**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

August 20, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 97-0611-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**SCOTT H. PETERSEN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and order of the circuit court for Crawford County: MICHAEL KIRCHMAN, Judge. *Affirmed.*

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

PER CURIAM. Scott Petersen appeals from a judgment convicting him of one count of second-degree sexual assault of a child. The issues are: (1) whether Petersen was denied the right to effective assistance of counsel when his attorney failed to request a jury instruction on the voluntariness of Petersen's confession; (2) whether Petersen's confession to the police should have been

suppressed; (3) whether the trial court should have granted a mistrial when a police officer testified that Petersen's confession was true; and (4) whether the trial court erred in admitting expert testimony that the victim's behavior was consistent with behavior exhibited by victims of sexual assault. We resolve all issues against Petersen and affirm.

The police questioned Petersen about his daughter's allegations that he had sexually assaulted her. He gave two statements. In the first, he completely denied sexually assaulting his daughter. In the second, he admitted that he may have touched her in a sexual manner one time in the winter of 1995. Before trial began, Petersen moved the trial court to suppress the admission. He argued that he made it up because a police officer told him he was facing forty years in prison, but that if he confessed to the crime, the officer would recommend a misdemeanor charge to the district attorney, and his daughter would be spared the trauma of testifying at trial. The trial court denied the motion to suppress.

Petersen first argues that his trial counsel ineffectively represented him. He bases his claim on the fact that his attorney did not request a jury instruction informing the jury of its duty to evaluate statements given by a defendant for trustworthiness. Petersen argues that this error was prejudicial because the jury convicted him of the sexual assault that he specifically admitted in the winter of 1995, but acquitted him of the other count that his daughter said occurred in June 1994. Wisconsin Jury Instruction 180 provides:

> The State has introduced evidence of [statements] which it claims [were] made by the defendant. It is for you, the jury, to determine how much weight, if any, to give to [each] statement.
>
> In evaluating [each] statement, you should consider three things.

> ….
>
> Finally, if you find that the statement was made by the defendant and accurately restated here at trial, you must determine whether this statement is trustworthy. "Trustworthy" simply means whether the statement ought to be believed.
>
> You should consider the facts and circumstances surrounding the making of [each] statement, along with all of the other evidence in the case, in determining how much weight, if any, the statement deserves.

Petersen's counsel testified at the postconviction motion hearing that she did not request this jury instruction because she simply forgot about it. Even if she had remembered, however, she stated that she might not have requested the instruction because she might not have wanted to draw additional attention to the trustworthiness of the statements. A police officer testified at trial that he thought Petersen was telling the truth in his second statement when he admitted the crime.[1]

We conclude that counsel's failure to request the jury instruction was deficient performance because her reasoning was not strategic, she simply forgot. However, we conclude that counsel's deficient performance was not prejudicial. The jury must have realized that it had to decide which of Peterson's two statements were true because the statements were contradictory. In closing arguments, Petersen's counsel argued to the jury that the second statement was coerced by the police. The jury was well aware of Petersen's position that the second statement should not be believed. We agree with the State that "[t]he question is not whether [Petersen's] confession had an impact on the jury, the question is whether the absence of the instruction had an impact on the verdict." Because there is no reasonable probability that the jury was ignorant of its duty to

[1] The trial court immediately struck this testimony.

determine what weight, if any, to give the statements, Petersen was not deprived of his constitutional right to the effective assistance of counsel. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (person seeking to establish that they received ineffective assistance of trial counsel must show that counsel's deficient performance prejudiced the defense).[2]

Peterson next argues that the trial court should have granted a mistrial after a police officer testified that he thought Petersen's confession to the sexual assault was more reliable than his denial of it. After the police officer made this statement, the trial court immediately instructed the jury to disregard it. In closing instructions, the trial court again reminded the jury that stricken testimony should be disregarded.

We assume that "a properly given admonitory instruction is followed." ***State v. Pitsch***, 124 Wis.2d 628, 644 n.8, 369 N.W.2d 711, 720 (1985). Although, in some cases, the risk of prejudice arising from the material put before the jury is "so great that even a limiting instruction will not adequately protect a criminal defendant's constitutional rights." ***Id***. We conclude that the brief statement by the officer about his perception of Petersen's veracity does not rise to that level. The trial court did not erroneously exercise its discretion in refusing to grant a mistrial.

Petersen next argues that the trial court erred in refusing to suppress his confession. He argues that the confession was coerced because the officer taking the statement promised he would recommend a misdemeanor charge if

[2] Petersen also argues that this court should exercise its discretionary power and order a new trial in the interests of justice because the jury instruction was not given. We decline to do so.

Petersen admitted the crime and said that Petersen could receive a forty-year prison term if he did not confess.

We conclude that the trial court properly denied the motion to suppress. It is not necessarily coercive for the police to tell a defendant the penalty range for a crime. *See* ***State v. Drogsvold***, 104 Wis.2d 247, 274, 311 N.W.2d 243, 256 (Ct. App. 1981) (the fact that the police described the range of possible charges for a potential homicide did not render a statement involuntary). Similarly, a confession is not involuntary because a promise of leniency is made where the promise is fulfilled. ***State v. Owens***, 148 Wis.2d 922, 931, 436 N.W.2d 869, 873 (1989). There is no allegation that the officer failed to keep his alleged promise to recommend a misdemeanor charge to the district attorney. Petersen came to the police station voluntarily, he was not threatened, interrogated for lengthy period of time, or otherwise treated in a manner designed to coerce him. We conclude that Petersen's statement was voluntarily made.

Finally, Petersen argues that the trial court should not have allowed expert testimony that the victim, S.K.P., exhibited certain behaviors or characteristics consistent with behavior exhibited by sexual assault victims.

At trial, Petersen argued that his daughter's statements were not true because she didn't tell anyone at the time the assaults allegedly occurred, she continued to voluntarily live with her father when she could have returned to her mother's residence, and she recanted at the preliminary hearing. The expert did not testify that S.K.P. was telling the truth or that she was, in fact, molested. The expert simply explained that some of S.K.P.'s behaviors, such as the delay in reporting the assault and depression, were consistent with behavior exhibited by victims of sexual assault. The expert acknowledged that these behaviors were also

consistent with other types of problems a young teenager might have. Expert testimony describing the behavior of a complainant and then describing the behavior of victims of the same type of crime is admissible if it helps the jury to understand a complainant's behavior. ***State v. Jensen***, 147 Wis.2d 240, 257, 432 N.W.2d 913, 920 (1988). Under ***Jensen***, the testimony was properly admitted.

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

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