COURT OF APPEALS
DECISION
DATED AND FILED

November 6, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0529-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RANDY MAURICE EIB,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

DYKMAN, P.J. Randy Maurice Eib appeals from a judgment convicting him of first-degree sexual assault of a child, contrary to § 948.02(1), STATS., and an order denying his motion for postconviction relief. Eib argues: (1) that the evidence was insufficient to support a finding that he had contact with the child for the purpose of sexual arousal or gratification; (2) that the trial court's

failure to ask potential jurors during voir dire if they or any of their family or friends had been the victim of a sexual assault deprived him of his due process right to a fair and impartial jury; (3) that he was denied effective assistance of counsel; and (4) that the court of appeals should exercise its discretionary reversal authority under § 752.35, STATS., because a multiplicity of errors at trial resulted in a miscarriage of justice.

We conclude that: (1) the evidence was sufficient to support the jury's finding of guilt; (2) Eib waived the voir dire issue by failing to object to the trial court's failure to ask the question on victimization; (3) Eib received effective assistance of counsel; and (4) the errors alleged by Eib did not result in a miscarriage of justice. Accordingly, we affirm.

BACKGROUND

On January 3, 1994, Eib was charged with first-degree sexual assault of a child. Eib was alleged to have had sexual contact with R.A.Z., the son of his girlfriend at the time, Cheryl L. R.A.Z. was three years old when the assault allegedly occurred. The criminal complaint provided that on or around November 2, 1993, Bette Z., R.A.Z.'s maternal grandmother, was baby-sitting for R.A.Z. when she noticed that the area around R.A.Z.'s anus was red. When Bette asked R.A.Z. what had happened, he stated, "Randy [Eib] touched me with his pee-pee." R.A.Z. later repeated the allegation to his grandfather, Roger Z.

Following a two-day trial, the jury found Eib guilty of first-degree sexual assault of a child. Eib brought two motions for postconviction relief, arguing that the evidence was insufficient to support the conviction and that he was deprived of effective assistance of counsel. The trial court denied the motions. Eib appeals.

SUFFICIENCY OF THE EVIDENCE

Eib first contends that the evidence was insufficient to support the jury's verdict. Upon a challenge to the sufficiency of the evidence, we may not substitute our judgment for that of the jury "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990). It is the function of the jury to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from the facts. ***Id.*** at 506, 451 N.W.2d at 757. If more than one inference can be drawn from the evidence, we must accept and follow the inference drawn by the jury unless the evidence on which that inference is based is incredible as a matter of law. ***Id.*** at 506-07, 451 N.W.2d at 757.

Eib was charged with sexual assault of a child under § 948.02, STATS. As an element of that offense, the State needed to prove that Eib had engaged in sexual contact with R.A.Z. Section 948.01(5)(a), STATS., defines "sexual contact" as an intentional touching, "either directly or through clothing by the use of any body part or object, … for the purpose of … sexually arousing or gratifying the defendant."[1] Eib contends that the evidence presented at trial was

[1] Section 948.01(5), STATS., provides in full:

> "Sexual contact" means any of the following:
>
> (a) Intentional touching by the complainant or defendant, either directly or through clothing by the use of any body part or object, of the complainant's or defendant's intimate parts if that intentional touching is either for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant.

(continued)

insufficient to support a finding that he had contact with R.A.Z. for the purpose of sexual arousal or gratification.

At trial, Bette Z., R.A.Z.'s maternal grandmother, testified that on November 2, 1993, after R.A.Z. used the bathroom, she noticed that the area "around [R.A.Z.'s] anus was totally beet red and his butt was totally red, like an abrasion." Bette noticed that R.A.Z. was sore and asked him what had happened. R.A.Z. responded, "Randy [Eib] touched me with his pee pee, hurt me," and again said, "Randy touched me with his pee pee." Bette testified that R.A.Z. uses the term "pee pee" for "penis." When Bette's husband Roger came home, Bette informed him of the incident and asked Roger to ask R.A.Z. what had happened to him. R.A.Z. gave the same answer. Roger Z. also testified and corroborated Bette's testimony.

