

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 26, 2002

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. 01-2632-CR
STATE OF WISCONSIN**

Cir. Ct. No. 99-CF-43

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT L. COLLINS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Green Lake County: LEWIS R. MURACH, Judge. *Affirmed.*

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

¶1 PER CURIAM. Robert L. Collins appeals from a judgment convicting him of second-degree sexual assault of a child after a jury trial and from an order denying his postconviction motion for a new trial due to ineffective

assistance of counsel. On appeal, he seeks a new trial under WIS. STAT. § 752.35 (1999-2000)¹ on the grounds that the real controversy was not tried because trial counsel did not object to certain testimony of the victim's mother. We disagree and affirm.

¶2 Collins was charged with three counts of second-degree sexual assault of a child. The victim was thirteen years old. The jury convicted Collins of one count (penis-vagina intercourse) but acquitted him of the other two counts (kissing the victim's breast and digital penetration of the vagina).

¶3 Postconviction, Collins alleged that trial counsel was ineffective because, on two occasions, he failed to object to the testimony of the victim's mother. The prosecutor asked the victim's mother on direct examination, "Do you believe your daughter that she was sexually assaulted by Robert Collins?" The victim's mother responded, "Without a doubt." On redirect examination, the prosecutor asked her, "Despite what you've been hearing from the defense, do you believe your daughter?" She responded, "Absolutely." Counsel also failed to object to the reference to the mother's testimony in the prosecutor's closing argument.

¶4 Postconviction, Collins argued that the mother's testimony was inadmissible under well-settled law that no witness, lay or expert, may opine that another is telling the truth, and that trial counsel was ineffective because he did not object. Collins argued that the case was a credibility contest between the victim and Collins, and the mother's testimony that her daughter was credible invaded the

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

jury's function to determine witness credibility. In an affidavit in support of the motion, trial counsel stated that he could not recall why he did not object to the mother's testimony and did not have a strategic reason for failing to object.²

¶5 In denying the postconviction motion, the circuit court rejected trial counsel's claim that he did not have a strategic reason for not objecting to the mother's testimony. The court recalled that during trial, trial counsel argued that the victim's mother had a strong, possibly irrational, belief that her daughter had been sexually assaulted. The defense contended that it was the mother who raised and pursued the sexual assault issue with the victim. The victim was afraid to contradict her mother and therefore fabricated the assault. The court noted that trial counsel argued on several occasions that the victim tailored her version of events to satisfy her mother's belief.³ The defense essentially contended that the mother badgered the daughter into alleging that she had been sexually assaulted. Therefore, the court found, the issue of the mother's belief and dominance over the victim was used at trial to support the defense's contention that the victim fabricated the sexual assault. The court did not find any deficient performance by trial counsel because trial counsel's failure to object to the mother's testimony fit

² Apparently, an evidentiary hearing was not held on the motion and the parties argued the facts set forth in the postconviction motion, response and trial counsel's affidavit.

³ In his opening statement, trial counsel stated that the evidence would show that the mother was angry and concerned when her daughter did not come home on the night of the assault and that the mother first suggested sexual assault, not the victim. In closing argument, trial counsel reviewed evidence that the mother burst into the bedroom where the victim had spent the night after the assault and that the mother felt "something" had happened. The mother badgered the victim for information about what happened, and the victim finally stated that she had been sexually assaulted. The mother then took the victim to the police station. Trial counsel argued that the victim fabricated the sexual assault in order to placate her mother.

the defense theme that the mother's influence led to the sexual assault allegations. The court found that trial counsel had a strategy and acted consistently with it.

¶6 Even if counsel should have objected, the court found that there was other evidence before the jury of the mother's reaction when the victim claimed that she had been sexually assaulted. Upon hearing this statement, the mother immediately took the victim to the police station, an action which in and of itself demonstrates the mother's belief in the daughter's version of events regardless of the testimony to which trial counsel did not object. The court noted that the jury could have easily drawn an inference regarding the mother's belief from her actions. Finally, the court found that the victim's credibility was raised with the jury before the mother testified. The court found that the jury was not confused or distracted by the mother's testimony, particularly since the jury acquitted Collins of two counts of sexual assault.

¶7 On appeal, Collins argues that pursuant to WIS. STAT. § 752.35, he should have a new trial because the mother's testimony prevented the real controversy from being fully tried. The real controversy may not have been fully tried if the jury had before it improperly admitted evidence which clouded a crucial issue. *State v. Smith*, 153 Wis. 2d 739, 742, 451 N.W.2d 794 (Ct. App. 1989).

¶8 The State contends that we cannot grant a new trial as a substitute for appellate review of the circuit court's decision that trial counsel was effective. Collins does not argue ineffective assistance on appeal; he seeks a reversal because the real controversy was not tried. We will assume without deciding that Collins may seek a new trial under WIS. STAT. § 752.35 without seeking appellate review of the circuit court's ineffective assistance ruling.

¶9 We will also assume without deciding that the mother's testimony was inadmissible under *State v. Haseltine*, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984), and *State v. Tutlewski*, 231 Wis. 2d 379, 605 N.W.2d 561 (Ct. App. 1999). *Haseltine* and *Tutlewski* hold that a witness may not opine that another mentally and physically competent witness is telling the truth. *Haseltine*, 120 Wis. 2d at 96; *Tutlewski*, 231 Wis. 2d at 389.

¶10 Even though inadmissible evidence was before the jury, we conclude that the evidence did not cloud a crucial issue: the victim's credibility. The circuit court found that other evidence of the victim's credibility was before the jury, including the mother's actions and the direct challenges to the victim's credibility. Furthermore, the mother's testimony was one aspect of the real controversy, i.e., whether the victim fabricated the sexual assault. A new trial is not warranted because the jury was not led astray by the mother's testimony.

By the Court.—Judgment and order affirmed.

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

