

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 31, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-3373-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ALICE FAYE HOWARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY and KITTY K. BRENNAN, Judges. *Affirmed and cause remanded.*

FINE, J. Alice Faye Howard was convicted by a jury of contributing to the delinquency of a child for recruiting her daughter to help her with a shoplifting scheme. See § 948.40(1), STATS.¹ Howard appeals, claiming

¹ The judgment mistakenly cites to § 947.15(1), STATS. This matter is remanded with directions that a corrected judgment be entered.

that her lawyer was ineffective because he did not object to evidence of her daughter's age that was presented during the State's case-in-chief. She also claims that her lawyer was ineffective because he did not move to dismiss after the State had finished presenting its case-in-chief because, in her view, there was then insufficient proof in the record of her daughter's age. We affirm Howard's conviction and the trial court's order denying her motion for postconviction relief.

The only testimony about the age of Howard's daughter that the State presented during its case-in-chief, was the following question and answer of a Milwaukee police officer:

Q Were you able to determine her name and date of birth?

A Yes.

Q And what was that?

A Her name is K[] R[], and I believe her birthday is March 20, 1981, I believe.

Q And how old did that make her at the time of the offense?

A Fourteen.

Q How did you determine her date of birth, sir?

A I asked her. I asked her mother. We checked with Madison Police Department to find out had there been any contacts with a person of that name.² There had, and that is the date of birth that they had.

On cross-examination, Howard's lawyer introduced into evidence the statement given to the police officer by Howard's daughter. In that statement, Howard's daughter said that she was fourteen.

² Howard lives in Madison.

Every criminal defendant has a Sixth Amendment right to the effective assistance of counsel, *Strickland v. Washington*, 466 U.S. 668, 686 (1984), and a coterminous right under Article I, § 7 of the Wisconsin Constitution, *State v. Sanchez*, 201 Wis.2d 219, 226–236, 548 N.W.2d 69, 72–76 (1996). In order to establish a violation of this fundamental right, a defendant must prove two things: (1) that his or her lawyer's performance was deficient, and, if so, (2) that “the deficient performance prejudiced the defense.” *Strickland*, 466 U.S. at 687; *see also Sanchez*, 201 Wis.2d at 236, 548 N.W.2d at 76. A lawyer's performance is not deficient unless he or she “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. The defendant must also prove prejudice; that is, he or she must demonstrate that the trial lawyer's errors “were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Ibid.* Put another way: “In order to show prejudice, [t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Sanchez*, 201 Wis.2d at 236, 548 N.W.2d at 76 (bracketing in *Sanchez*) (quoting *Strickland*, 466 U.S. at 694).

In assessing a defendant's claim that his or her counsel was ineffective, a court need not address both the deficient-performance and prejudice components if the defendant does not make a sufficient showing on one. *Strickland*, 466 U.S. at 697; *Sanchez*, 201 Wis.2d at 236, 548 N.W.2d at 76. The issues of performance and prejudice present mixed questions of fact and law. *Sanchez*, 201 Wis.2d at 236, 548 N.W.2d at 76. Findings of historical fact will not be upset unless they are clearly erroneous. *Ibid.*; RULE 805.17(2), STATS. Whether counsel's performance was deficient, and, if so, whether it was

prejudicial, are legal issues we review *de novo*. *Sanchez*, 201 Wis.2d at 236–237, 548 N.W.2d at 76.

Howard complains that her lawyer should have objected to the evidence of her daughter's age presented by the State through the testimony of the Milwaukee police officer because the officer's answer was uncertain (he qualified his answer with “I believe”) and, according to Howard, was a hearsay response. The officer, however, gave the basis for his belief: he asked the daughter how old she was. The daughter's statement that she was fourteen was admissible under RULE 908.03(19), STATS., as an exception to the rule against hearsay. RULE 908.03(19) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

....

(19) REPUTATION CONCERNING PERSONAL OR FAMILY HISTORY. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, relationship by blood, adoption, or marriage, ancestry, whether the person is a marital or nonmarital child, or other similar fact of this personal or family history.

The rationale behind RULE 908.03(19) as applicable here is simple: no one remembers the date of his or her birth. We know when we were born because others have told us. By the same token, the rule not only permits a person to testify how old he or she is and base that testimony on what other family members have told that person, but it also permits that person's out-of-court declaration concerning the “reputation” in his or her family about the person's age to be received into evidence. In the language of the rule, and cutting through to the essence of the matter, Howard's daughter told the officer about the “[r]eputation

among members” of her family “concerning” the daughter's date of birth; clearly, she had no personal knowledge about when she was born. This evidence was sufficient to permit a reasonable jury to find beyond a reasonable doubt that Howard's daughter was under eighteen at the time of the crime. *See State v. Poellinger*, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757–758 (1990). Moreover, had Howard objected because of the “I believe” qualifier, the officer could have quoted from the daughter's statement, as he did during Howard's cross-examination of him. Further, had the trial court sustained an objection to the daughter's out-of-court statement, the State could have called the daughter, who was present in court, as its witness. Had the daughter asserted her privilege against self-incrimination as a reason not to testify, her out-of-court declaration concerning her age would have been admissible under RULE 908.045(5)(a), STATS. (“The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: ... A statement concerning the declarant’s own birth, adoption, marriage, divorce, relationship by blood, adoption or marriage, ancestry, whether the person is a marital or nonmarital child, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated.”). As it turns out, the daughter testified on her mother's behalf, and told the jury that she was then fifteen and one-half years old at the time of the trial. In light of all this, Howard's lawyer's failure to object or to move to dismiss at the end of the prosecution's case-in-chief was neither deficient performance nor prejudicial.

We affirm.

By the Court.—Judgment and order affirmed, and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

