COURT OF APPEALS
DECISION
DATED AND FILED

March 14, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP1265-CR **Cir. Ct. No. 2002CF1168**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY P. GREGORY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 HAGEDORN, J. A jury convicted Timothy P. Gregory of three counts of first-degree sexual assault of a child following charges that he sexually assaulted two sisters. Gregory raises a litany of challenges to his convictions on appeal:

(1) The circuit court erroneously admitted other-acts evidence of an earlier 1986 sexual assault;

(2) The circuit court should have granted a motion for mistrial in response to improper remarks by one of the witnesses;

(3) The circuit court violated his right to present a defense by excluding certain evidence of alleged affairs involving the victims' mother;

(4) The circuit court erred by excluding photographs of the victims' family continuing to socialize with Gregory and his family after the assaults;

(5) Gregory's attorney rendered ineffective assistance of counsel by failing to object and move for a mistrial in response to an allegedly improper propensity argument during the prosecutor's closing argument;

(6) The circuit court erred by instructing the jury to disregard a comment Gregory's attorney made during closing arguments regarding a potential corroborating witness who was not called to testify; and

(7) A new trial is warranted in the interests of justice.

We see no error and affirm.

BACKGROUND

¶2 In 2002, Gregory was charged with four counts of first-degree sexual assault of a child against two sisters. The assaults occurred in 1997 when the girls were twelve and eight years old respectively. The trial was an extensive multiday affair, so we give only a brief summary of the facts here, and add additional details in our consideration of Gregory's specific objections.

¶3 Prior to trial, the State sought to admit evidence regarding Gregory's 1986 sexual assaults of D.B., the nine-year-old daughter of his then-girlfriend—a crime to which he pled guilty.[1] Gregory was in prison for this crime until 1993—approximately four years before the assaults at issue here. The State maintained that evidence of the prior sexual assaults was probative of Gregory's "motive, intent and opportunity" to commit the sexual assaults alleged in this complaint. Over Gregory's objection, the circuit court permitted testimony by D.B. and her mother. D.B. testified that Gregory assaulted her "several" times. She averred that while on a couch, Gregory would place a blanket over her and place his penis on her vagina. D.B. also testified that Gregory climbed into bed with her and sexually assaulted her there as well. She further stated that Gregory put his mouth on her vagina, but she did not remember where that conduct occurred. Gregory instructed D.B. not to tell anyone. D.B.'s mother, whose testimony will be discussed further below, corroborated this story.

[1] Though multiple acts were alleged in the original complaint in the 1986 case, Gregory pled guilty to only one count of first-degree sexual assault of a child. We refer to sexual "assaults" (plural) throughout the opinion because the other-acts evidence put forward in this trial implicated Gregory in multiple inappropriate acts.

¶4 The two victims in this case testified that Gregory assaulted them in a manner similar to the assaults against D.B. The first victim, who was eighteen at the time of trial, testified that Gregory assaulted her in the winter of 1997 when she was twelve years old. She explained that Gregory placed a quilt over her while on a couch and then inserted his fingers into her vagina. Gregory told her she could not tell anyone and that it "was our little secret."

¶5 The second victim, who was fifteen at the time of trial, testified that Gregory assaulted her multiple times in 1997 when she was eight years old. In keeping with his pattern, the second victim explained that Gregory assaulted her under a blanket on a couch at Gregory's home. While under the blanket, he removed her underwear, made her touch his penis, and inserted his fingers into her vagina. The second victim also claimed that Gregory assaulted her in the basement of the church they attended; he allegedly inserted his fingers into her vagina while giving her a piggyback ride. She finally testified that Gregory "put his face down and oral sexed" her while she was in bed. "This is our little secret," he told her. "[J]ust be quiet about it."

¶6 After the close of evidence, the jury convicted Gregory of three counts of first-degree sexual assault of a child but acquitted on the charge stemming from the piggyback ride. The court sentenced Gregory to the maximum of fifty years on each count to be served consecutively—a total of 150 years of incarceration.

¶7 In 2013, nearly nine years after the judgment of conviction was entered, Gregory filed a petition for a writ of habeas corpus. Gregory sought to reinstate his appeal rights, which, he argued, had lapsed due to ineffective assistance of counsel. The State agreed, and the circuit court granted the writ.

Gregory then filed a postconviction motion raising these claims. The circuit court conducted a ***Machner***[2] hearing and ultimately rejected each claim for relief. Gregory now appeals.

DISCUSSION

¶8 Gregory's objections primarily relate to evidentiary decisions and related alleged errors the circuit court made prior to and during trial. First, he maintains that the circuit court should not have admitted other-acts evidence of his 1986 sexual assaults because it was unfairly prejudicial and only relevant to prove propensity. Second, he takes issue with the circuit court's denial of his motion for mistrial when the mother of D.B., the victim of the 1986 sexual assaults, referred to other sexual assault allegations that were inadmissible. Third, Gregory proffered evidence of alleged affairs by the victims' mother and conflict stemming therefrom. He takes issue with the circuit court's decision to exclude this evidence, claiming that its exclusion violated his constitutional right to present a defense. Fourth, Gregory argues that the circuit court erred by excluding certain photographs on the grounds that they were not disclosed to the State prior to trial. Fifth, he maintains that his counsel was ineffective for failing to object and move for a mistrial when the prosecutor made an allegedly impermissible propensity argument during closing arguments. Sixth, Gregory argues that the circuit court erred by instructing the jury to disregard an argument his attorney made during closing arguments regarding a potential corroborating witness the State did not call. Finally, Gregory requests that we exercise our discretionary authority under

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

WIS. STAT. § 752.35 (2015-16)[3] to reverse his convictions in the interest of justice. We disagree on each count.

