COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0768-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DALE GOULD, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Pierce County: ROBERT W. WING, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Dale Gould, Jr., appeals a judgment of conviction for first-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(1),[1] and

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

an order denying his postconviction motion claiming ineffective assistance of counsel. Gould argues that his trial counsel was ineffective because he failed to adequately oppose the State's motion to exclude evidence necessary to Gould's defense. Because trial counsel's conduct was not prejudicial, we affirm.

BACKGROUND

¶2 Aaron, a nine-year-old child, accused Gould of touching Aaron's genital area. Several weeks after the alleged incident, Aaron had sexual contact with a nine-year-old boy. Aaron's parents confronted him and asked where he had learned such behavior. Aaron stated, "well, you and mom have sex." Aaron eventually told them that Gould had touched him in that way and that Gould had tried to get Aaron to touch Gould. Gould was subsequently charged with sexual assault of a child.

¶3 Before trial, the State moved to exclude any evidence surrounding Aaron's sexual contact with the other boy. The State based its argument on the rape shield statute that excludes any reference of other sexual conduct by a victim.[2]

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[2] WISCONSIN STAT. § 972.11 provides:

> **(2)** (a) In this subsection, "sexual conduct" means any conduct or behavior relating to sexual activities of the complaining witness, including but not limited to prior experience of sexual intercourse or sexual contact, use of contraceptives, living arrangement and life-style.
>
> (b) If the defendant is accused of a crime under s. 940.225, 948.02, 948.025, 948.05, 948.06 or 948.095, any evidence concerning the complaining witness's prior sexual conduct or opinions of the witness's prior sexual conduct and reputation as to prior sexual conduct shall not be admitted into evidence during the course of the hearing or trial, nor shall any reference

(continued)

¶4 Defense counsel argued that the sexual conduct between Aaron and the other boy fell within one of the narrow statutory exceptions to the rape shield law. *See* WIS. STAT. § 972.11(2)(b)1. Counsel also argued that Aaron knew it was wrong when he touched the other boy's genitals. Thus, it could be argued that Aaron fabricated the claim that Gould sexually assaulted him in order to deflect the blame from himself. The trial court granted the State's motion because it determined that the proffered evidence did not fall within one of the statutory exceptions. *See* ***id.***

> to such conduct be made in the presence of the jury, except the following, subject to s. 971.31 (11):
>
> 1. Evidence of the complaining witness's past conduct with the defendant.
>
> 2. Evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered.
>
> 3. Evidence of prior untruthful allegations of sexual assault made by the complaining witness.
>
> (c) Notwithstanding s. 901.06, the limitation on the admission of evidence of or reference to the prior sexual conduct of the complaining witness in par. (b) applies regardless of the purpose of the admission or reference unless the admission is expressly permitted under par. (b) 1., 2. or 3.
>
> (d) 1. If the defendant is accused of a crime under s. 940.225, 948.02, 948.025, 948.05, 948.06 or 948.095, evidence of the manner of dress of the complaining witness at the time when the crime occurred is admissible only if it is relevant to a contested issue at trial and its probative value substantially outweighs all of the following:
>
> a. The danger of unfair prejudice, confusion of the issues or misleading the jury.
>
> b. The considerations of undue delay, waste of time or needless presentation of cumulative evidence.
>
> 2. The court shall determine the admissibility of evidence under subd. 1. upon pretrial motion before it may be introduced at trial.

¶5 A jury found Gould guilty. At the postconviction hearing, Gould argued that his trial counsel's performance was deficient by failing to argue that Aaron's sexual contact with the other boy was admissible under ***State v. Pulizzano***, 155 Wis. 2d 633, 456 N.W.2d 325 (1990), and that trial counsel's failure to do so was prejudicial.[3] In a written decision denying the motion, the trial court stated:

> [T]he fact that this evidence was excluded from trial was not only not prejudicial to the defendant but in fact prevented the State from making a stronger case against the defendant than it could have had the court allowed the evidence to be received at trial. It turns the concept of prejudice on its head to suggest that the defendant is injured by the fact that this evidence was not admitted at trial when admission of the evidence would have made the State's case against the defendant stronger not weaker.

This appeal followed.

