COURT OF APPEALS
DECISION
DATED AND FILED

February 19, 2013

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. 2012AP1076-CR **Cir. Ct. No. 2009CF450**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICHOLAS LASKOWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Nicholas Laskowski appeals a judgment of conviction for repeated sexual assault of a child, and an order denying his motion for postconviction relief. Laskowski argues the trial court erroneously exercised

its discretion regarding an evidentiary ruling; there was insufficient evidence of a third assault; and his trial attorney was ineffective. We affirm.

BACKGROUND

¶2 The State charged Laskowski with one count of repeated sexual assault against the same child, Stephanie J., contrary to WIS. STAT. § 948.025(1)(e),[1] as a repeater. Prior to trial, the State moved to admit other acts evidence under WIS. STAT. § 904.04(2). The State sought to introduce allegations by Laskowski's adult daughter that he sexually assaulted her as a child. Laskowski was never charged with respect to these allegations. The trial court denied the motion, concluding the evidence would be "completely confusing" to the jury and would result in a "trial within a trial." The court reasoned that the allegations were not timely reported and had not undergone the scrutiny of the court process.

¶3 Laskowski subsequently moved to admit evidence of specific acts of theft by the victim to challenge her credibility. The trial court ruled that Laskowski could introduce this evidence. However, the court further held that presenting it would open the door for the State to introduce the previously excluded other acts evidence against Laskowski. The court indicated Laskowski could not "have it both ways," explaining:

> You can't call into question her credibility, and then somehow prevent the [S]tate from trying to bolster her credibility by talking about relevant other acts. It is correct that I was concerned about the concept of the trial within a trial, the fact that these were uncharged, and therefore, they

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

> didn't reflect actual convictions, but that is similar, so not so much that it's an issue of simple fair play between the parties, but it is equivalent of it in that sense, that the information you wish to put before the jury in order to call into question her credibility also consists of uncharged misconduct ….

¶4 Neither party presented other acts evidence at trial. Laskowski argued in his postconviction motion that the court erroneously prevented him from presenting evidence crucial to his defense. The court rejected his argument, reasoning that evidence "Laskowski had assaulted another person repeatedly in the past tends to show that [Stephanie] was telling the truth when she alleged that Laskowski had assaulted her …."

¶5 At trial, Stephanie recounted a specific assault where she was playing solitaire on a computer. She explained Laskowski "started touching me in my boob area and then I went like this and then he stopped and then he started doing it again and then he went downstairs." The State argued to the jury, without objection, that this incident alone constituted two of the three assaults necessary to prove the repeated sexual assault charge.

¶6 Additionally, Stephanie stated Laskowski would come to her room while she was sleeping and touch her in her "private part." She indicated this happened "a whole lot of times but I don't remember them." However, Stephanie explained, "[H]e does the same thing most every time…. He'll touch my private area and then my boobs … then when he's done, he goes downstairs." Stephanie further recalled that Laskowski started touching her when she was eleven or twelve and did it "[m]aybe ten" times. She stated that most of the time Laskowski wore jeans and a shirt during the assaults, but once or twice he wore his robe.

¶7 Laskowski argued in his postconviction motion that his attorney was ineffective for not objecting to the State's argument that the solitaire incident constituted two assaults. The trial court rejected the argument, concluding Laskowski was not prejudiced. Laskowski now appeals.

DISCUSSION

¶8 Laskowski argues the trial court erroneously exercised its discretion with regard to the admission of other acts evidence; there was insufficient evidence of a third assault; and his trial attorney was ineffective. We address each in turn.

Admission of other acts evidence

¶9 Laskowski argues that, because the trial court tied the admissibility of his proffered other acts evidence to that of the State's, the court effectively precluded him from presenting evidence crucial to his defense. We agree that Laskowski was effectively precluded from presenting his evidence of specific acts of theft by the victim.

¶10 Fatal to his appeal, however, Laskowski fails to develop a properly supported argument. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we need not consider inadequately developed arguments). While he addresses the propriety of the trial court's ruling that he would be opening the door to introduction of the State's other acts evidence, Laskowski does not explain why the exclusion of *his* purported evidence would be either erroneous or prejudicial. As the State observes, Laskowski's brief contains a section titled, "Statement of the Case and Facts," but it contains nothing but procedural history. WISCONSIN STAT. RULE 809.19(1)(d) requires "a statement of facts relevant to the

issues presented for review, with appropriate references to the record." Moreover, Laskowski never precisely identifies the evidence he sought to introduce. He merely alludes to "specific acts of stealing by the victim," without describing when, where, or how the acts occurred; what was taken; who it was taken from; or how the evidence was to be introduced at trial.