"Intent to become sexually aroused or gratified, like other forms of intent, may be inferred from the defendant's conduct and from the general circumstances of the case—although the jury 'may not indulge in inferences wholly unsupported by any evidence.'" ***State v. Drusch***, 139 Wis.2d 312, 326, 407 N.W.2d 328, 334 (Ct. App. 1987) (citation omitted). Because Bette testified that R.A.Z. answered, "Randy touched me with his pee pee," when asked what happened to his anal area, the jury could reasonably conclude that Eib touched R.A.Z.'s anal area with his penis. Furthermore, the jury could reasonably infer that this contact was for the purpose of sexual arousal or gratification. We cannot

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> (b) Intentional penile ejaculation of ejaculate or intentional emission of urine or feces by the defendant upon any part of the body clothed or unclothed of the complainant if that ejaculation or emission is either for the purpose of sexually degrading or sexually humiliating the complainant or for the purpose of sexually arousing or gratifying the defendant.

think of any other reason that an adult male would engage in genital-anal contact with a three-year-old boy. Therefore, we conclude that the jury's verdict was supported by sufficient evidence.

VOIR DIRE

Before jury selection, the State asked the court to voir dire the jury as to whether any member of the panel or any of their family or friends had ever been accused of sexual assault. The court then asked defense counsel if he wanted the court to ask the jury whether any of them or their family or friends had been the victim of a sexual assault. Defense counsel requested that the court ask the question. During voir dire, the court asked the jury, "Has any member of the panel themselves, a close family member or friend been accused of a sexual assault?" The court failed, however, to ask the question requested by the defense.

Eib argues that the trial court's failure to ask potential jurors whether they or their family or friends had been the victim of a sexual assault deprived him of due process in the selection of an impartial jury. Under both the United States and Wisconsin constitutions, a criminal defendant is guaranteed a fair trial by a panel of impartial jurors. ***Hammill v. State***, 89 Wis.2d 404, 407, 278 N.W.2d 821, 822 (1979). Voir dire serves as the mechanism for ensuring that the jurors are impartial. ***State v. Moats***, 156 Wis.2d 74, 99, 457 N.W.2d 299, 310 (1990).

The trial court is accorded ample discretion in determining the best method for conducting voir dire. ***Rosales-Lopez v. United States***, 451 U.S. 182, 189 (1981). This includes broad discretion over the form and number of questions to be asked. ***State v. Koch***, 144 Wis.2d 838, 847, 426 N.W.2d 586, 590 (1988). We examine the trial court's decision regarding voir dire for an erroneous exercise

of discretion, keeping in mind that the court's broad discretion "is subject to the essential demands of fairness." *See* ***id.***

We do not need to determine whether the trial court erroneously exercised its discretion because Eib failed to object to the court's failure to ask the requested question. "The proper time to determine whether a juror is impartial is on voir dire examination." ***State v. Messelt***, 185 Wis.2d 254, 267, 518 N.W.2d 232, 238 (1994). In ***McGeever v. State***, 239 Wis. 87, 96-97, 300 N.W. 485, 489 (1941), the court provided:

> When a defendant has the opportunity to question every person called as a juror as to his qualifications and neglects to do this and fails to exercise his right of challenge, then "he must, in cases not capital, be presumed to have waived all objections which do not tend to impeach the justice or fairness of the verdict." ***State v. Vogel***, 22 Wis. 471, 472.

Similarly, in ***State v. Wyss***, 124 Wis.2d 681, 719, 370 N.W.2d 745, 763 (1985), *overruled on other grounds*, ***State v. Poellinger***, 153 Wis.2d 493, 505, 451 N.W.2d 752, 757 (1990), the court concluded that the defendant waived his right to object to a juror who lived outside of the county where the offense was committed because the defendant failed to question the juror during voir dire about his residency and failed to object to his serving on the jury. The court noted that the juror's nonresidence furnished "no presumption against the justice of the verdict." ***Id.*** at 720, 370 N.W.2d at 764 (quoting ***Rockwell v. Elderkin***, 19 Wis. 388 [*367], 390, [*368] (1865)).

