

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 23, 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. 2014AP561-CR

Cir. Ct. No. 2011CF82

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD H. HARRISON, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ashland County: JOHN P. ANDERSON, Judge. *Affirmed.*

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Richard Harrison appeals a judgment of conviction and an order denying his motion for postconviction relief. The issues relate to ineffective assistance of counsel. We affirm.

¶2 Harrison was convicted after a jury trial on one count of repeated sexual assault of the same child. He filed a postconviction motion alleging ineffective assistance of counsel. The circuit court denied the motion after an evidentiary hearing.

¶3 To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if defendant makes an inadequate showing on one. *Id.* at 697. To demonstrate prejudice, the 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. *Id.* at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.* We affirm the trial court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the trial court. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985).

¶4 Harrison argues that his trial counsel was ineffective by failing to use the victim's testimony from the preliminary hearing to cross-examine her at trial. He argues that the victim testified at the preliminary hearing to a much more limited series of assaults than she had described earlier in her recorded video statement that was shown to the jury. He argues that counsel should have cross-examined the victim at trial using her preliminary examination testimony, with the goal of undermining her credibility by showing that her accounts differed so greatly from each other that it was plausible none of them were true.

¶5 For purposes of this opinion, we assume, without deciding, that trial counsel's performance was deficient, meaning that trial counsel should have used

the preliminary hearing testimony in this way at trial. However, we conclude that there was no prejudice. Given the age of the victim, it would be reasonable for the jury to regard the victim's reduced description of the assaults as resulting from the passage of time. In addition, Harrison has not suggested any reason that the victim would have fabricated these allegations entirely. As a result, our confidence in the verdict is not undermined, because even if this cross-examination of the victim had occurred, we are skeptical that it would have led the jury to have reasonable doubt about whether assaults occurred.

¶6 Harrison also argues that his trial counsel should have more fully cross-examined the victim's mother regarding the way the victim described the assaults to the mother. The argument is that counsel should have used differences in descriptions that the mother gave at trial and to police. We again assume that counsel's performance was deficient, and again conclude there was no prejudice. The mother's testimony was generally collateral, as compared to the detailed statement made by the victim in the video recording. We believe the jury would have been much more influenced by the victim's statement than by the relatively undetailed statements made by her mother.

¶7 Harrison next argues that his trial counsel was ineffective by not objecting to evidence of certain actions by Harrison. He argues that this should have been excluded as impermissible other-acts evidence.

¶8 One part of this argument concerns a portion of the victim's recorded statement in which she described a large number of police officers looking for Harrison, and that he would hide from police in a hole under the residence. Harrison argues that this was properly objectionable because it was

irrelevant and would lead the jury to conclude that he is a bad person who would be more likely to commit the crime charged in this case.

¶9 We again conclude there was no prejudice. There is no specific information in the victim's statement about what offense Harrison was wanted for when hiding from the police, and therefore the jury could not reasonably infer from his being wanted that he had committed a major offense, or that it was a child sexual assault. As to the hiding itself, avoiding police is relatively benign conduct. Accordingly, we see little likelihood that his being sought by, and hiding from, police would lead the jury to conclude that he was more likely to have committed the child sexual assault charged in this case.

¶10 Harrison also argues that his trial counsel should have moved to redact, as other-acts evidence, those parts of the victim's statement in which she described certain acts of moderate violence by Harrison against her that were not directly connected to the sexual assaults. We conclude that counsel's performance was not deficient because this evidence would have been admissible as relevant to the charged crime. It was for a proper purpose and relevant because Harrison was using physical force and threats to control the victim for the purpose of sex. Because it was closely tied to the crime, it was not unfairly prejudicial.

¶11 Finally, Harrison argues that we should exercise our discretionary reversal authority under WIS. STAT. § 752.35 (2013-14)¹ because the real controversy was not fully tried. The argument is based on the same issues we

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

described above. Our resolution of those issues leads us to conclude that the real controversy was fully tried.

By the Court.—Judgment and order affirmed.

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

