitez to play the tapes. The issue of the admissibility of the tapes arose when Benitez's counsel stated:

> But what I would like to do is I'm just going to ask the Court to rule that it would allow me, if I wanted to, to play the tape. But I want to—I'm not going to make the decision right now. I'm going to put my client on the stand, and then see whether or not at some point in time if I choose to do so.

After some discussion between Benitez's counsel, the prosecutor and the trial court, the court replied:

> Well, to the extent that the [taped] conversations have some—
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> ....
>
> — have some effect on the credibility of the witness, the witnesses, that is the mother and the two daughters, the conversations are I guess—or the fact that the conversations took place I guess is admissible.
>
> What I would suggest, counsel, is it's my understanding you're going to put the defendant on the stand. He can testify that they would call him, that they would swear at him. Although the fact that there's animosity there certainly is no secret and certainly is not contested. I don't know if it's going to be necessary to actually play the tapes.

After further argument by Benitez's counsel, the court stated:

> You can put your client on the stand. He can give his version. He can talk about the girls calling or the mother asking him to come back. But whether or not

> we have to play the tape, it seems to me that you don't really need the tape other than to inflame some passions.

Finally, just before terminating the discussion, the court stated:

> Well, the Court will withhold ruling on the actual admissibility of the tapes depending on what gets opened up.
>
> But as best as I can see right now, the defendant can testify about the bias or prejudices that the witnesses who testified against him have, and I will allow him to do so.

Benitez never attempted to play the tapes or again asked the trial court to permit him to play the tapes. He cannot claim that the court prevented him from introducing evidence that he did not attempt to introduce. At most, the court said that it did not believe the defendant needed to introduce the tapes. The court's last ruling on Benitez's counsel's request to admit the tapes was to withhold making a ruling on their admissibility.

Rule 809.10(4), STATS., provides that an appeal brings before this court all prior nonfinal judgments, orders and rulings adverse to the appellant and favorable to the respondent. In ***Mutual Serv. Casualty Ins. Co. v. Koenigs***, 110 Wis.2d 522, 526-27, 329 N.W.2d 157, 159 (1983), the court concluded that a party had to be aggrieved by an order before filing an appeal. In ***Ford Motor Credit Co. v. Mills***, 142 Wis.2d 215, 217-18, 418 N.W.2d 14, 15 (Ct. App. 1987), we concluded that to be aggrieved, the person must be adversely affected in some appreciable manner. Benitez was not adversely and appreciably aggrieved when the trial court withheld its ruling on Benitez's request that he be permitted to play the tapes for the jury. Accordingly, he cannot appeal this issue.

Furthermore, we have listened to the tapes. Our independent review of them supports a trial court decision to deny their admission in evidence. All of the words on the answering machine are spoken by Amy and her mother. But the tapes are not "40 minutes of vulgarity" as the State asserts.

In large part, the tapes are complaints regarding Benitez's refusal to speak with them. "I know that you are there—why don't you come to the telephone?" is a paraphrase of a common question on the tapes. There is some vulgarity, but it is not the theme of the tapes. The claim that the tapes show that Amy was not frightened of Benitez stretches believability. When Amy spoke to the answering machine, she could be as brave as she liked because Benitez could not harm her. We conclude that had the court excluded the tapes, it would not have erroneously exercised its discretion by doing so.

Benitez's final claim of evidentiary error is that Wanda Schafer, an expert in family dynamics and sexual abuse, was permitted to testify to the following:

1. "And I was asked to deal with the sexual abuse that had been perpetuated upon them."

2. "I concluded that there were definitely signs of abuse with these children."

3. "The red flags were all there that they had indeed been abused."

But Benitez did not object to any of these statements on the grounds now asserted on appeal. Trial court error to which no objection is made is deemed waived. ***State v. Smith***, 170 Wis.2d 701, 717-18, 490 N.W.2d 40, 47 (Ct. App. 1992), *cert. denied*, 113 S. Ct. 1860 (1993). Benitez asserts that an objection that Schafer's testimony was conclusory preserved the issue of whether Schafer's testimony was an opinion that another witness was telling the truth, evidence held impermissible in ***State v. Haseltine***, 120 Wis.2d 92, 96, 352 N.W.2d 673, 676 (Ct. App. 1984). We disagree.

An objection must be specific. ***Holmes v. State***, 76 Wis.2d 259, 271, 251 N.W.2d 56, 62 (1977). An objection that a witness has drawn a conclusion is by no means an objection on ***Haseltine*** grounds. Benitez adds in a footnote: "In any event, allowing the expert to testify that she had concluded that the twins `had indeed been abused' was plain error." This is the sort of argument we held to be inadequate in ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 377-

78 (1980). It is no more adequate now. We follow ***Shaffer*** and do not consider the issue further.

NEW TRIAL IN THE INTEREST OF JUSTICE

Benitez asks that we grant him a new trial in the interest of justice. We are given the authority to grant such a request by § 752.35, STATS. We may grant a new trial if the real controversy has not been fully tried or if we conclude that a new trial will likely produce a different result. ***State v. Von Loh***, 157 Wis.2d 91, 102, 458 N.W.2d 556, 560 (Ct. App. 1990).

Benitez argues that because of the asserted errors that we have previously discussed, he should be given a new trial. We are not convinced. According to Benitez, a new trial without the prior consistent statements, the hearsay, the testimony by Wanda Schafer, evidence of Amy's and Andrea's juvenile dispositional orders, and the answering machine tapes would result in his being acquitted. But the trial court considered this argument and concluded that the case boiled down to whether the jury believed the twins' testimony. In the trial court's view, Amy's testimony was, in effect, devastating. Benitez was not a good witness, and his explanation for the twins' accusations was weak. Insofar as a paper record can support the court's observations, we agree. At a new trial, with the evidence as Benitez would have it, the same conflict would occur. We have no reason to believe that Amy would be a less devastating witness or that Benitez would be any better. Though a possibility exists that Benitez might be acquitted, we cannot conclude that it is likely that he would be. Benitez does not argue that the real controversy was not tried, so we do not address that prong of § 752.35, STATS.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.