

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 15, 2001**

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.

**No. 00-2884**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**VLADO GAZIC,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Walworth County:  
ROBERT J. KENNEDY, Judge. *Affirmed.*

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Vlado Gazic appeals from the order denying his motion for relief under WIS. STAT. § 974.06 (1999-2000).<sup>1</sup> The issue on appeal is

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

whether Gazic received ineffective assistance of counsel. Because we conclude that he did not receive ineffective assistance of counsel, we affirm.

¶2 In 1995, Gazic was convicted after a jury trial of four counts of sexual assault of a child under the age of thirteen years. Gazic was charged with having sexually assaulted the daughters of his girlfriend. The court sentenced him to four consecutive forty-year terms of imprisonment. Gazic appealed the decision and this court affirmed in an unpublished decision. *State v. Gazic*, No. 96-2582-CR, unpublished slip op. (Wis. Ct. App. Oct. 15, 1997). Subsequently, Gazic filed a motion under WIS. STAT. § 974.06, in which he alleged ineffective assistance of appellate and trial counsel. The circuit court held extensive hearings on the motion and then denied it. Gazic appeals from the order denying his motion.

¶3 To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. Consequently, if counsel's performance was not deficient, the claim fails and this court need not examine the prejudice prong. See *State v. Moats*, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶4 We review the denial of an ineffective assistance claim as a mixed question of fact and law. See *Strickland*, 466 U.S. at 698. We will not reverse the trial court's factual findings unless they are clearly erroneous. However, we review the two-pronged determination of trial counsel's performance independently as a question of law. See *State v. Johnson*, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶5 There is a strong presumption that counsel rendered adequate assistance. *Strickland*, 466 U.S. at 690. Professionally competent assistance encompasses a “wide range” of behaviors and “[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Id.* at 689. We will not “second-guess a trial attorney’s ‘considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.’ A strategic trial decision rationally based on the facts and the 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) (citations omitted).

¶6 The circuit court held three days of hearings on this motion. During that time, the court heard both testimony and extensive arguments on Gazic’s claims. The circuit court thoroughly addressed each of the issues Gazic raised in his motion.<sup>2</sup> The court denied the motion. The court found that defense counsel’s trial strategy was to argue that the children’s father had coached the children to make these charges against his ex-wife’s lover, and to show that the State was overstating the case against Gazic in an attempt to vilify him. The court concluded that many of the instances which Gazic claimed constituted ineffective assistance of counsel were, in fact, situations in which his defense counsel had made a strategic decision which was consistent with this strategy. The court

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<sup>2</sup> The court found that the motion was rather confusing because Gazic tended to explain the issues using broad generalities and many of the claims were overlapping. The circuit court, however, went through the motion paragraph by paragraph in an attempt to address each claim.

further found that this was a reasonable trial strategy under these circumstances and that counsel was not ineffective.

¶7 Gazic's first claim of ineffectiveness is based on trial counsel's failure to object to certain testimony offered by an expert witness. Gazic claims that the testimony offered by a therapist who had counseled both of the victims constituted improper opinion testimony that the girls had been sexually assaulted. Specifically, Gazic asserts that counsel should have objected when the therapist testified as to her "diagnostic impression" of the children as having "adjustment disorders with mixed emotional features, meaning that there's something going on there—with their emotions, their behavior as a result of something that happened out of the ordinary that they are having difficulty adjusting to."

¶8 He further argues that counsel should have objected to the following exchange:

Q Okay. Now, Axis IV you wrote the word, or the word is written "severity," and then next to it it looks like you've written the word "severe"?

A Um-hmm.

Q And what did you mean by that?

A Level of stressors are categorized by mild, moderate, severe. And any time there's an indication of sexual abuse, it would go under severe, a severe stressor.

¶9 Gazic argues that the testimony by this expert constituted a statement by the therapist that the children were telling the truth and that the children had been sexually abused. The circuit court rejected this argument. As to the statement about her diagnostic impressions, the court found that it was not improper testimony because there had been evidence that the children had offered

contradictory statements about what had occurred. The court concluded that the expert's testimony was simply explaining that there was "something going on with their emotions" and was not improper.