1. Other-Acts Evidence of 1986 Sexual Assaults

¶9 Gregory first argues that the circuit court erred by admitting evidence of his 1986 sexual assaults as evidence of prior bad acts under WIS. STAT. § 904.04 (2003-04). He complains that the evidence was only relevant "to prove propensity"—which was not permissible under the then-enacted version of the statute—and therefore should not have been admitted. We examine the circuit court's decision to admit or exclude other-acts evidence for an erroneous exercise of discretion. ***State v. Hunt***, 2003 WI 81, ¶34, 263 Wis. 2d 1, 666 N.W.2d 771. We will sustain the circuit court's ruling as long as it examined the relevant facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion a reasonable judge could reach. ***Id.***

¶10 At the time of Gregory's trial, evidence of other crimes or bad acts was "not admissible to prove the character of a person in order to show that the person acted in conformity therewith." WIS. STAT. § 904.04(2) (2003-04). However, such evidence could be introduced for "other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ***Id.***[4]

[3] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[4] The statute has subsequently been amended, and the present version allows a prior conviction for sexual assault of a child "or a comparable offense in another jurisdiction" to be introduced "as evidence of the person's character in order to show that the person acted in conformity therewith." WIS. STAT. § 904.04(2)(b)2.

¶11 When determining whether to admit other-acts evidence for a purpose other than propensity, the circuit court must follow the following three-step framework established in ***Sullivan***:

> (1) Is the other acts evidence offered for an acceptable purpose under WIS. STAT. [§ 904.04(2)], such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?
>
> (2) Is the other acts evidence relevant, considering the two facets of relevance set forth in WIS. STAT. [§ 904.01]? The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.
>
> (3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence? *See* WIS. STAT. [§ 904.03].

State v. Sullivan, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998) (footnote omitted).

¶12 As a preliminary matter, Gregory disputes whether the greater latitude rule[5] is applicable because his victims were fifteen and eighteen at the

[5] In cases involving sexual assaults, courts are permitted "greater latitude" in admitting other-acts evidence. *See* ***State v. Davidson***, 2000 WI 91, ¶¶36, 51, 236 Wis. 2d 537, 613 N.W.2d 606. The "greater latitude rule"—up until recently an exclusively common law rule—allows "a 'greater latitude of proof as to other like occurrences'" and applies to "sexual assault cases, especially those involving assaults against children." ***Id.*** The greater latitude rule applies to each step of the analysis under ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). ***Davidson***, 236 Wis. 2d 537, ¶46.

(continued)

time of trial and "had no difficulty in testifying." We need not reach this, however. The circuit court's discretionary decision to admit the evidence was permissible regardless of whether this thumb on the scale is applied or not.

¶13 The circuit court followed the three-step analysis required by ***Sullivan*** and reached a reasonable conclusion based on the facts of this case. With regards to the first step, the evidence of the 1986 sexual assaults was offered to show Gregory's motive to commit the sexual assaults, as well as a common plan or scheme between them. These are proper and permissible purposes; Gregory offers no real rebuttal demonstrating otherwise. *See* WIS. STAT. § 904.04(2) (2003-04) (evidence of other acts admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"); *see also* ***State v. Davidson***, 2000 WI 91, ¶¶57, 60, 236 Wis. 2d 537, 613 N.W.2d 606.

¶14 As both of Gregory's 1997 victims testified, D.B. related that she had been abused while on a couch under a blanket. D.B. also testified that she had been abused while in bed and that Gregory had put his mouth on her vagina—very similar to one of Gregory's 1997 victims. All three victims were instructed to keep quiet. All three victims were prepubescent girls. The first step of the ***Sullivan*** analysis is "*hardly demanding*." *See* ***State v. Payano***, 2009 WI 86, ¶63, 320 Wis. 2d 348, 768 N.W.2d 832 (citation omitted). The circuit court's conclusion that the evidence was offered for a proper purpose was reasonable.

The legislature has since modified WIS. STAT. § 904.04(2) to include a new paragraph entitled, "Greater latitude." Sec. 904.04(2)(b). Our supreme court recently concluded that the revisions "adopt[ed] the common law greater latitude rule" with respect to domestic violence offenses. *See* ***State v. Dorsey***, 2018 WI 10, ¶31, __ Wis. 2d __, __ N.W.2d __.

¶15 The circuit court also reasonably concluded that the evidence of the 1986 assault was relevant under the second step of the ***Sullivan*** analysis. To prove first-degree sexual assault of a child, the State was required to show that Gregory had intentionally touched his victims for the purpose of sexual arousal. *See* WIS. STAT. §§ 948.01(5), 948.02(1) (1997-98).[6] Evidence tending to show a common plan for the assaults and a motive to commit them—in this case, obtaining sexual gratification from children—is relevant to proving this element of the charged crimes. *See* ***Davidson***, 236 Wis. 2d 537, ¶¶57-59. Gregory responds that the 1986 assault was irrelevant to show motive "because that was not an issue at trial." He is wrong. Evidence of a motive to commit sexual assault is relevant to intent "whether or not [the] defendant disputes motive." ***Id.***, ¶65 (citation omitted). Furthermore, Gregory makes no attempt to rebut the State's assertion that the evidence was relevant to show a common plan or scheme between the assaults.

