

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 11, 2015

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. 2014AP1045

Cir. Ct. No. 2013JV49

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN THE INTEREST OF CHARLES C. S. JR., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

CHARLES C. S., JR.,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JOHN R. RACE and KRISTINE E. DRETTWAN, Judges.
Reversed and cause remanded with directions.

¶1 REILLY, J.¹ Charles S. requests a new trial on the ground that his trial counsel was prejudicially deficient. Charles’s trial counsel did not know that a witness may not testify that another witness is “honest” in his or her accusations. The State introduced testimony at Charles’s delinquency trial that its investigating detective had received “training on detecting honesty” and testified that one of Charles’s accusers was honest “every time” with the detective. Charles’s counsel did not object to this “honesty” testimony and did not impeach the detective and his accusers with evidence that the accusers had repeatedly lied to the detective during the investigation. The deficient performance by Charles’s trial counsel was prejudicial as credibility was the crux of the trial and the court never heard that Charles’s accusers repeatedly lied to police during the investigation. We reverse and remand for a new trial.

BACKGROUND

¶2 The Bethel United Methodist Church in Sugar Creek township was burglarized and torched during the early morning hours of June 19, 2013. Police quickly focused on three juveniles: Drake C., sixteen years of age; Robert M., fifteen years of age; and Charles, fourteen years of age. Robert admitted to being at the church and said that Charles was with him. Charles denied being at the church and said Robert and Drake went to the church. Drake said he was the one who stayed home and that Robert and Charles went to the church. Based on Robert’s and Drake’s statements to law enforcement, the State filed a delinquency petition against Charles alleging arson, burglary, and criminal damage to religious

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

property as party to the crimes. The State did not have any direct evidence that Charles was at the church.

Delinquency Trial and Disposition

¶3 The delinquency trial (i.e., fact-finding hearing) boiled down to a credibility contest between the teens.² Charles’s counsel asked Detective Jeffrey Recknagel on cross-examination why he “believed” Drake rather than Charles. Recknagel responded, “Based on the overall circumstances of everything that we investigated that day.” On redirect examination, the State engaged in the following exchange with Recknagel:

Q: And as a detective have you had any training on detecting honesty?

A: Yes, ma’am.

Q: And from your interview with Drake [], did you feel that he was being honest with you?

A: Absolutely. And I haven’t had just one interview with Drake, I had more than one interview and I believe that every time he was being honest with me.

¶4 Charles’s counsel did not object to this testimony. Charles’s counsel did not impeach Recknagel with proof that Drake and Robert had repeatedly lied to Recknagel during his investigation on June 19, 2013. Charles’s counsel also did not impeach Drake and Robert, both of whom testified, with evidence that they had repeatedly lied to Recknagel. Throughout closing arguments, the assistant

² Charles’s theory was that Drake and Robert, being better friends, conspired to protect Drake by falsely accusing Charles of going to the church with Robert. Although not developed at trial nor at the postdisposition motion hearing, there is evidence in the record that shows another possible motive; Drake was going to be seventeen years old as of September 6, 2013, possibly subjecting him to adult court jurisdiction. *See* WIS. STAT. § 938.02(10m).

district attorney acknowledged that the State's case came down to which of the teens was to be believed:

This case is going to come down to credibility.... [I]f [Robert and Drake] are lying to get Charles [] in trouble, why not lie better?... And we heard from Detective Recknagel that [Drake] had implicated himself in other crimes and appeared to be honest....

....

[Charles] is the only one who has testified today who has clearly been shown to be lying. So there are two versions. [Charles] is the only one who has been impeached today.

The court³ made findings that Robert and Drake were credible witnesses, adjudged Charles delinquent on each of the crimes, and placed Charles in the custody of the department of corrections until his nineteenth birthday.

Detective Recknagel's Report

¶5 The following account was included in a report filed by Recknagel that was obtained by Charles's counsel prior to the delinquency trial. Recknagel was requested to assist in the investigation of the church arson and burglary on the morning of the fire. Later that day, Recknagel went to Robert's home but Robert was not there. Recknagel sent another detective to Charles's home to interview Charles, who denied any involvement in the church fire but admitted to being at Drake's home the previous evening. Recknagel went to Drake's home where he found Drake and his father.

³ The Honorable John R. Race presided over the delinquency trial and dispositional hearing. The Honorable Kristine E. Drettwan presided over the postdisposition proceedings.

¶6 Drake told Recknagel that Charles and Robert arrived at his home the previous evening at 7:00 p.m. and stayed overnight. Drake said he fell asleep about 1:30 a.m. and slept until 11:00 a.m. Drake told Recknagel that when he awoke, he noticed Robert was still at his home. Drake said he asked Robert what Robert did while he was sleeping and Robert told him “we played Grand Theft Auto 4.” Drake told Recknagel that he did not know where Robert was at the time of the interview.

