

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 12, 2012**

Diane M. Fremgen  
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. 2011AP945-CR**

**Cir. Ct. No. 2008CF43**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DONALD R. WENDT,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Juneau County: JAMES EVENSON, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Donald Wendt appeals a judgment of conviction. He also appeals an order denying his postconviction motion for a new trial. Wendt argues that a new trial is warranted in the interest of justice on the ground

that the real controversy was not fully tried. For the reasons discussed below, we affirm.

#### BACKGROUND

¶2 Donald Wendt was convicted after a jury trial of child enticement and first-degree sexual assault of his granddaughter, A.E.W. At trial, the jury viewed videotapes of two cognitive graphic interviews of A.E.W. conducted by social worker Cherie Green. A.E.W. and Green both testified at trial. Wendt did not testify at trial, but the jury viewed a videotaped interview of him, and the police officer who conducted the interview testified.

¶3 Wendt filed a postconviction motion requesting a new trial in the interest of justice on the ground that the real controversy was not fully tried. At the postconviction motion hearing, Wendt presented testimony from Alona Payne, a chief deputy sheriff from Minnesota who has substantial experience with cognitive graphic interviews of children. Payne critiqued the videotaped interviews of A.E.W. and opined that the questioning techniques used by social worker Green showed bias and did not produce reliable information regarding A.E.W.'s sexual assault.

¶4 Wendt argued in his postconviction motion that the deficiencies in the cognitive graphic interviews and Green's apparent bias were not fully tried and Wendt should receive a new trial at which Payne would testify. The circuit court denied the postconviction motion, concluding that the real controversy was fully tried. Wendt now appeals.

## DISCUSSION

¶5 Pursuant to WIS. STAT. § 752.35 (2009-10),<sup>1</sup> this court has discretion to grant a new trial if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried. To establish that the real controversy has not been fully tried, the appellant must show that the jury was precluded from considering important testimony that bore on an important issue, or that evidence which was improperly received “clouded a crucial issue” in the case. See *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996) (addressing the supreme court’s counterpart interest of justice statute).

¶6 On appeal, Wendt argues that the real controversy was not fully tried because the jury did not have the opportunity to hear, in the form of expert testimony from Deputy Payne, about the deficiencies and unreliability of the cognitive graphic interviews that were used to show that A.E.W. had been sexually assaulted. Deputy Payne testified at the postconviction motion hearing that she has done approximately 2,000 interviews of children and was trained in cognitive graphic interviewing by the same person who trained Green. Payne also testified that there are no nationally accepted standards for cognitive graphic interviews.

¶7 In her critique of Green’s interview techniques, Payne made both negative and positive comments. She opined that Green did not adequately determine A.E.W.’s competency level, did not listen to A.E.W., and did not ask follow-up questions. Payne also stated that Green fed information to A.E.W. and

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

asked questions that were too complex for a five-year-old to understand. Payne further criticized Green for using anatomical dolls in a suggestive way and failing to focus her questions on a specific incident.

¶8 However, Payne also praised Green for explaining the ground rules of the interview to A.E.W. and for Green’s use of a “mapping” technique, in which Green used a drawing to focus A.E.W. on what occurred at Wendt’s home at the time of the alleged assault. Payne stated that, by use of mapping, Green was able to elicit from A.E.W. that the alleged touching by Wendt occurred in Wendt’s bedroom. Payne stated: “It goes to show how when you get specific and focused how—what a tool and how valuable the accurate information that you can get from a child ....”

¶9 Even though no expert testimony was heard by the jury at trial, our review of the record reveals that the jury, nonetheless, was adequately apprised of possible deficiencies in the interviews done by Green. Wendt’s trial counsel, Mark Frank, through his cross-examination of Green and in his closing argument, pointed out problems with Green’s interview technique and her apparent bias. Frank testified at the postconviction motion hearing that he considered using an expert witness to discuss the appropriate procedure for interviewing a child, but decided not to do so because he did not believe an expert was needed to show that Green was not impartial. Frank also testified that he has been a trial lawyer for twenty-six years and has handled many sex offense cases involving children.

¶10 During Wendt’s trial, Frank cross-examined Green about her failure to discuss with A.E.W. whether A.E.W. understood the difference between dreams and reality. During her initial examination by a sexual assault nurse examiner (SANE), A.E.W. had stated that she had “dreams about grandpa moving me

around like dad does, grandpa and dad. They touch me right there. I don't like it." Green admitted that she did not discuss the concept of dreams or inquire about "dad" during either of her two subsequent interviews with A.E.W.

¶11 Frank's cross-examination of Green also drew attention to portions of the interviews where A.E.W. gave responses that were inconsistent or said she didn't remember a detail, and Green then seeming to lead A.E.W. to a particular answer by "redirecting" her. For example, A.E.W. stated at the beginning of her second interview that "grandpa" touched her only one time. Then, toward the end of the second interview, Green directed A.E.W.'s attention to statements A.E.W. had made in the first interview indicating that Wendt had touched her private parts more than one time. Frank undermined the reliability of A.E.W.'s statements about Wendt by eliciting testimony from Green that A.E.W. was exhausted by the end of the first interview. Additionally, Frank questioned Green about times during the interviews where Green presented A.E.W. with "options" instead of allowing A.E.W. to give answers based upon free recall. For example, Frank highlighted that Green asked A.E.W. whether Wendt touched her "outside or inside" of her vagina, or "both."

¶12 During his closing argument, Frank again mentioned the inconsistencies in the responses that Green elicited from A.E.W., and Green's failure to explore with A.E.W. the difference between dreams and reality. He criticized Green's style of interviewing, which he stated was like a "helping session" to direct A.E.W. to give particular answers. Frank also emphasized to the jury that Green was not impartial, and pointed out that Green had cried on the witness stand during trial because of her inability to detach herself from A.E.W.'s case. He reminded the jurors that, unlike Green's apparent bias, they had to be impartial and neutral.

¶13 Thus, even if we assume, as Wendt argues, that there were deficiencies in the way the cognitive graphic interviews were conducted, we are satisfied that such deficiencies were adequately brought to the jury's attention. We conclude that the failure of defense counsel to call an expert witness to testify about problems with Green's interview techniques did not result in the controversy not being fully tried.

*By the Court.*—Judgment and order affirmed.

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

