COURT OF APPEALS
DECISION
DATED AND FILED

August 22, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1671-CR **Cir. Ct. No. 2004CF327**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ARTHUR L. ANKEBRANT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: PATRICK J. FARAGHER, Judge. *Reversed and cause remanded.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Arthur L. Ankebrant[1] has appealed from a judgment convicting him of two counts of first-degree sexual assault of a child under the age of thirteen and one count of child enticement. He has also appealed from an order denying his motion for postconviction relief. Because we conclude that Ankebrant was denied effective assistance of counsel at trial, we reverse the judgment and order and remand the matter for a new trial.

¶2 Ankebrant was convicted after a jury trial that was held in March 2005. At trial, E.A.R. testified regarding an incident that occurred in the summer of 2001, when she was nine years old. At the time, E.A.R. resided in a townhouse with her father, Michael, her mother, Bobbie Jo, and her younger brother. The family's townhouse was attached to the townhouse in which Ankebrant, his wife, Sherry, and their two sons resided, and shared a front porch. E.A.R. testified that Sherry occasionally babysat her and her brother in the Ankebrants' home, which consisted of a kitchen, living room and bathroom on the main floor, with bedrooms upstairs.

¶3 E.A.R. testified that she was playing outside in back of her townhouse in the summer of 2001 when she decided to go inside to get a drink of water. She indicated that it was July or August, but closer to August. She testified that Ankebrant probably heard her tell her friends that she was going to get water and that, as she prepared to enter her front door, Ankebrant told her she could get a drink in his house. She testified that Ankebrant led her into the kitchen and gave her a glass of water, which she thought came from a faucet. She testified that the

[1] At trial, the defendant testified that his last name is spelled "Ankebrandt." However, since the criminal complaint, judgment of conviction, order denying postconviction relief, and notice of appeal spell the defendant's last name as "Ankebrant," we will use that spelling.

air conditioning was running, and the windows were closed. She testified that after giving her a drink, Ankebrant led her to the living room and told her that he wanted to teach her to protect herself from people who would try hurting her when she was older. She testified that Ankebrant told her to sit down on the couch and that he then exposed himself, touched her hand to his penis, and pulled down her pants and drummed his fingers on her vagina.

¶4 E.A.R. testified that she went home following the incident, but did not tell her mother, who was home. She testified that a few days after the incident, she saw Ankebrant while she was playing outside, and he asked her not to tell anyone about it. It is undisputed that she did not tell anyone that Ankebrant had assaulted her until the summer of 2004, when she reported it to Michael.

¶5 E.A.R. also testified about the tumultuous relationship between her parents during the summer of 2001. She testified that her father moved out of the townhouse around August 19, 2001 after a fight between her parents, and that her parents did not live together thereafter. She testified that she, her mother and brother moved out of their townhouse after her father left. She acknowledged that she did not tell her mother or anyone else about the assault until the summer of 2004, when she reported it to Michael within approximately one month of moving in with him.

¶6 Ankebrant testified at trial and denied that the acts alleged by E.A.R. occurred. He also testified that Michael and Bobbie Jo were fighting a lot in the summer of 2001, and that he had called the police, including reporting fighting on August 12, 2001, which was the last day that Michael lived in the townhouse. In his opening and closing arguments at trial, defense counsel contended that Michael

had a vendetta against Ankebrant because of this, creating a motive for E.A.R.'s false accusations against Ankebrant.

¶7 Testimony from multiple witnesses, including Michael, Bobbie Jo, and E.A.R., confirmed that Michael and Bobbie Jo were fighting throughout the summer, and that the police were called to their home several times. Bobbie Jo testified that she called the police on August 12, 2001, and that the Ankebrants assisted her that night. She testified that the Ankebrants had previously called the police because of fighting between her and Michael, and that she had previously told the Ankebrants that if they heard fighting, they could call the police. Bobbie Jo testified that her family never lived together after the August 12, 2001 police contact, that she and her children moved out of the townhouse in August 2001, and that Michael did not see E.A.R. for two years and saw her sporadically the year after that. She testified that E.A.R. lived with her until moving in with Michael in June 2004. She also testified that E.A.R. never told her about an assault by Ankebrant.