Here, the trial court was going to ask the jurors whether any of them or their families or friends had been the victim of a sexual assault. The court forgot to do so. Defense counsel never objected to the court's failure to ask the question. Defense counsel never approached the bench to request that the question be asked. And defense counsel was given the opportunity to conduct his own voir

dire of the jurors, yet never asked the question on victimization. The defendant had ample opportunity to attempt to remedy the situation prior to jury selection, but failed to do so.

Furthermore, the court's failure to ask the victimization question did not impeach or create a presumption against the justice or fairness of the verdict. First, Eib offers no evidence that any of the jurors or their friends or relatives had been the victim of a sexual assault. To hypothesize that the question would have yielded any affirmative answers is purely speculative.

Second, even if any of the jurors had answered the question affirmatively, we cannot say that Eib would have been denied his right to a fair and impartial jury. In ***State v. Olson***, 179 Wis.2d 715, 508 N.W.2d 616 (Ct. App. 1993), a sexual assault case, the defendant discovered, after the trial, that one of the jurors had been the victim of a sexual assault. The defendant argued that "the juror's experience as the victim of a sexual assault similar to the complaining witness should create an implied bias as a matter of law." ***Id.*** at 720, 508 N.W.2d at 618. We disagreed, concluding that "[t]he failure of a victim of sexual assault to honestly answer a question about her experience on voir dire should not give rise to an irrebuttable presumption of bias or prejudice." ***Id.*** at 720-21, 508 N.W.2d at 618. If the failure of a juror to truthfully admit that she had been the victim of a sexual assault does not create "an irrebuttable presumption of bias or prejudice," then a juror's admission that he or she had been the victim of a sexual assault also would not create such a presumption.

Third, the trial court did take precautions to ensure that the jury was fair and impartial. After the prospective jurors were seated, the court informed them:

> This is a criminal case. Randy Maurice Eib is charged in the Information by the State of Wisconsin on November 2nd, 1993 at Aztalan Township, Jefferson County, to have committed allegedly the crime of first degree sexual assault of a child, having sexual contact with a person who has not attained the age of 13 years; to-wit: a R.A.Z., date of birth 10/1/90, contrary to section 948.02(1) of the Wisconsin Statutes.

During its general voir dire of the jury, the court asked:

> THE COURT: Is there anyone among you who has a feeling of any bias or prejudice for or against either of the parties in this case?
>
> (There is no show of hands.)
>
> THE COURT: Is there anyone among you who has an opinion now or has ever formed or expressed an opinion as to the guilt or innocence of this defendant?
>
> (There is no show of hands.)
>
> THE COURT: Is there anyone among you who cannot or will not try this case fairly and impartially on the evidence that is given here in court and understand the instructions of the Court and render a just and true verdict?
>
> (There is no show of hands.)

This questioning adequately ensured that the jurors were not biased against Eib.

In summary, the trial court's failure to ask the victimization question did not create a presumption against the justice or fairness of the verdict. Therefore, Eib waived his right to raise the issue here by failing to object to the trial court's failure to ask the question during voir dire.

INEFFECTIVE ASSISTANCE OF COUNSEL

Eib next argues that he was denied effective assistance of counsel. To establish ineffective assistance of counsel, Eib must satisfy a two-prong test. First, he must show that his counsel's performance was deficient. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Second, he must establish that the deficient performance was prejudicial. ***Id.***

There is a strong presumption that counsel rendered adequate assistance. ***Id.*** at 689. 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.*** To meet the prejudice test, Eib must show that there is a reasonable probability that, but for trial counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 694.

We will not overturn the trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy unless its findings are clearly erroneous. *See* ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). However, whether counsel's performance was deficient and, if so, whether that performance was prejudicial, are questions of law that we review independently from the trial court. ***Id.*** at 236-37, 548 N.W.2d at 76. We need not address both the deficient performance and prejudice prongs if the defendant does not make a sufficient showing on one. ***Strickland***, 466 U.S. at 697.