¶16 Finally, the circuit court reasonably concluded that the probative value of the other-acts evidence was not substantially outweighed by the danger of unfair prejudice—the third step in the ***Sullivan*** analysis. As the circuit court recognized, the probative value of the 1986 assault was high due to the striking similarities with the conduct charged here, clearly demonstrating a common plan or scheme. Again, Gregory assaulted D.B. while on a couch under a blanket in a very similar manner to the way he sexually assaulted his victims in 1997. The victim was similarly a prepubescent girl, nine years old. And Gregory similarly told his victim not to tell anyone. Although the assaults were committed eleven

[6] Gregory's crimes were committed in 1997, making the applicable statute the 1997-98 version.

years prior to the conduct alleged here, Gregory spent a substantial amount of that time in prison, and he was released approximately four years before these assaults. This gap does not seriously diminish the probative value of the evidence.

¶17 Gregory does not address the similarity between the assaults. Instead, he hinges his argument on the high risk of unfair prejudice, which he maintains "provoked a desire to punish" and "confused the jury about the issues before it" because it encouraged the jury to find him guilty because of his character and propensity to sexually assault children. But this risk—real though it is—remains present in every decision regarding prior other-acts evidence. Nonetheless, the circuit court made a reasonable judgment call that the risk of unfair prejudice did not outweigh the substantial probative value of this evidence. Additionally, the circuit court acted to limit the danger of unfair prejudice by instructing the jury that the evidence should only be considered for proper purposes. *See* ***Davidson***, 236 Wis. 2d 537, ¶78 (a cautionary instruction can limit the danger of unfair prejudice). The given instructions admonished the jury that it could "not consider this evidence to conclude that [Gregory] has a certain character or certain character trait and that [Gregory] acted in conformity with that trait or character." The evidence was only to be considered to establish motive, intent, or a common scheme between the assaults. Moreover, Gregory was acquitted on one of the four charges against him. This partial acquittal reflects a jury that took its duty to examine each claim on the merits quite seriously, not one motivated by punishment based on prior bad acts or a propensity toward sexual assault of children. This suggests the circuit court's judgment that the evidence could be admitted in a fair way and for legitimate purposes was correct. The circuit court applied the proper legal standard and came to a conclusion a reasonable judge could reach in deciding to admit evidence of Gregory's 1986

sexual assaults. We see no legal grounds to second guess this exercise of discretion.

2. Motion for Mistrial

¶18 Gregory next challenges the circuit court's decision to give a curative instruction rather than granting a mistrial when one of the witnesses referred to another sexual assault allegation against Gregory. The incident played out as follows.

¶19 After D.B. finished testifying, her mother took the stand and testified that D.B. "told me that [Gregory] touched her in her private areas." The prosecutor then asked if "Gregory was ever arrested for these allegations," and the witness offered the following response, "I don't know if he was ever arrested for them but I found out later that there had been somebody else's child who didn't or couldn't testify so it didn't go to court." The court immediately instructed the jury to disregard this nonresponsive answer and destroy any reference to it in the jury's notes.

> Ladies and gentlemen of the jury, quite clearly you've heard a spontaneous response that was unexpected by the attorneys with regards to what this witness believed happened. I'm instructing you that you must disregard it with regards to this proceeding. It does not go to prove any allegations in this proceeding. It's not intended to do that, and therefore, in that respect, if you've made a note of it, destroy it. Disregard it with regards to your considerations and deliberations when you are in the jury room.

¶20 When testimony continued, D.B.'s mother was shown a copy of Gregory's judgment of conviction for the 1986 assault and was again asked what "the nature of" Gregory's offense was. She responded, "I believe down here it says sexual perpetration—perpetrators group." Defense counsel again objected,

the court conducted a sidebar, and the prosecutor resumed questioning. On cross-examination, D.B.'s mother reiterated that Gregory was arrested for sexually assaulting her daughter, but she was unsure whether Gregory "was arrested for other incidents." Gregory did not object to this last remark. After she was excused, the court offered to give another curative instruction, but Gregory's counsel opined that the damage had already been done and moved for a mistrial. The court determined that the remarks were not sufficiently damaging to warrant a mistrial, and it determined that the single curative instruction was sufficient.[7]

¶21 Whether to grant a mistrial is committed to the circuit court's discretion. ***State v. Doss***, 2008 WI 93, ¶69, 312 Wis. 2d 570, 754 N.W.2d 150. "[A] mistrial is not warranted unless, in light of the entire proceeding, the basis for the mistrial motion is sufficiently prejudicial to warrant a new trial." ***State v. Adams***, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998). Because declaring a mistrial is a drastic remedy, the circuit court should, in the exercise of its discretion, consider other alternatives such as a curative instruction. *See* ***State v. Moeck***, 2005 WI 57, ¶72, 280 Wis. 2d 277, 695 N.W.2d 783 ("Sound discretion includes considering alternatives such as a curative jury instruction."). We presume that the jury follows cautionary instructions. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 644 n.8, 369 N.W.2d 711 (1985).