¶8 In addition to denying that an assault occurred, Ankebrant denied ever bringing E.A.R. into his residence and giving her a glass of water. He testified that his family did not drink water from the sink because it tasted bad, and that they used a water cooler with bottled water instead. He also testified that his wife, Sherry, used a wheelchair and walker in the summer of 2001 because of serious problems with her back, and that she could not walk up the stairs without assistance from another person. The testimony of Ankebrant, his sons, and their friend and neighbor, Ronald, indicated that Sherry stayed on the couch in the living room most of the summer of 2001, that she did not go outside alone, and that Ankebrant and one of his sons built a wooden ramp for Sherry's wheelchair at the front door.

¶9 Sherry testified that she injured her back in a car accident and had been on disability since 1996. She testified that she was hospitalized from around June 10 to June 16, 2001 because she lost all movement in her legs. She testified that when she returned home she used a walker and had a wheelchair ramp, and slept on the couch in the living room. She testified that she recalled going upstairs only twice all summer, once when Ankebrant and her older son helped her, and a second time when Ankebrant and Ronald helped her. She also testified that the Ankebrants ran their air conditioning all of the time in the summer because of her problems with asthma. She testified that a conversation behind the house could not be heard when the air conditioning was running.

¶10 Ankebrant, Sherry, and their son, Toby, also testified regarding surgeries that Toby had in 2001, and indicated that he rarely went outside as he recuperated during the summer of 2001. In contrast to their testimony regarding the presence of a ramp for a wheelchair at the front door, E.A.R. denied seeing a wheelchair ramp at the front door, or a wheelchair or walker in the home. However, she acknowledged that Toby had health problems that summer and was usually home.

¶11 On appeal, Ankebrant contends that his trial counsel rendered ineffective assistance when he failed to object to two portions of Michael's testimony, and to the prosecutor's questioning of Ronald. He also contends that the evidence was insufficient to convict him of the crimes charged.

¶12 We reject Ankebrant's claim that the evidence was insufficient to convict him. The test on appeal for the sufficiency of the evidence is not whether this court is convinced of the defendant's guilt beyond a reasonable doubt, but whether the jury, acting reasonably, could be so convinced by evidence that it had

a right to believe and accept as true. ***State v. Poellinger,*** 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (1990). The credibility of the witnesses and the weight of the evidence is for the jury. ***Id.*** at 504. Inconsistencies and contradictions in the witnesses' testimony are for the jury to consider in determining credibility. ***Kohlhoff v. State***, 85 Wis. 2d 148, 154, 270 N.W.2d 63 (1978). We must view the evidence in the light most favorable to the verdict, and if more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the jury. ***Poellinger***, 153 Wis. 2d at 504.

¶13 Applying this standard here, no basis exists to conclude that the evidence was insufficient to convict Ankebrant of the charged offenses. E.A.R.'s testimony clearly supported a finding that Ankebrant enticed her into his home when she was nine years old with the intent to have sexual contact with her, thus rendering him guilty of child enticement. *See* WIS JI—CRIMINAL 2134 (2002). Her testimony also supported a finding that Ankebrant engaged in two acts of sexual contact with her, rendering him guilty of two counts of first-degree sexual assault of a child under the age of thirteen. WIS JI—CRIMINAL 2102 (2001). Since E.A.R.'s credibility was for the jury to determine, no basis exists for this court to conclude that the evidence was insufficient to convict Ankebrant.

¶14 Although we reject Ankebrant's challenge to the sufficiency of the evidence, we reverse the judgment and order and remand the matter for a new trial based on ineffective assistance of counsel. Ankebrant filed a postconviction motion for a new trial, contending that his trial counsel rendered ineffective assistance when he failed to object to two portions of Michael's testimony, and to the prosecutor's questioning of Ronald.