¶10 The circuit court also found that counsel was not ineffective when he did not object to the expert's definition of "severe." The court found that counsel's performance was not deficient because the expert's answer went beyond the State's question. The court found that neither the State nor defense counsel could have known that the expert was going to give that answer to the question actually asked.

¶11 Gazic argues on appeal that this expert's testimony is the type of testimony forbidden by *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984), and *State v. Romero*, 147 Wis. 2d 264, 278, 432 N.W.2d 899 (1988), and counsel was ineffective because he did not object to it. This expert's testimony, however, was not the same as the testimony found to be improper in those two cases.

¶12 In *Haseltine*, this court concluded that an expert psychiatrist's testimony that there "was no doubt whatsoever" that the victim was an incest victim went too far and was improper. *Haseltine*, 120 Wis. 2d at 96. And in *Romero*, the supreme court concluded that testimony from a police officer and a social worker that the victim was "totally truthful" and had been "honest with us from the time of the first interview" were improper. *Romero*, 147 Wis. 2d at 277-78. This expert, however, did not give direct testimony that she thought Gazic had sexually assaulted the girls, or that she thought the girls were telling the truth. Gazic claims, however, that "the message" in her testimony was that the girls were

truthful and had been assaulted. He argues, therefore, that this testimony should also be found improper under *Haseltine* and *Romero*. We disagree.

¶13 “A witness may not testify that another competent witness is telling the truth. However, an expert witness may offer relevant testimony that a victim’s behavior is consistent with the behavior of similarly situated victims.” *State v. Huntington*, 216 Wis. 2d 671, 697, 575 N.W.2d 268 (1998) (citations omitted). In this case, the expert offered appropriate opinion testimony about the children’s behavior and her treatment of them. This is not the same as a direct statement that a child was an incest victim or truthful. The testimony was proper and relevant, and defense counsel’s failure to object to it did not constitute ineffective assistance of counsel.

¶14 Gazic also argues that counsel was ineffective for failing to object during closing to the State’s reference to the therapist’s testimony.<sup>3</sup> Specifically, Gazic objects to the statements that the girls were receiving therapy because they needed emotional help, and that the girls needed more therapy. The State responds that Gazic has misconstrued the State’s closing statements in his brief.

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<sup>3</sup> During the extensive hearings held on the motion in the circuit court, the court commented to defense counsel more than once on the difficulty created for the court by the “overlapping” nature of the claims asserted in the motion. The same problem is presented by the brief on appeal. While argued together as one claim, the brief really asserts three different grounds for ineffective assistance of counsel in matters related to the therapist. The bases are: (1) that counsel did not object when the therapist testified; (2) that counsel did not object when the State referred to this testimony during closing; and (3) that counsel did not properly object to certain exhibits being sent to the jury during deliberations. While these arguments are related because they all involve evidence from the same witness and they are all being used to establish ineffective assistance of counsel, it would have been of more assistance to the court if the brief had identified these as three separate issues or subissues instead of analyzing them as one. A more obvious and distinct organizational structure would be very helpful to the court.

¶15 We agree that the statements were proper. “In Wisconsin a prosecutor or a defense counsel may comment on the evidence, detail the evidence, argue from it to a conclusion and state that the evidence convinces him and should convince the jurors.” *Embry v. State*, 46 Wis. 2d 151, 160, 174 N.W.2d 521 (1970). The prosecutor’s comment that the children were receiving therapy because they needed emotional help is obvious and not objectionable. The testimony had established a number of reasons why the children needed emotional help. Further, as the State asserts, the statements actually made by the prosecutor were that the expert was an advocate for the children and not a therapist. The prosecutor did not suggest that the expert had testified that the children were truthful. The prosecutor is entitled to offer her opinion on the testimony during closing. We agree that the statements made concerning the therapist were proper and therefore defense counsel’s performance was not deficient for not objecting to them.

¶16 Gazic also argues that defense counsel was ineffective when he did not object to certain exhibits being given to the jury during deliberations. The exhibits that were offered were the therapist’s reports. Defense counsel testified at the *Machner*<sup>4</sup> hearing that he had objected to the exhibits earlier in the proceeding and that he never withdrew the objection. He also testified that Gazic insisted that the documents be given to the jury. The State responds simply that the exhibits did not convey any information that the jury had not already heard. Consequently, even if counsel should have objected, Gazic was not prejudiced.