¶22 Gregory, however, suggests that a cautionary instruction was insufficient because the court's admonition to disregard the stricken testimony "is akin to an order not to think about pink elephants." We are unpersuaded. The

[7] After the close of evidence, the circuit court gave the standard instruction directing the jury to disregard any testimony that was stricken from the record.

references by D.B.'s mother to other allegations were a brief portion of a multi-day trial dealing with sensitive allegations that were already years old, and the court appropriately instructed the jury to disregard the remarks because they had nothing to do with the issues in the case. With the latter two remarks, Gregory's counsel did not request a curative instruction. Again, declaring a mistrial is a discretionary decision. Other than disagreement with the circuit court's judgment call, Gregory points to no error of law or other deficiency sufficient to reverse the court's discretionary decision.

3. Right to Present a Defense

¶23 Gregory claims that the circuit court violated his right to present a defense by prohibiting him from presenting evidence that would suggest a motive for false accusations by the victims. Whether an evidentiary decision violates a defendant's right to present a defense is a question of constitutional fact that we determine independently. ***State v. Muckerheide***, 2007 WI 5, ¶18, 298 Wis. 2d 553, 725 N.W.2d 930.

¶24 Gregory propounded two related theories to support motive for fabricated accusations by the victims. First, he proffered that the victims' father was upset with Gregory because Gregory knew about extramarital affairs that the victims' mother had engaged in but refused to disclose the affairs to the father. As a result, Gregory claimed that the father "became angry" and "vowed revenge." Presumably, this revenge included persuading these two young girls to concoct false allegations against Gregory. Gregory's second theory was that this was an effort by the victims' parents—who had conflict with the pastor of their church in part due to the alleged affairs—to falsely accuse Gregory, which would somehow lead to the removal of the pastor from the church. Gregory maintained that he

should be allowed to present evidence along these lines because it was crucial to his defense.

¶25 The State did not see it the same way and filed a motion to prevent Gregory from introducing any evidence concerning the following matters:

> (1) Any conflict between the victims' parents and the church they attended with Gregory;
>
> (2) Any sexual history of the victims' parents;
>
> (3) Any therapy or counseling sessions the parents had with their pastor; and
>
> (4) Any marital disputes between the parents.

The State expressed "concern" that these were sensitive matters that had little or no relevance to the disputed issues and, in any event, were "unduly prejudicial" and "would tend to confuse the jury." The court granted the State's motion because it concluded that (1) the evidence was not relevant, and (2) even if the evidence was relevant, the probative value was substantially outweighed by the danger of unfair prejudice. *See* WIS. STAT. § 904.03 ("[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.").

¶26 The Confrontation Clause and Compulsory Process Clause of the Sixth Amendment to the United States Constitution and article I, section 7 of the Wisconsin Constitution guarantee a criminal defendant the right to present evidence in his or her defense. ***State v. St. George***, 2002 WI 50, ¶14, 252 Wis. 2d 499, 643 N.W.2d 777. This right, however, is not absolute; it must be balanced

against "other legitimate interests in the criminal trial process." *See* ***Rock v. Arkansas***, 483 U.S. 44, 55-56 (1987) (quoting ***Chambers v. Mississippi***, 410 U.S. 284, 295 (1973)). A defendant has had his constitutional rights violated by "the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote."[8] ***Holmes v. South Carolina***, 547 U.S. 319, 326 (2006). Correspondingly, "well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." ***Id.***; *see also* ***State v. Pulizzano***, 155 Wis. 2d 633, 646, 456 N.W.2d 325 (1990) (a defendant only has "the constitutional right to present relevant evidence not substantially outweighed by its prejudicial effect").

¶27 Gregory has not been denied his right to present a defense because the probative value of evidence related to the alleged extramarital affairs was, as the circuit court recognized, outweighed by the danger of unfair prejudice. Gregory proposes that the victims' father was so angry that he coached his daughters to fabricate multiple counts of sexual assault merely because Gregory did not disclose extra marital affairs the victims' mother was having—keeping in mind that Gregory did not have an affair, he merely refused to disclose the supposed affairs. Without any offer of proof connecting these conflicts to supposed false accusations, this does not pass the smell test. And Gregory's only

[8] Gregory suggests the proper test is the one laid out in ***State v. St. George***, 2002 WI 50, ¶¶53-55, 252 Wis. 2d 499, 643 N.W.2d 777, where our supreme court outlined a two-part test for use in determining whether an accused has a constitutional right to present expert testimony. We rely on more recent cases discussing the right to present a defense in contexts other than expert testimony.

response is that, although the victims' father's alleged reaction would have been irrational, "anger is not always a rational emotion." In Gregory's briefing before us, he offers no explanation as to why the victims' parents had a broader quarrel with the church and its pastor or how that quarrel factored into the parents' motive to influence their daughters to fabricate the allegations. Gregory offers no evidence that the victims had in fact been coached. We see nothing, other than pure conjecture, to suggest that marital difficulties between the victim's parents and the associated conflict led to false allegations by two young girls.