¶15 To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Counsel's conduct is deficient if it falls below an objective standard of reasonableness. ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. When reviewing counsel's performance, we are required to be highly deferential and to avoid the distorting effects of hindsight. ***Id.***

¶16 To prove 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.'" ***Id.***, ¶20 (quoting ***Strickland***, 466 U.S. at 694). The critical focus is not on the outcome of the trial but on "the reliability of the proceedings." ***Thiel***, 264 Wis. 2d 571, ¶20 (citation omitted). We view the case from counsel's perspective at the time of trial. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

¶17 Appellate review of an ineffective assistance of counsel claim presents a mixed question of law and fact. ***State v. McDowell***, 2004 WI 70, ¶31, 272 Wis. 2d 488, 681 N.W.2d 500, *cert. denied*, 543 U.S. 938 (2004). We will not disturb the trial court's findings of fact unless they are clearly erroneous. ***Id.*** However, the ultimate determination of whether counsel's performance satisfies the constitutional standard for ineffective assistance of counsel presents a question of law. ***Thiel***, 264 Wis. 2d 571, ¶21. This court reviews de novo the legal questions of whether deficient performance has been established and whether the deficient performance led to prejudice rising to a level undermining the reliability of the proceedings. ***Id.***, ¶24.

¶18 The trial court denied Ankebrant's postconviction motion after a ***Machner***[2] hearing at which testimony was received from Ankebrant's trial counsel. In denying the motion, the trial court concluded that trial counsel's performance was neither deficient nor prejudicial. However, as noted above, although this court sustains the trial court's factual findings unless they are clearly erroneous, we review de novo whether deficient performance has been established and whether the deficient performance was prejudicial. Based upon our review of the testimony at trial and the postconviction testimony, we reject Ankebrant's claim that his trial counsel rendered ineffective assistance by failing to object to inadmissible hearsay testimony by Michael. However, we conclude that trial counsel performed deficiently when he failed to object to Michael's testimony that E.A.R. was telling the truth, and to the prosecutor's questioning of Ronald. Because these deficiencies undermine our confidence in the reliability of the proceedings, we reverse the judgment of conviction and the trial court's order denying postconviction relief, and remand the matter for a new trial.

¶19 Ankebrant's first argument is that his trial counsel performed deficiently when he failed to object to the following testimony by Michael:

> Q. Do you remember what it was that your daughter told you had occurred between her and the defendant?
>
> A. Yes.
>
> Q. What did she tell you?
>
> A. She told me that he invited her in for a glass of water and told her – then told her after she had the water that he would help teach her how to protect herself from somebody that would hurt her; and then proceeded to do what he said he was going to protect her from.

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

> Q. Now did [E.A.R.] tell you what the defendant actually did?
>
> …
>
> A. She told me that he had exposed himself and made her touch it, his penis. And that he had put his hand down her pants. And that's about all she really could tell me. She said when he was done she pulled up her pants and she went home.

¶20 Ankebrant contends that his trial counsel should have objected to this testimony because it constituted inadmissible hearsay under WIS. STAT. § 908.02 (2005-06).[3] We disagree.

¶21 WISCONSIN STAT. § 908.01(4)(a)2 provides that a prior statement by a witness is not hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement, and the statement is consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. In this case, E.A.R. was the declarant. She testified at trial and was subject to cross-examination concerning the statement to Michael. *See* ***State v. Miller***, 231 Wis. 2d 447, 470-71, 605 N.W.2d 567 (Ct. App. 1999). The statement was consistent with E.A.R.'s testimony at trial. In addition, because the statement was made by E.A.R. before the assault was reported to the police, it rebutted Ankebrant's contention that E.A.R. had been manipulated or induced by Michael

[3] All references to the Wisconsin Statutes are to the 2005-06 version.

to make false accusations against Ankebrant to the authorities and at trial.[4] As such, it was not hearsay. Because it is not ineffective assistance to fail to raise an objection which would have lacked merit, trial counsel did not render ineffective assistance by failing to object to the testimony. *See* ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App.1994).