¶7 Recknagel requested that Drake show him his Facebook account, and Drake took the detective upstairs to his home computer. When Recknagel got to the top of the steps, he saw “another teenage male subject” at the computer logged on to Facebook. Recknagel suspected the teenager was Robert and asked him to identify himself. The teenager identified himself as “John.” Recknagel asked Drake three times if “John” was really Robert, and Drake said each time that the person was not Robert. Recknagel asked “John” if he was Robert; “John” said that he was not and provided a full name, birth date, and address that were later determined to be false. Drake’s father was brought upstairs and identified the person at the computer as Robert.

¶8 After admitting to lying about his identity, Robert told Recknagel that he and Charles were at the church. Robert told Recknagel that he is a pyromanic, “often ‘has ideas’ of fires,” and “has lit stuff on fire approximately 20-30 times.” Robert showed Recknagel his Facebook posts from earlier in the day, in which he implicated himself and an unidentified friend in the break-in and arson at the church. Robert told Recknagel he went back to the church about 1:00 p.m. to see how much damage “he caused.”

Postdisposition Motion and Hearing

¶9 Postdisposition, Charles filed a motion for a new trial, alleging that trial counsel was ineffective for failing to impeach and cross-examine the State’s witnesses with their acts of dishonesty. At the *Machner*⁴ hearing, Charles’s trial counsel offered no reason for failing to impeach Drake, Robert, and Detective Recknagel with the fact that Drake and Robert repeatedly lied to Recknagel during his investigation on June 19, 2013. Trial counsel acknowledged that he did not know that one witness may not testify that another witness is honest in his or her accusations. Detective Recknagel admitted that Drake lied to him at least three times.

¶10 The postconviction court acknowledged that credibility was key to Charles’s trial and found that counsel was deficient on the “credibility” question and in his failure to impeach the State’s witnesses with evidence of their lies. The court concluded that Charles suffered no prejudice as Judge Race, the trial judge, had thirty years of experience on the bench and was presumed to know the law and had the ability to ascertain the credibility of the witnesses. Charles appeals.

STANDARD OF REVIEW

¶11 To establish a claim for ineffective assistance of counsel, a defendant must show that counsel’s performance was deficient and that the deficiency prejudiced the defendant. *State v. Balliette*, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334. Counsel’s performance is deficient if it is outside the wide range of professionally competent assistance and is not the result of

⁴ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

reasonable professional judgment. *Strickland v. Washington*, 466 U.S. 668, 690 (1984). The performance prejudices the defense when there is a probability sufficient to undermine confidence in the outcome that but for counsel’s errors, the result of the proceeding would have been different. *Id.* at 694. “[W]hile the rules of evidence apply on actions tried to the court, it will be presumed if there is proper evidence to support the findings of the trial court that the court disregarded any evidence improperly admitted.” *McCoy v. May*, 255 Wis. 2d 20, 25, 38 N.W.2d 15 (1949). The postconviction court’s findings of fact will be upheld unless clearly erroneous, but the ultimate determination of whether counsel’s performance fell below the constitutional minimum is a question of law that we review independently. *State v. Erickson*, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999).

DISCUSSION

¶12 We begin with a review of the law regarding “truthfulness.” In *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984), this court held that “[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth.” While an investigator may testify as to the reasons behind decisions made during the course of an investigation, testimony regarding the veracity of another witness’s claims, both before and at trial, crosses the line by usurping the fact finder’s role in determining the credibility of the witnesses. See *State v. Snider*, 2003 WI App 172, ¶27, 266 Wis. 2d 830, 668 N.W.2d 784; *State v. Krueger*, 2008 WI App 162, ¶¶16, 19, 314 Wis. 2d 605, 762 N.W.2d 114.

¶13 In contrast, opinion evidence in the more general area of a nondefendant witness’s “character for truthfulness” may be admitted, but only

after that character has been attacked. *See* WIS. STAT. § 906.08(1). The person providing such an opinion must have personal knowledge of the witness's character for truthfulness or untruthfulness. *State v. Cuyler*, 110 Wis. 2d 133, 139, 327 N.W.2d 662 (1983). An allegation of a single instance of falsehood is not sufficient to imply a character for untruthfulness so as to permit rehabilitation of the witness's character for truthfulness. *State v. Eugenio*, 219 Wis. 2d 391, 404-05, 579 N.W.2d 642 (1998). Rather, the trial court "must believe that a reasonable person would consider the attack on the witness to be an assertion that the witness is not only lying in this instance, but is a liar generally," to permit opinion testimony as to the witness's character for truthfulness. *Id.*