¶28 Moreover, we agree with the circuit court that evidence concerning alleged marital difficulties and extramarital sexual practices is highly sensitive and potentially damaging information that had slight (if any) relevance to the core issues at trial. Gregory's theories as to motive may have left him with fewer options in defending his case, but Gregory had no constitutional right to drag the parents' alleged marital woes before the jury in hopes that it would bite on a specious theory that they coached the victims to fabricate the allegations. The evidence offered in support of the theories presented simply does not add up to something plausible. We agree with the circuit court that any relevance was far outweighed by the danger of unfair prejudice and confusing the issues. Therefore, Gregory's constitutional right to present a defense was not violated by the circuit court's decision to exclude evidence supporting these theories.

4. Photographic Evidence

¶29 Gregory next takes issue with the circuit court's decision to exclude several photographs.[9] Gregory claims that these photographs would have shown the victims' family and Gregory's family "going on vacation and getting together for the birth, dedication, and first birthday of [Gregory's daughter]" after the alleged assaults occurred. He maintains that this photographic evidence would chiefly prove that "the complainants' claims that they were assaulted were inconsistent with their actions after the assaults because the families still socialized together."

¶30 Pursuant to WIS. STAT. § 971.23,[10] the circuit court had entered a pretrial order requiring, among other things, all physical evidence to "be identified to opposing counsel and made available for inspection," and warned that failure to comply could result in the undisclosed evidence being barred at trial. The State objected to Gregory's attempt to introduce these photographs into evidence because they had not been disclosed prior to trial pursuant to the discovery order. Gregory's counsel explained that she had "left for military duty," and interim counsel managed the case in her absence. She averred that she thought interim counsel had disclosed the photographs as required by the discovery order.

[9] Gregory also claims that the circuit court erroneously excluded a videotape he sought to admit. However, although he deals with the excluded photographic evidence in detail in his brief-in-chief, he never squarely addresses the excluded videotape in the body of his argument. None of Gregory's scattered references to the videotape attempt to explain how the court erred by excluding it. Instead, his argument generally lumps the videotape together with the photographs. Given the fact-specific nature of the circuit court's evidentiary rulings, this scant development is not enough to preserve Gregory's argument. To address his claim, we would have to develop it, and it is well-established that we cannot serve as both advocate and court. ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). And to the extent the videotape evidence has a better case than the photographs supporting its admission, Gregory has not made it.

[10] The order also listed WIS. STAT. §§ 802.10(5) (pretrial conference), 804.12 (sanctions for failing to comply with discovery), 805.03 (consequences for failure to prosecute or comply with procedural statutes), and 971.11 as authority.

Gregory's interim counsel appeared by phone and explained that he had mentioned that "we even have photographs of [the families] hanging out after this stuff supposedly happened" to the prosecutor. However, interim counsel did not remember whether he showed the photographs to the State or otherwise made them available. The prosecutor testified the State had "never been provided with those photographs, they were never mentioned."

¶31 After hearing both sides, the court made a factual finding that the photographs were not properly disclosed to the State prior to trial and excluded them:

> [Counsel] probably did say something to the effect that they have got some photographs. I'm also satisfied that they were never physically displayed, were never provided to the District Attorney's office….
>
> ….
>
> Based upon the information I've received today, I'm going to find that those photographs were not disclosed to the State in accordance with the [discovery] order. Whether—I don't think it's an issue of whether [counsel] said we've got some evidence one way or the other; I'm satisfied that probably occurred. But quite clearly, that type of evidence is significant to a certain extent, and it should have been provided….

The circuit court also noted that excluding the photographs would not prevent Gregory from soliciting testimony from the witnesses that the two families continued to socialize after the assaults were disclosed.

¶32 WISCONSIN STAT. § 971.23 requires the defendant to disclose "[a]ny physical evidence that the defendant intends to offer in evidence at trial." Sec. 971.23(2m)(c) (2003-04). The statute also provides that "[t]he court shall exclude any witness not listed or evidence not presented for inspection or copying required

by this section, unless good cause is shown for failure to comply." Sec. 971.23(7m) (2003-04). Once the court finds that a party has violated § 971.23, its decision to exclude evidence "is committed to the … court's discretion"; we will sustain the court's decision "if there is a reasonable basis for the ruling." ***State v. Gribble***, 2001 WI App 227, ¶29, 248 Wis. 2d 409, 636 N.W.2d 488.

¶33 Gregory first argues that he did in fact disclose the photographs. However, after considering the conflicting assertions of the prosecutor and defense counsel, the circuit court resolved this factual issue against Gregory.[11] We will not reverse factual findings unless they are clearly erroneous. *See* ***Hur v. Holler***, 206 Wis. 2d 335, 345-46, 557 N.W.2d 429 (Ct. App. 1996) (applying clearly erroneous standard of review to a circuit court's factual finding that failing to comply with a discovery order caused damage).[12] In light of the somewhat vague testimony of Gregory's counsel and the prosecutor's denial that the photographs had ever been disclosed, we cannot say the court's finding was clearly erroneous.

¶34 Gregory next insists that even if he failed to disclose the photographs, we should reverse the circuit court's decision because it failed to

[11] Gregory seizes on the court's statement that Gregory's counsel "probably did say something to the effect that they have got some photographs," and he seems to argue that this amounted to an implied ruling that Gregory did in fact disclose the photographs as required by the court's order. As our full quotation of the court's ruling makes clear, this is not the case. Saying "something to the effect" that Gregory had "some photographs" clearly falls short of identifying all physical evidence and making that evidence available for inspection. Nothing in the court's ruling supports Gregory's assertion that he disclosed the photographs.