¶22 Although we reject Ankebrant's contention that his trial counsel performed deficiently by failing to object to the testimony regarding E.A.R.'s statement to Michael, we conclude that counsel performed deficiently when he failed to object to Michael's testimony regarding the truthfulness of E.A.R.'s statement to him. At trial, Michael testified as follows in response to questioning by the prosecutor:

> Q. Now I would like you to think back to the day that [E.A.R.] first told you about what the defendant did. Okay?
>
> A. Okay.
>
> Q. Do you recall what your reaction was when she had told you what the defendant had done?
>
> A. Yes. I told her that it is a very serious charge; and if it's a lie, she better tell me now.
>
> Q. Do you recall what she said in response to that statement?

[4] In his opening argument, counsel for Ankebrant stated that while he did not have to prove why E.A.R. would be lying or falsifying her allegations, the defense was going to suggest a motive based upon the tumultuous relationship of E.A.R.'s parents and Michael's having "an axe to grind" with Ankebrant because of the assistance Ankebrant and his family provided to Bobbie Jo. In his closing argument, defense counsel referred to "this vendetta" between Michael and Ankebrant, and argued that this may have caused Michael "to have created this and fabricated this." These arguments, implicitly if not expressly, asserted that Michael caused or induced E.A.R. to make false allegations against Ankebrant.

> A. She didn't at first. She -- I think she was kind of shocked that I reacted in that way instead of going straight to the comfort thing. But after a couple of minutes she spoke up and reiterated what she -- or released (sic) parts of what she had said.
>
> Q. What parts?
>
> A. That something inappropriate had happened. *She basically swore that it was the truth to me. And her body language and her mannerisms, I pretty much believed her. I just needed to, you know, make sure that it wasn't – I needed to make sure it was true.* (Emphasis added.)

¶23 In its respondent's brief, the State concedes that this testimony was improper under the longstanding rule that no witness, expert or otherwise, is permitted to give an opinion that another mentally and physically competent witness is telling the truth in a particular case. *See* ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). However, the State concludes, as did the trial court, that this testimony and trial counsel's failure to object to it were not prejudicial. We disagree.

¶24 As recognized by both the prosecutor and defense counsel in their closing arguments at trial, this was a "he said/she said" case that turned completely on credibility. Any evidence that enhanced the credibility of either E.A.R. or Ankebrant was thus critically important. The State argues that the testimony was not prejudicial because Michael's testimony as to E.A.R.'s truthfulness was not mentioned by the prosecutor in closing argument, and because the jury would have inferred that Michael believed E.A.R. from the fact that he reported the assault to the authorities. However, it does not necessarily follow that a parent who reports a child's allegations to authorities personally believes them. Most importantly,

neither a parent nor any other witness is permitted to give an opinion as to whether another witness is telling the truth.[5] Michael opined that, based on his conversation with E.A.R. and her demeanor, E.A.R. was telling the truth. His testimony was improper and, based upon the crucial importance of the jury's credibility determinations in this case, trial counsel's failure to object to the testimony must be deemed prejudicial to Ankebrant's defense.[6]

¶25 We also conclude that counsel performed deficiently when he failed to object to the prosecutor's cross-examination of Ronald. Ronald was a long-time friend of the Ankebrants and lived in the same townhouse complex, where he performed maintenance work. He testified as a witness for the defense regarding the health problems of Sherry, Sherry's limited mobility, and her presence on the main floor of the Ankebrants' home during most of the summer of 2001. He also testified that he was in the Ankebrants' home on a daily basis in the summer of 2001.

¶26 Ronald's testimony on direct examination clearly supported Ankebrant's claim that his wife was almost always on the couch or main floor of his townhouse in the summer of 2001. This claim in turn supported Ankebrant's

[5] In recognition of this rule, the trial court granted the State's motion in limine to preclude Bobbie Jo from testifying that she did not believe that E.A.R. was being truthful.