Eib first argues that trial counsel was ineffective for failing to remind the court to ask the jurors if any of them were biased because they were the

victim of a sexual assault or the relative or close friend of a victim. We do not need to address whether counsel performed deficiently in failing to remind the court to ask the question. We have already concluded that the trial court's failure to ask the victimization question did not create a presumption against the fairness of the verdict. Accordingly, we conclude that the result of the proceeding probably would not have been different had the court asked the question. Because Eib was not prejudiced by the court's failure to ask the question, he was not deprived of effective assistance of counsel.

Eib next contends that his trial counsel was ineffective for failing to have Amy O'Laughlin, R.A.Z.'s maternal aunt, testify that she overheard R.A.Z. tell his mother, Cheryl, that "Randy didn't hurt me. I like Randy." Eib further argues that counsel was ineffective for failing to present a sound legal argument for the admission of hearsay testimony from Cheryl. At the postconviction hearing, Cheryl testified that in January 1994, she asked R.A.Z. if he remembered telling Bette Z. that Randy touched him in a bad way, and R.A.Z. said, "I never said that."

The trial court found that Cheryl was not a credible witness, either at trial or at the postconviction hearing. Regarding the potential admission of R.A.Z.'s hearsay statements, the court stated:

> Had the baby's subsequent statements that the defendant never hurt him and he wanted to see the defendant been presented to the jury within the context that they were made; after the defendant and the child's mother had fled the state together[,] leaving [R.A.Z.] behind[;] after the child's mother returned to the state some 30 days later[;] after the defendant was apprehended and waived extradition; after the child's mother had shared with the child the fact that "Randy" was in jail because the child said Randy had hurt him[;] the jury would not[,] given the fleeing and other strong circumstantial evidence of guilt[,] come to any different conclusion than it did.

When the trial court acts as the finder of fact, it is the ultimate arbiter of the credibility of witnesses. *See* ***Johnson v. Merta***, 95 Wis.2d 141, 152, 289 N.W.2d 813, 818 (1980). The court found that, considering the circumstances, R.A.Z.'s denial that Randy had hurt him lacked credibility. Because the trial court found that R.A.Z.'s denial lacked credibility, we cannot conclude that the trial result likely would have been different had this information been before the jury. We also conclude that defense counsel did not perform deficiently for failing to adduce testimony that was not credible.

Next, Eib contends that his counsel performed ineffectively for failing to present evidence that Bette Z. lied to Dr. Paul Neary regarding Cheryl's explanation for the condition of R.A.Z.'s anal area. On December 3, 1993, Dr. Neary, a pediatrician, examined R.A.Z. for the purpose of determining whether he had been sexually assaulted. Dr. Neary's report provides that "Cheryl … apparently told [Bette] that [R.A.Z.] had perianal redness because he was constipated." However, Bette testified that Cheryl told her that R.A.Z.'s buttocks were red because of diarrhea. Eib contends that Bette's inconsistent statements were detrimental to her credibility.

At trial, both Bette and Cheryl testified that Cheryl attributed R.A.Z.'s perianal redness to diarrhea. If Eib's trial counsel had sought to admit evidence of Bette's statement to Dr. Neary, he would have impeached the testimony of both Bette and Cheryl. And it was Cheryl who attributed R.A.Z.'s redness to diarrhea, as opposed to genital contact with the defendant. If the jury had heard evidence that Cheryl told Bette that R.A.Z.'s buttocks were red due to constipation, it would have been less likely to believe that Cheryl was being truthful when she testified that diarrhea caused the redness. Therefore, trial

counsel was not ineffective for failing to bring Bette's statement to Dr. Neary to the jury's attention.

Eib also argues that his counsel was ineffective for failing to elicit testimony from Dr. Neary that the redness of R.A.Z.'s buttocks was consistent with diaper rash, which jibes with the explanation that Cheryl had given for the redness. But Dr. Neary had already answered, albeit indirectly, that R.A.Z.'s redness was consistent with diaper rash.

