

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 23, 2006

Cornelia G. Clark
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. 2005AP133-CR

Cir. Ct. No. 2002CF627

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD A. M.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: DALE T. PASSELL, Judge. *Affirmed.*

Before Vergeront, Deininger and Higginbotham, JJ.

¶1 PER CURIAM. Richard A.M. appeals from a judgment convicting him of two counts of repeated sexual assault of the same child and from an order denying his postconviction motion. He claims he is entitled to a new trial because the admission of videotaped statements by the child victims was plain error and he

was denied effective assistance of counsel in several regards. For the reasons discussed below, we reject each of Richard's arguments and affirm.

BACKGROUND

¶2 Richard was charged with two counts each of incest and repeated sexual assault of a child based on the allegations of his preadolescent daughters, Allyssa D.M. and Misty K.R.M. La Crosse County Social Services videotaped interviews with both girls, and the tapes were introduced at trial without objection. The jury returned guilty verdicts on all four counts, but the court set aside the incest charges based on improper joinder. Richard sought postconviction relief from the remaining charges based upon counsel's failure to challenge a question asked by jurors; failure to object to the testimony of one of the witnesses on hearsay grounds; and failure to elicit testimony from other witnesses regarding the untruthful character of the girls. The circuit court denied the postconviction motion following a *Machner* hearing, and Richard appeals.¹ We will set forth additional facts in our discussion of the issues to which they pertain.

STANDARD OF REVIEW

¶3 A court may take notice of "plain errors affecting substantial rights although they were not brought to the attention of the judge." WIS. STAT. § 901.03(4) (2003-04).² To obtain relief under the plain error doctrine, a

¹ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), provides that the court may hold a hearing when a criminal defendant's trial counsel is challenged for allegedly providing ineffective assistance. Trial counsel testifies at the hearing as to his or her reasoning for the challenged action or inaction.

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

defendant must establish both that an error was “clear” or “obvious,” and that it likely “denied a defendant a basic constitutional right.” *State v. Frank*, 2002 WI App 31, ¶25, 250 Wis. 2d 95, 640 N.W.2d 198 (citation omitted).

¶4 Claims of ineffective assistance of counsel present mixed questions of law and fact. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). We will not set aside the circuit court’s findings about counsel’s actions and the reasons for them, unless they are clearly erroneous. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel’s conduct violated the defendant’s constitutional right to effective assistance of counsel is ultimately a legal determination, which this court decides de novo. *Id.*

The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel’s performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant.... To prove deficient performance, a defendant must establish that his or her counsel “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms.... To satisfy the prejudice prong, the defendant must show that counsel’s errors were serious enough to render the resulting conviction unreliable.... We need not address both components of the test if the defendant fails to make a sufficient showing on one of them.

State v. Swinson, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12 (citations omitted).

DISCUSSION

Admission of Videotaped Statements

¶5 Richard first alleges that the videotaped testimony of his daughters was plainly inadmissible under WIS. STAT. § 908.08(3)(c), which requires a showing of the child’s “understanding that false statements are punishable and of the importance of telling the truth,” and WIS. STAT. § 908.08(3)(d), which requires “[t]hat the time, content and circumstances of the statement provide indicia of its trustworthiness.”

¶6 With regard to understanding that false statements are punishable and the importance of telling the truth, Misty stated that “bad things happen” when someone lies, and that she and her sister got spankings for lying. When asked whether the female social worker was a boy or girl, Misty said “girl,” then “no, boy,” and reiterated “boy.” Misty then correctly stated that the social worker was holding a black marker, and that it would be a lie to say it was green, and she promised to only talk about the truth. Allyssa said that when people tell lies, “[t]hey will probably get in trouble.” She then cited being seen doing something by a teacher and denying it as an example of lying. Allyssa correctly stated that the social worker was a girl and it would be false to say she was a boy, and that the social worker was holding a black marker and that it would be false to say the marker was blue and truth to say it was black. Near the end of the interview, Allyssa said that everything they had talked about was truth.

¶7 Taken in context, we are satisfied that both girls were well aware of the distinction between truth and lies and that there were consequences for lying. We have viewed the videotape of Misty’s interview. Misty’s statement that the social worker was a boy was made in a playful tone and does not indicate that she

did not understand the difference between the truth and a lie. Moreover, throughout the interviews, both girls corrected the social worker when they believed she had misstated something.

¶8 With regard to indicia of trustworthiness, Richard points to Misty's failure to remember the social worker's name, her complaints about how long the interview was taking and general reluctance to answer questions about the abuse, her statement that she was wearing the same clothes during the abuse as during the interview, and her statement that the abuse happened "about a 100 [o]r 300" times as indications that the statement was inherently unreliable. While internal inconsistencies in the child's statement are certainly relevant to her credibility and the accuracy of her memory, they do not show her statement to be so untrustworthy as to be inadmissible. The jury was capable of viewing the statements and weighing the import of any inconsistencies. In sum, we are not persuaded that the circuit court erred in admitting the tapes, much less that any such error was clear or obvious.

Question from Jury

¶9 The circuit court permitted the jury to submit some questions for the witnesses. One juror had the court ask Richard, "Do you feel that all of the professional witnesses and both your daughters are liars?" Richard responded, "Not all of them, no."

¶10 Richard contends that counsel provided ineffective assistance by failing to object to this question on the grounds that it impermissibly allowed him to comment upon another witness's credibility. The Wisconsin Supreme Court has explained, however, that asking such questions on cross-examination is not really meant to illicit comment on the credibility of the other witnesses, but rather

to provide the testifying witness with an opportunity to address inconsistencies between accounts. *State v. Johnson*, 2004 WI 94, ¶¶19-24, 273 Wis. 2d 626, 681 N.W.2d 901. Because the question was proper, counsel did not render deficient performance by failing to object to it.

Denise Green's Testimony

¶11 Misty's foster parent Denise Green testified that Misty told her Richard had molested her and her sister. Richard claims counsel provided ineffective assistance by failing to object to that testimony on hearsay grounds. We agree with the State, however, that the testimony was admissible as an excited utterance.

¶12 WISCONSIN STAT. § 908.03(2) defines an excited utterance as “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” Richard claims Misty's statements to her foster parent do not qualify because Misty was discussing events that had occurred some months earlier. Case law, however, mandates an expansive interpretation of the excited utterance exception in child sexual assault cases, focusing not on the length of time from the incident to the disclosure, but upon whether the child was still experiencing stress from the incident. *State v. Gerald L.C.*, 194 Wis. 2d 548, 556-58, 553 N.W.2d 777 (Ct. App. 1995). Here, Misty made her disclosures shortly after the startling event of being caught masturbating by her foster mother. Green further testified that Misty appeared “very scared” when discussing what her father had done. Because Green's testimony fit within the expansive definition of an excited utterance used in child sexual assault cases, we see no deficient performance in counsel's failure to object to Green's testimony.

Character Witnesses

¶13 Richard next faults counsel for failing to present any testimony from relatives of the defendant who would have said that the girls were known to be untruthful. Counsel explained that he chose not to present such testimony because he was not aware of any specific instances of lying upon which such opinions might be based and, in his experience, such attacks can backfire on the defense unless supported by strong evidence. We are satisfied that counsel's failure to raise the issue of the girls' character for truthfulness was a reasonable strategic decision and not deficient performance.

Discretionary Reversal

¶14 Finally, Richard contends that he is entitled to a new trial in the interests of justice based upon the cumulative prejudicial effect of the errors he has alleged. Since we do not agree that the challenged actions or omissions represent error, we conclude there is no basis for exercising our discretionary reversal power.

By the Court.—Judgment and order affirmed.

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