¶14 Our supreme court agreed with *Haseltine*'s holding regarding the inadmissibility of testimony as to another witness's truthfulness in *State v. Romero*, 147 Wis. 2d 264, 278, 432 N.W.2d 899 (1988). We find *Romero* to be particularly instructive given its factual similarities to this case. *Romero* involved a sexual assault trial where the sole issue to be determined by the jury was whether the complainant or the defendant was telling the truth. *Id.* at 266, 279. At trial, in response to the prosecutor's question as to the accuser's "character for truthfulness," a police officer investigating the alleged assault testified that in his opinion the accuser "was being totally truthful with us." *Id.* at 269. In addition, a social worker was allowed to testify that the accuser "was honest with us from the time of the first interview through my subsequent contact with her." *Id.* at 268. The prosecutor referred to this testimony during closing arguments. *Id.* at 271-72. On appeal, both parties conceded that the admission of this testimony was erroneous. *Id.* at 277.

¶15 The *Romero* court found that these statements did not constitute opinions as to the alleged victim's character for truthfulness admissible under WIS.

STAT. § 906.08(1), but were impermissible opinions that her accusations were true. *Romero*, 147 Wis. 2d at 277. The *Romero* court concluded that the admission of testimony that the accuser was truthful in her accusations and the prosecutor's commentary on that issue so "clouded" the crucial issue of credibility that it "may be fair to say that the real controversy was not fully tried." *Id.* at 279. The court remanded for a new trial as the erroneous admission of the testimony discussing the truthfulness of the complainant's accusations played a significant and "perhaps" decisive role in the case's battle of credibility. *Id.* at 278-80.

¶16 Charles's trial is similar to *Romero* in being a battle of credibility. As in *Romero*, the State presented no evidence independent of witness testimony that linked Charles to the charged crimes. As in *Romero*, the statement by Detective Recknagel that Drake (and, by implication, Robert) was being honest in his accusations against Charles was not simply an opinion as to Drake's character for truthfulness under WIS. STAT. § 906.08(1), but was an impermissible opinion that Drake's accusations were true. *See Romero*, 147 Wis. 2d at 277. The *Romero* court disagreed with the State's attempt to characterize such testimony as "merely character evidence," concluding it to be improper testimony under WIS. STAT. § 907.01 as it was used to assess the victim's credibility. *Romero*, 147 Wis. 2d at 277-78. Even if the testimony in this case had been confined to Drake's character for truthfulness, it still would have been improper as there had been no defense attack on Drake's character sufficient to permit such rehabilitation under § 906.08(1)(b).

¶17 We presume that Judge Race was aware of the law regarding the admissibility of such testimony and properly disregarded it in reaching his decision, *see McCoy*, 255 Wis. at 25, and therefore, we presume that Charles was not prejudiced by that error. Standing alone, the deficient performance by

Charles's counsel in permitting such questions of Recknagel may not have resulted in a finding of *prejudicial* performance. But standing with counsel's deficient performance is that Detective Recknagel gave demonstrably false testimony that Drake had been honest with him "every time." Charles's counsel failed to impeach Recknagel (or Drake or Robert) with Recknagel's own report reflecting Drake's repeated dishonesty and, by doing so, Judge Race never received evidence critical to the determination of the credibility of the witnesses.

¶18 A judge cannot assess credibility when evidence highly relevant to credibility is withheld from the judge by officers of the court. Judge Race never heard the evidence that Drake and Robert repeatedly lied to Detective Recknagel during the investigation and did not receive the evidence that Recknagel's testimony that Drake was honest with him "every time" was untrue.

¶19 The State shares the blame for the prejudicial performance by introducing Recknagel's "training on detecting honesty" and by asking "did you feel that [Drake] was being honest with you?" The State added to these errors by referring in closing argument to the fact that Charles "is the only one who has been impeached today," despite knowing that this should not have been so.⁵ The State has an obligation to the justice system. We are troubled that the State took advantage of defense counsel's deficient performance by introducing clearly inadmissible evidence and, most egregiously, arguing evidence that was not true.

⁵ Recknagel's report was divulged by the State to Charles during pretrial discovery, thus the State is presumed to have known that its contents showed that Drake and Robert had repeatedly lied during Recknagel's investigation. We call the assistant district attorney's attention to *State v. Bvocik*, 2010 WI App 49, 324 Wis. 2d 352, 781 N.W.2d 719, as a reminder of the State's obligations to the ascertainment of the truth.

¶20 Given the magnitude of the deficient performance by Charles's counsel and the State's troubling response, we conclude a reasonable probability exists that there would be a different result in this case had defense counsel not performed deficiently.

CONCLUSION

¶21 As we find that Charles received prejudicially ineffective assistance from trial counsel, we reverse the judgment in this case and remand for a new trial.

By the Court.—Judgment and order reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