¶11 Turning from this dearth of factual support, Laskowski presents the following as his legal argument:

> The rights of a defendant to have relevant evidence placed before the jury and to present a defense are sufficient "substantial rights" to justify a new trial. *See* ***State v. Hinz***, 121 Wis. 2d 282, 289-90, 360 N.W.2d 56 (Ct. App. 1984); ***State v. Pulizzano***, 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990). Laskowski therefore requests that the Court vacate the judgment of conviction and grant him a new trial where he can fairly present the evidence calling Stephanie J.'s credibility into question.

Laskowski neither discusses the facts or legal rationale of the cases he relies on nor applies any legal standard to any facts of his case. Indeed, it is unclear how the unidentified acts would even concern the victim's credibility. We will not develop an argument on Laskowski's behalf. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).

Sufficiency of the evidence

¶12 We may not deem the evidence insufficient "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶13 In arguing that the trial evidence was insufficient to support his conviction, Laskowski concedes that there was enough evidence to prove two assaults, namely, the solitaire incident and one bedroom incident. However, he argues there is no evidence of a third assault because Stephanie did not specifically recall the details of any additional bedroom incidents. Laskowski contends that without any "specifics as to the time, nature, or surrounding circumstances[, t]he jury could not have concluded that the sexual contact element was satisfied …."

¶14 The State concedes that the solitaire incident could provide the evidentiary basis for only a single assault. *See* ***State v. Hirsch***, 140 Wis. 2d 468, 410 N.W.2d 638 (Ct. App. 1987). Nonetheless, Laskowski's argument is unavailing. It appears he is arguing that the jury could not determine whether the sexual gratification component of a third sexual contact was satisfied. However, if there was sufficient evidence to conclude he twice touched Stephanie for the purpose of sexual gratification, the jury could reasonably infer that a third or subsequent similar touching was for that same purpose. The real controversy at trial was not over how many assaults might have occurred. Rather, the question was if *any* had occurred. As Laskowski's trial counsel argued prior to trial, the victim's "credibility is at the center of this case. If the jury believes her, they're going to convict my client. If they don't believe her, they're going to acquit my client. It's as simple as that."

¶15 Moreover, Stephanie testified that all of the numerous bedroom assaults followed the same pattern. That testimony, combined with a single explanation of what typically occurred, constituted sufficient evidence of third and subsequent assaults. Indeed, we have explained that the repeated sexual assault of a child statute

> was enacted to address the problem that often arises in cases where a child is the victim of a pattern of sexual abuse and assault but is unable to provide the specifics of an individual event of sexual assault. The purpose of the legislation was to facilitate prosecution of offenders under such conditions.

State v. Nommensen, 2007 WI App 224, ¶15, 305 Wis. 2d 695, 741 N.W.2d 481 (footnote omitted).

Ineffective assistance of counsel

¶16 Laskowski must demonstrate that trial counsel's performance was deficient and that the deficient performance was prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To satisfy the prejudice prong, Laskowski must show there is a reasonable probability that the result of the proceeding would have been different absent his counsel's error. *See* ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305. A reasonable probability is one that is sufficient to undermine confidence in the outcome. ***Strickland***, 466 U.S. at 694.

¶17 Laskowski argues his attorney was ineffective for failing to object when, during both the State's opening statement and closing argument, the prosecutor represented that touching Stephanie's breast twice during the solitaire incident constituted two distinct sexual assaults.

¶18 While the State concedes trial counsel was deficient for failing to object, we agree with the trial court that the error did not prejudice Laskowski. This argument fails for essentially the same reasons as did his sufficiency of the evidence argument. The jury simply did not need to double-count the solitaire incident. Stephanie alleged Laskowksi assaulted her ten times in the bedroom. There is no reason that the jury would have believed Laskowski assaulted her once

in the bedroom, but not at least twice. Counsel's error therefore does not undermine our confidence in the jury verdict.

By the Court.—Judgment and order affirmed.

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