[6] At the ***Machner*** hearing, trial counsel indicated that he failed to object as a matter of trial strategy because he did not want to highlight the testimony and wanted to get Michael off the stand. We acknowledge that a strategic trial decision rationally based on the facts and law will not support a claim of ineffective assistance of counsel. ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996). However, while our review of an attorney's performance is highly deferential to counsel's strategic decisions and actions, we will declare a performance deficient if counsel's acts or admissions fall outside the wide range of professionally competent assistance. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶7, 286 Wis. 2d 721, 703 N.W.2d 694. Because the jury's assessment of E.A.R.'s credibility was crucial and determinative in this case, we conclude that trial counsel performed deficiently when he failed to object to her father's testimony as to her truthfulness, and that the failure to object was prejudicial.

defense because, if believed, it significantly diminished the likelihood that Ankebrant was alone in the living room of the townhouse with E.A.R. in July or August 2001 and sexually assaulted her.

¶27 Following Ronald's direct testimony, the prosecutor cross-examined him, asking the following questions:

> Q. Sir, this is not your first contact with a sexual assault case in Washington County Circuit Court, is it?
>
> A. No, it's not.
>
> Q. In fact, one of your children has been in court before; is that correct?
>
> A. Yes.
>
> Q. In fact, one of your children has been convicted of sexual assault; is that correct?
>
> A. Well, he's actually a stepchild. I didn't actually adopt him. He's not my own son.
>
> Q. You are aware, however, of what is involved in the court process of prosecuting these crimes, correct?
>
> A. Yes, I am.
>
> Q. And you are aware that these crimes, sir, based on your own experience in court, occur in private, correct?
>
> A. Yes, I do.
>
> Q. And you know that, from your own experience, these kind of crimes don't occur when there's likely to be someone around, right?
>
> A. Usually, yes.

¶28 As conceded by the State in its respondent's brief, evidence regarding Ronald's stepson's sexual assault conviction was irrelevant to this case.

However, unlike the State and trial court, we cannot conclude that the prosecutor's questioning regarding the matter was not prejudicial.

¶29 The trial court concluded that the testimony was non-prejudicial because it did not affect Ronald's testimony that Sherry was incapacitated most of the summer of 2001, rendering it unlikely that E.A.R. was ever alone with Ankebrant in the living room of his home. While we agree that the testimony was not directly related to Ronald's testimony about Sherry, the likely impact of questioning Ronald concerning his family involvement in a sexual assault was to impugn his credibility, staining him by association with criminal conduct that jurors were likely to deem reprehensible.[7] While the prejudice arising from such questioning might have been of little import in another case, the jury's assessment of the credibility of E.A.R. and Ankebrant was of utmost importance in this case. It follows that the testimony of any witness that supported the credibility of either Ankebrant or E.A.R. was also of utmost importance. *Cf.* ***State v. Jeannie M.P.***, 2005 WI App 183, ¶11, 286 Wis. 2d 721, 703 N.W.2d 694 (when counsel recognized the case as a "he said/she said" case, counsel should also have recognized the potential impact of an additional witness supporting the victim's account).

¶30 The cumulative effect of counsel's deficient acts undermines our confidence in the reliability and outcome of the trial. *See* ***Thiel***, 264 Wis. 2d 571,

[7] At the ***Machner*** hearing trial counsel testified that he thought the questioning was irrelevant but not harmful. He also indicated that he was "somewhat pleased" when the questions were asked, and believed they may have bolstered Ronald's credibility by demonstrating his understanding of the serious nature of the charges. We discern nothing in the record that could support a conclusion that questioning Ronald about his stepson's sexual assault conviction could bolster his credibility.

¶60. We therefore reverse the judgment of conviction and the order denying postconviction relief, and remand the matter for a new trial.

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

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