[12] However, where the facts are undisputed, applying WIS. STAT. § 971.23 "to a given set of facts" "presents a question of law subject to independent appellate review." ***State v. DeLao***, 2002 WI 49, ¶14, 252 Wis. 2d 289, 643 N.W.2d 480.

address whether Gregory had good cause for not disclosing the photographs.[13] He additionally claims that excluding the photographs violated his right to present a defense. We conclude that both of these alleged errors are harmless. *See* ***State v. Rice***, 2008 WI App 10, ¶14, 307 Wis. 2d 335, 743 N.W.2d 517 (explaining that harmless error applies to violations of WIS. STAT. § 971.23); ***State v. Kramer***, 2006 WI App 133, ¶26, 294 Wis. 2d 780, 720 N.W.2d 459 (holding that a violation of a defendant's right to present a defense does not require reversal if "it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error'" (citation omitted)).[14]

¶35 Gregory sought to introduce the photographs to show that the families continued to socialize to some extent after the assaults. Though the circuit court excluded the photographs, it allowed Gregory to call witnesses to

[13] Gregory suggests that the State bears the burden to show "a lack of good cause" for *his* discovery violation. He cites ***State v. Martinez***, 166 Wis. 2d 250, 257, 479 N.W.2d 224 (Ct. App. 1991), for this proposition. The decision does not support his assertion. The case merely held that where the *State* violated WIS. STAT. § 971.23, it must show good cause for its failure to comply. ***Id.***

Though we address Gregory's good cause argument under harmless error, we observe that while the circuit court never explicitly addressed good cause, it had no reason to do so. Gregory made no argument that there was good cause for his failure to disclose the photographs. Gregory merely insisted that he had in fact disclosed the photographs.

[14] Though we are bound by our decision in ***State v. Kramer***, 2006 WI App 133, ¶26, 294 Wis. 2d 780, 720 N.W.2d 459, holding that the harmless error rule applies to our analysis of whether a defendant's right to present a defense has been violated, we note that our supreme court has found harmless error inapplicable in cases governed by the ***St. George/Pulizzano*** framework. *See* ***State v. Pulizzano***, 155 Wis. 2d 633, 655-56, 456 N.W.2d 325 (1990). In such cases, a defendant must show that evidence was necessary to his or her defense. ***St. George***, 252 Wis. 2d 499, ¶54. When applicable, the requirement that a defendant show that evidence is necessary to his or her defense subsumes the harmless error inquiry. *See* ***Pulizzano***, 155 Wis. 2d at 655-56. To the extent this inquiry reflects general constitutional principles and applies to this case, we conclude that Gregory has failed to show that the photographs were necessary to his defense for the same reasons any error is harmless.

demonstrate that the families continued to socialize. Gregory did so. Gregory's wife testified that the two families continued to socialize up until the assaults were reported to the police in 2002. She specifically noted that the victims' family had attended the dedication and first birthday of Gregory's daughter in 1999. One of the victims, as well as the victims' mother, confirmed that both victims attended the birthday party. In light of the fact that the basic story was presented to the jury, we see no merit to Gregory's rather conclusory assertion that a picture is worth a thousand words—and here, a new trial.

¶36 Gregory finally claims that—assuming the photographs were not disclosed—his attorneys were ineffective for not following the discovery order. However, Gregory's argument is little more than a conclusory recitation of the standard for ineffective assistance of counsel, and he fails to prove that he was prejudiced by counsel's failure to ensure that the photographs were admitted. *See* ***Harrington v. Richter***, 562 U.S. 86, 104 (2011). Gregory had ample alternate avenues to introduce evidence that the families continued to socialize. And he did just that with the testimony of his wife. Further, there was agreement that the victims had attended the birthday party as Gregory argued the photographs would have shown. Gregory has not shown that there is a reasonable probability that the omission of these photographs would have altered the outcome of the trial. *See* ***id.***

5. Prosecutor's Propensity Argument During Closing

¶37 Gregory next argues that counsel was ineffective for failing to object to the prosecutor's closing argument, which he claims was an improper propensity

argument.[15] The prosecutor's closing argument was lengthy, and the allegedly problematic portions are worth quoting at length:

> I want you to answer a very simple, direct, to-the-point, cut-to-the-chase question: Is … Gregory a person who is sexually attracted to children? And I submit to you that the only reasonable conclusion you can reach is yes.
>
> ….
>
> And I think the testimony and the evidence that we presented will make you conclude, beyond a reasonable doubt, that he is a person who sexually looks at children to fulfill his appetites. How do we know this? We know this because in 1986 he repeatedly sexually assaulted a nine-year-old girl.

¶38 The prosecutor further described Gregory's pattern of abuse common to the assaults:

> Under the blanket … Gregory puts his moves on.… The same MO [as the 1986 assault].
>
> I mean, if these were sheer coincidental acts, sheer coincidence, the odds are phenomenal that these things occurred individual, apart from each other. This is a common scheme for Mr. Gregory. This is what he does. Some sex offenders might use a car. Some sex offenders might use other areas, other devices. He uses a couch and a blanket.