STANDARD OF REVIEW

¶6 A claim of ineffective assistance of counsel presents a mixed question of law and fact. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will not reverse the trial court's findings of fact unless they are clearly erroneous. *See* ***id.*** at 634. Whether counsel's performance was

[3] To determine whether the rape shield law deprives a defendant of his constitutional right to admit evidence, the court in ***Pulizzano*** established a two-part process. The defendant must first establish through an offer of proof that: (1) the prior act clearly occurred; (2) the act closely resembled those of the present case; (3) the prior act is clearly relevant to a material issue; (4) the evidence is necessary to the defendant's case; and (5) the probative value of the evidence outweighs its prejudicial effect. If the defendant satisfies the five requirements, it then becomes necessary to determine whether the defendant's right to present the proffered evidence is outweighed by the State's compelling interest to exclude the evidence. *See* ***State v. Pulizzano***, 155 Wis. 2d 633, 656, 456 N.W.2d 325 (1990).

deficient and prejudicial is a question of law the appellate court reviews without deference to the trial court. *See* ***id.***

¶7 A criminal defendant who claims his conviction should be reversed because he received ineffective assistance of counsel must demonstrate both that his attorney's performance was deficient and that any deficient performance prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶8 Counsel is presumed to have acted properly, so that the defendant must demonstrate that his attorney made serious mistakes that could not be justified in the exercise of objectively reasonable professional judgment. *See* ***id.*** at 687-91. 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *See* ***id.*** at 694. In applying this principle, reviewing courts are instructed to consider the totality of the evidence before the trier of fact. *See* ***State v. Johnson***, 153 Wis. 2d 121, 129, 449 N.W.2d 845 (1990).

¶9 The court need not consider whether trial counsel's performance was deficient if it can resolve the ineffectiveness issue on the ground of lack of prejudice. *See* ***State v. Kuhn***, 178 Wis. 2d 428, 438, 504 N.W.2d 405 (Ct. App. 1993).

DISCUSSION

¶10 We first address Gould's argument that he was prejudiced by trial counsel's failure to argue that the evidence should be admitted on constitutional grounds. Gould argues that excluding the evidence prejudiced his defense because

he was left with no defense at all. The State had no witnesses other than Aaron, no physical evidence, and no corroborating stories. The result was a test of credibility between Gould and Aaron.

¶11 The State argues that Gould was not prejudiced, noting that even trial counsel had doubts whether the evidence itself would be useful. At the postconviction hearing, trial counsel testified that he had not made up his mind whether to use evidence of Aaron's sexual contact with the other boy even if the trial court had ruled it admissible. He stated that the evidence could have helped the defense, but it also "could have been dynamite in the favor of the State as well. I just perceived that as being a dangerous issue."

¶12 Gould's trial counsel believed that the State could have used the evidence of Aaron touching the other boy as being consistent with the sexual assault by Gould. He also believed that the jury could perceive Aaron's admitted sexual contact with the boy as bolstering Aaron's credibility as much as it provided evidence of a motive to lie.

¶13 The trial court, in denying the postconviction motion, stated that the evidence was not necessary to the defense's case, and was in fact more helpful to the State. We agree with this assessment of the evidence. While Gould may have used the evidence to show that Aaron had a motivation to lie, the State could have just as easily used the evidence to bolster Aaron's credibility.

¶14 Gould also argues that Aaron's statements were admissible as prior inconsistent statements. *See* WIS. STAT. § 906.13(2). When Aaron's parents asked him where he had learned how to do the sexual touching, Aaron told them, "[w]ell you and mom have sex." Approximately fifteen minutes later, Aaron stated that he had learned about the touching from Gould. Aaron also told his

father that "[Gould] touched me and tried to get me to touch him." He did not, however, tell the investigator that Gould tried to get him to touch Gould. He did tell the police that Gould touched Aaron's underwear, then put his hand down Aaron's pants. We conclude that these inconsistencies are minor. More fundamentally, we are not convinced that Gould has shown a reasonable probability that the inconsistencies would have resulted in a different outcome. *See* ***Strickland***, 466 U.S. at 694.

¶15 Because our decision on the prejudice prong is dispositive, we need not address whether Gould's trial counsel was deficient. *See* ***Kuhn***, 178 Wis. 2d at 438.

By the Court.—Judgment and order affirmed.

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