Dr. Neary testified that he was unable to determine whether R.A.Z. had been sexually assaulted because R.A.Z.'s perianal area appeared to be normal when examined on December 3, 1993. Dr. Neary could not express an opinion despite having been told how R.A.Z.'s buttocks appeared on November 2, 1993. Dr. Neary testified that the redness caused by anal penetration is at times indistinguishable from the redness caused by diaper rash. The jury could reasonably infer that Dr. Neary was unable to offer an opinion because the redness described to him was consistent both with the redness caused by a sexual assault and the redness caused by diaper rash. Therefore, we conclude that trial counsel was not deficient for failing to ask Dr. Neary whether R.A.Z.'s perianal redness was consistent with diaper rash.

Eib also contends that his trial counsel was ineffective for failing to have Dr. Neary testify that the penile friction necessary to cause the perianal redness described also would have caused the perpetrator's penis to exhibit similar irritation and would have been painful for the perpetrator. But Eib presents no evidence that a pedophile would be less likely to sexually assault a child if the sexual contact was painful or irritating. Therefore, we conclude that counsel did not perform deficiently for failing to ask this question. Counsel cannot be

expected to ask every minimally relevant question. Our rules of evidence provide that even relevant questions may be excluded when their probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *See* § 904.03, STATS.

Eib next contends that his trial counsel was ineffective for failing to present evidence that Bette lost or destroyed a diary in which she made note of some of the events of November 2, 1993. We disagree. The evidence is inconclusive as to whether Bette lost or destroyed the diary. At trial, defense counsel asked Bette whether she kept a diary. She answered, "Yes, I did. I keep a diary. Our religion teaches us to keep a diary every day, if possible, not just of these events. It's of every day, everything." Defense counsel had not subpoenaed Bette to produce the diary, and Bette did not have the diary with her. Bette was then questioned outside of the presence of the jury to determine whether the diary was still in existence:

> [DISTRICT ATTORNEY]: Do you know right now whether or not you even possess the diary that would have covered the period in question?
>
> [BETTE]: I am not positive. I mean, it is possible remotely, but every year after they are full we just throw them out. I mean, it's just basically to keep your thoughts ….
>
> [DISTRICT ATTORNEY]: …. And do you have any idea whether or not, if it did exist, it would be in your storage unit in Lily, Wisconsin?
>
> [BETTE]: No, I don't.

This testimony indicates that Bette doubts that the diary still exists, not that she destroyed the diary for some sinister reason. We do not believe that Bette's answer had any bearing on her credibility, and therefore counsel was not ineffective for failing to pursue this line of questioning in the presence of the jury.

Finally, Eib contends that counsel was ineffective for failing to present evidence that Bette and Roger discussed fabricating evidence in the form of a diary. At the postconviction hearing, Cheryl testified that, during a break in the trial, she overheard Bette tell Roger that the statements attributed to R.A.Z. do not appear in the diary and that they "could just go out and buy a book and write what we want to write and bring it in."

Defense counsel was not ineffective for failing to elicit this information at trial. Cheryl testified that she overheard this conversation during the trial, and therefore counsel would have had no way of discovering this evidence during pretrial interviews. Moreover, the trial court found Cheryl to be lacking in credibility, and therefore, even if this information had been before the jury, the trial result would have probably been unchanged.

DISCRETIONARY REVERSAL

Eib argues that we should exercise our discretionary authority under § 752.35, STATS., to grant him a new trial because a multiplicity of errors may have resulted in a miscarriage of justice. In order to reverse because of a miscarriage of justice, we must first find a substantial probability of a different result on retrial. ***Vollmer v. Luety***, 156 Wis.2d 1, 16, 456 N.W.2d 797, 804 (1990).

Here, Eib repeats several of the arguments that we have already addressed. In addition, he asserts that trial counsel was unprepared to challenge R.A.Z.'s hearsay declarations and that trial counsel failed to make an opening statement. Eib does not tell us why R.A.Z.'s hearsay declaration should have been inadmissible or why trial counsel's failure to make an opening statement was erroneous or prejudicial. We have already concluded that none of Eib's other

contended errors, standing alone, affected the outcome of the trial. Adding the alleged errors together, we still do not believe that they substantially affected the jury's verdict. Therefore, we decline to exercise our discretionary authority under § 752.31, STATS.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.