¶39 The prosecutor then attempted to preempt the defense argument:

[15] "A defendant's failure to move for a mistrial before the jury returned its judgment constitutes a waiver of his objections to the prosecutor's statements during closing arguments." ***Davidson***, 236 Wis. 2d 537, ¶86. Gregory's counsel failed to lodge an objection to the prosecutor's closing argument, and Gregory appropriately casts his argument as one for ineffective assistance. We note, however, that certain fundamental errors, like prosecutorial misconduct, cannot be waived. ***Id.***, ¶88. But Gregory does not develop any argument that the prosecutor's remarks were so egregious as to constitute misconduct. Therefore, we only address his claim of ineffective assistance of counsel.

> So when you're done, the defense is going to … show you probably diagrams, and charge, and wrote elements out and all this stuff; look at it and go, Yes, okay, but is the Defendant, is Mr. Gregory, a person who is sexually attracted to kids? And if you answer yes, then you have to answer quite logically in sequence: If he sexually is attracted to kids, did he touch [the victims]? Yes…. Not once, not twice, but three times. And did the way he touched [the victims] reflect a common scheme[] that started with [D.B.]? I say yes. I don't think [the 1986 assault] was an anomaly …. Quite honestly, I think it was a precursor for sexual assaults to come. And we know that because he used the same MO, the couch and the blanket, and there's no getting around that.
>
> So I want you to continue to ask yourself, is this the type of guy that's going to look at a child and think sexual thoughts and act upon them? Yes. And if you answer that yes, then I think you logically and reasonably conclude he sexually assaulted these girls.
>
> I've kept on asking you, is he the type of a person to sexually assault a child, be sexually attracted to a child? Keep on answering, yeah I think he is, then it's not a very logical far leap to conclude that he acted upon those impulses and violated [his victims], and then I want you to convict him for it….

¶40 In rebuttal, the prosecutor ended with a story of a farmer who saved a poisonous snake from freezing only to have the snake bite him and kill him. When the farmer asked the snake why it bit him, the snake replied: "Well, you stupid farmer … I'm a snake, what else could you expect me to do?" The prosecutor admonished the jury that "today is another winter day," and "[t]he snake is on the ground. Let's not pick him back up."

¶41 Gregory's counsel did not object throughout this entire argument. And at the postconviction hearing, Gregory's counsel explained that she had strategic reasons for not objecting and requesting a mistrial. Though she did not "have exact recollection of what the reasoning was," counsel testified that she thought that her objection would have likely been overruled and noted that there

was a risk of drawing undue attention to the argument by objecting. Furthermore, counsel testified that she declined to request a mistrial because she "thought at that time we'd put in a good case and that the jury would come back favorably for us." Counsel further explained she thought that Gregory was "better off letting the jury actually come to [a] verdict." In its written decision, the circuit court accepted counsel's testimony as "credible and reasonable as to actions taken during the trial," and ruled that the "trial tactics considered by Gregory and his attorneys" were reasonable."

¶42 Our "review of an ineffective assistance of counsel claim is a mixed question of fact and law." ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). We will not reverse a circuit court's factual findings unless clearly erroneous, but whether an attorney's performance falls below constitutional minimums is a question of law we review de novo. ***Id.*** To prove ineffective assistance, "a defendant must show both (1) that his counsel's representation was deficient and (2) that this deficiency prejudiced him." ***Id.*** We "strongly presume[]" that counsel rendered constitutionally adequate assistance." ***State v. Balliette***, 2011 WI 79, ¶25, 336 Wis. 2d 358, 805 N.W.2d 334. And the defendant bears the burden of overcoming this presumption. ***Id.***, ¶78. An attorney's performance is deficient when he or she commits errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Counsel is not ineffective merely because he or she "was imperfect or less than ideal." ***Balliette***, 336 Wis. 2d 358, ¶22. "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms.'" ***Harrington***, 562 U.S. at 105 (quoting ***Strickland***, 466 U.S. at 690). In light of our deference in reviewing performance, "counsel's strategic choices, made after

thorough investigation of the law and facts, are virtually unchallengeable." ***State v. Chu***, 2002 WI App 98, ¶52, 253 Wis. 2d 666, 643 N.W.2d 878.

¶43 Gregory insists that the prosecutor's statements were nothing more than "a direct appeal for the jury to convict because of Gregory's propensity to sexually assault little girls." Even if there were some truth to this assertion, Gregory's argument fails because counsel made a reasonable strategic decision not to object.

¶44 When the prosecutor made the allegedly objectionable arguments, Gregory's trial counsel had several options: (1) object, potentially drawing undue attention to the remarks; (2) request a curative instruction, which also risked drawing more attention; (3) request a mistrial, which if granted carries a whole set of strategic risks, including a new jury that may not be as sympathetic to Gregory's arguments; or (4) continue with the trial. Counsel chose the last option. She felt that Gregory had a good chance with the empaneled jury. Counsel also contemplated the risk of drawing more attention to the remarks and declined to object or request a curative instruction. This decision on how to handle the prosecutor's statements involved an on-the-spot assessment of the impact these statements had on the jury in light of the whole trial, judgments that are difficult to second guess in hindsight, and "virtually unchallengeable" as ineffective assistance of counsel. *See* ***id.***

¶45 Additionally, although Gregory characterizes the prosecutor's remarks as solely propensity evidence, they were primarily aimed at using the 1986 assault to show a common scheme between the assaults as well as a motive to commit them. The prosecutor repeatedly drew the jury's attention to the similarity of the 1986 assault and the assaults at issue, arguing that the assaults

shared the same "MO." This was a proper use for the evidence. The prosecutor did ask the jury to consider whether Gregory was the type of person to be "sexually attracted to a child." While this could be taken as an invitation to find Gregory guilty merely because he had a propensity to commit sexual assaults against children, the remarks can also be viewed as an argument that Gregory had a motive to commit the charged sexual assaults, namely a desire to obtain sexual gratification from children—a proper purpose. These permissible interpretations of the closing remarks are at least as reasonable as Gregory's take. In light of this, counsel could have, and apparently did, conclude that the remarks were not so egregious as to prevent Gregory from receiving a fair trial.