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<sup>4</sup> *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶17 We agree with the State that Gazic has not established how he was prejudiced by the failure of counsel to object to these documents being sent to the jury. Gazic argues that the therapist's testimony "swayed" the jury. The testimony, however, had already been heard. Gazic has not explained why the failure to object to the reports being sent to the jury was prejudicial given that the jury had already heard the therapist's testimony. We cannot conclude that the failure to object to these exhibits being sent to the jury constituted ineffective assistance of counsel.

¶18 Gazic also argues that his counsel was ineffective because of the part he played in the State being able to call the victims' mother as a witness. Gazic asserts that by telling the court that he would argue a missing witness theory to the jury if the mother were not called, defense counsel opened the door for the State to be allowed to call the mother. Gazic then argues that this "opened the floodgates of prejudicial information which the jury would not have otherwise heard." At the *Machner* hearing, defense counsel testified at length about his reasons for wanting the mother to testify. He stated that Gazic demanded that she be allowed to testify. Defense counsel also stated that he did not know before trial just how bad a witness the mother would be.

¶19 We cannot conclude that counsel was ineffective in this instance either. Overall, the testimony the mother had to offer was relevant. There were issues in the trial of credibility and the children's contradictory testimony. The mother's testimony was important to help explain the inconsistencies in their statements. The State hoped her testimony would show that she was biased in favor of Gazic and had urged the children to lie to protect him. The defense hoped that her testimony would establish that Gazic and the children had a close relationship and that he would not harm them, thereby supporting the defense



theory that the children's father had put them up to making these charges against Gazic.

¶20 Gazic also argues that counsel was ineffective when he failed to object to improper questioning of the mother. The substance of the mother's testimony was that the children got along well with Gazic. At one point during her testimony, the State asked her a series of questions such as, "So if the girls say the defendant is mean to them, they're also lying?" Defense counsel did not object to these questions.

¶21 While we agree with Gazic that these types of questions are not proper, we also agree with the circuit court that defense counsel's decision to not object to them did not constitute ineffective assistance of counsel. Counsel testified that at the time of this testimony he made a strategic decision to let the questions continue in the hope that the jury would perceive it as an aggressive district attorney who was abusing a witness. This was consistent with the overall defense strategy to establish that the State was attempting to vilify Gazic. This was a reasonable strategic decision under the circumstances and did not render counsel's performance ineffective.

¶22 Gazic also argues that counsel was ineffective for failing to object to statements made by the State during closing arguments that Gazic was a "drunk animal." The circuit court agreed with Gazic that this statement was improper. The court further found, however, that the decision not to object to the statement was consistent with the defense strategy. Defense counsel testified that he believed the State would lose credibility by name calling and he did not want to draw attention to the remark.

¶23 We agree with the circuit court and Gazic that this statement was improper. However, we also accept defense counsel's explanation for why he did not object. As stated earlier, we agree with the circuit court that it was a reasonable strategic decision for defense counsel to allow this type of statement to be heard to buttress his position that the State was being overly aggressive in the way it prosecuted the case. We conclude that counsel's failure to object to this statement did not constitute ineffective assistance of counsel.

¶24 While we have concluded that defense counsel was not ineffective and that the decision to allow the prosecutor to engage in these types of tactics was a reasonable strategic decision by the defense, we believe that a word of warning is in order for the prosecutor. This is the type of prosecution which risks reversal. Not only do these tactics risk reversal, but we concluded that counsel's performance was not ineffective because these types of tactics will alienate a jury. While the State was successful in this case, that may be more because of the intrinsic strength of the evidence and in spite of the way the prosecution presented its case. The prosecutor is reminded that the nature of the crime does not permit cowboy lawyering. In fact, the more heinous the crime, the more careful the district attorney must be in securing the conviction.

¶25 For the reasons stated, the order denying the motion for postconviction relief is affirmed.

*By the Court.*—Order affirmed.

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