¶46 Furthermore, although hindsight often reveals flaws in an otherwise reasonable strategy, the jury verdict gives us reason to believe counsel's assessment of the jury may have been correct. As noted above, despite testimony from two victims alleging multiple acts of abuse, the jury only found Gregory guilty on three of the four sexual assault charges. This is far from the most favorable outcome for Gregory, but it was a partial win. And it demonstrates that the jury actively weighed the evidence and did not convict Gregory solely based on a propensity to sexual assault young girls.

¶47 Gregory does little to discredit his trial counsel's decision-making process. Nor does he directly address whether it was reasonable for counsel to forgo objecting in the hopes that this jury would return a favorable outcome. He instead focuses his energies on arguing that the prosecutor's remarks were in fact improper. However, even if we assume this, it is Gregory's burden to demonstrate that counsel's decision not to object was unreasonable and constitutionally deficient. He has not overcome the presumption that counsel rendered reasonably effective assistance.

6. Gregory's Missing Witness Argument During Closing

¶48 Gregory maintains that the circuit court erred by preventing him from making arguments during his closing about a witness who was not called to testify at trial. One of the victims testified that she first disclosed Gregory's abuse to a friend, who was not called to testify. Gregory's counsel commented, "We've heard a lot about how [the victim] told her friend [about the abuse]," but "[u]nfortunately, we never saw her friend. No one called her in." The prosecutor objected and requested a side bar. The court then gave the jury the following instruction:

> Ladies and gentlemen, Wisconsin law does not permit comment by counsel on witnesses that were not called. What it does, it requires the jury then to speculate as to what may or may not have been said by that witness. [Gregory's counsel] indicated a witness wasn't called, and called upon you as to speculate as to what would happen in that respect. Do not draw any conclusions from that situation. The witness quite simply, whoever it may have been, wasn't called. You must decide this case solely on the evidence presented during this trial and upon the testimony given by the witnesses that were called.

Gregory maintains that he should have been allowed to argue "that the state's failure to call a particular witness who one would have assumed would corroborate [the victim's] testimony if [the victim] were telling the truth should create a reasonable doubt." Gregory also claims that preventing him from making an argument about the witness's absence violated his constitutional right to present a defense.

¶49 Gregory's argument is long on propositions of law, but short on legal analysis. He makes no real attempt to explain how commenting on the State's failure to call the victim's friend would have made any difference in the outcome of his trial. Thus, even if the circuit court's decision was in error, we

conclude that any such error was harmless. *See* WIS. STAT. § 805.18(1)[16] ("The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party."). Had the circuit court allowed presentation of the inference that the State was concealing unfavorable testimony without any specification concerning what was being concealed, we do not see how that could have altered the outcome of the trial. Harmless error similarly precludes Gregory's argument that the decision denied him his constitutional right to present a defense. *See* ***Kramer***, 294 Wis. 2d 780, ¶26.

7. New Trial in the Interests of Justice

¶50 Gregory finally requests that we exercise our authority under WIS. STAT. § 752.35[17] to grant him a new trial in the interests of justice, resting on a brief rehashing of his previous arguments. Exercise of this authority is rare; it is reserved for exceptional cases. *See* ***State v. Avery***, 2013 WI 13, ¶38, 345 Wis. 2d 407, 826 N.W.2d 60. We may reverse a conviction where the real controversy was not fully tried, or where a miscarriage of justice has occurred. *See* § 752.35; *see also* ***State v. Thomas***, 161 Wis. 2d 616, 625, 468 N.W.2d 729 (Ct. App. 1991).

¶51 While Gregory raises six separate alleged deficiencies in his trial, none are availing. The circuit court's evidentiary decisions were legally

[16] WISCONSIN STAT. § 805.18 is applicable in all criminal proceedings. *See* WIS. STAT. § 972.11(1); *see also* ***State v. Travis***, 2013 WI 38, ¶68, 347 Wis. 2d 142, 832 N.W.2d 491.

[17] WISCONSIN STAT. § 752.35 provides that "[i]n an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from."

appropriate and fair for the reasons explained above. Contrary to Gregory's assertion, he was not prevented from presenting compelling evidence that was critical to his defense. The circuit court's decisions during this complex, multiday trial were exemplary and prudent. Similarly, his attorney rendered reasonably effective assistance of counsel. Gregory was even successful in securing a not guilty verdict on one of the four charges. In short, the State made its case, and Gregory was allowed to present his side of the story. The record reveals that the controversy was fully tried.

¶52 A finding that justice has miscarried requires "a finding of substantial probability of a different result on retrial." ***Thomas***, 161 Wis. 2d at 625. This we do not see either. Nothing in the record causes us to second guess the judgment of a jury of Gregory's peers. We will not disturb the verdict.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.