**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**January 6, 2010**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2008AP1135-CR** **Cir. Ct. No. 2005CF231**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JACOB L. G.,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Winnebago County: ROBERT HAWLEY and KAREN L. SEIFERT, Judges. *Affirmed.*

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

¶1 PER CURIAM. Jacob L. G.[1] appeals from a judgment convicting him of repeated first-degree sexual assault of the same child and from an order denying his motion for postconviction relief seeking a new trial due to ineffective assistance of trial counsel or, in the alternative, in the interest of justice. We conclude that trial counsel's performance, while less than ideal, does not undermine our confidence in the verdict. We also are satisfied that the real controversy was fully and fairly tried. We affirm.

¶2 In April 2005, the State charged Jacob with repeated first-degree sexual assault of the same child, his girlfriend Cynthia W.'s nine-year-old son, Charlie, and first-degree sexual assault of his four-year-old biological son, Jacob, Jr. According to the evidence adduced at the two-day trial, Jacob lived with Cynthia, Charlie, and Jacob's and Cynthia's four children, including Jacob, Jr. Charlie testified that "[a]ll the time" when his mother went out to do errands, Jacob would pull down Charlie's pants and touch his "pee-pee." He also testified that he had seen Jacob do the same to Jacob, Jr.

¶3 Cynthia testified that in the days before she learned of the sexual assault allegations, she and Jacob were under the influence of methamphetamines. "[C]razy stuff" Jacob said about child molesters and about not "mean[ing] to hurt the kids" and that he "needed help" concerned Cynthia, so she left with the children. She took Charlie to see his biological father, Charles W., and told Charles he "needed to talk to his son because of [Jacob's] comments." Charles testified that Charlie was "real nervous" but "looked me right in the eyes" and said

[1] We made the caption confidential and use only initials for the adults' surnames to better shield the children's identities.

that "Jacob had touched his pee-pee." The jury convicted Jacob of the assaults against Charlie but acquitted him of the charge involving Jacob, Jr. The court imposed a twenty-five-year sentence.

¶4 Jacob's postconviction counsel filed a motion for postconviction relief, a brief in support and a notice of appeal. Soon thereafter, this court granted counsel's motion to withdraw and successor counsel was appointed. This court granted successor counsel's motion to dismiss the appeal and remanded to the trial court for further postconviction proceedings, reinstating deadlines for filing the motion under WIS. STAT. RULE 809.30 (2007-08).[2] Successor counsel filed the postconviction motion at issue here, seeking a new trial on grounds of ineffective assistance of trial counsel or, alternatively, in the interest of justice. After a hearing pursuant to ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), and post-hearing briefing, the court denied the motion. Jacob appeals. More facts will be supplied as needed.

Ineffective Assistance of Counsel

¶5 The right to counsel includes the right to effective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 686 (1984); ***State v. Trawitzki***, 2001 WI 77, ¶39, 244 Wis. 2d 523, 628 N.W.2d 801. To prove ineffective assistance, the defendant must show that trial counsel's representation was deficient and that he or she was prejudiced by the deficient performance. ***Strickland***, 466 U.S. at 687. Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness and is constitutionally

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

prejudicial if the defendant demonstrates "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***State v. Thiel***, 2003 WI 111, ¶¶19-20, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted). The focus of this inquiry is not on the outcome of the trial, but on "the reliability of the proceedings." ***Id.***, ¶20 (citation omitted).

¶6 Our review of an ineffective assistance of counsel claim is a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). We will not disturb the trial court's findings of fact unless they are clearly erroneous but the ultimate determination of whether counsel's performance fell below the constitutional minimum is a question of law that we review independently. ***Id.*** We must be "highly deferential" when evaluating counsel's performance and must avoid the "distorting effects of hindsight." ***Thiel***, 264 Wis. 2d 571, ¶19 (citation omitted). Absent proof that counsel's performance was deficient, we need not address whether there was resulting prejudice. *See* ***Strickland***, 466 U.S. at 697.

¶7 Attorney David Keck represented Jacob at trial. Jacob first contends that Keck was ineffective with regard to Charles' testimony for failing to impeach him with his prior convictions and with the fact that Charles also was under the influence of methamphetamines when Charlie disclosed the alleged assaults to him. The parties stipulated postconviction that Charles had at least four criminal convictions, all out of state.[3] Also, Cynthia testified at the ***Machner*** hearing that,

[3] The State has the ability to run criminal record checks through various national law enforcement databases; the public defender's office, where Keck works, does not. Keck testified his practice is to rely on the State to provide search results. The record is unclear why Keck did not have Charles' conviction information that the State had at trial.

like her and Jacob, Charles, too, was under the influence of methamphetamines when she brought Charlie to talk to him. Jacob argues that using the convictions and mental impairment to impeach Charles' credibility would have undermined Charles' testimony as to the truth of Charlie's accusations and the accuracy of Charles' perceptions of them.

¶8 Prior convictions are admissible to impeach a witness' character for truthfulness. WIS. STAT. § 906.09. They are relevant because Wisconsin law presumes that, as a class, criminals are less truthful than persons who have not been convicted of a crime. ***State v. Gary M.B.***, 2004 WI 33, ¶21, 270 Wis. 2d 62, 676 N.W.2d 475. Similarly, a witness' mental capacity, including temporary impairment, properly may be considered as bearing on credibility. ***Chapin v. State***, 78 Wis. 2d 346, 353, 254 N.W.2d 286 (1977).

¶9 Keck testified that he was aware that Charles had a record, "may have" been aware from Cynthia that Charles previously had been incarcerated, recalled after reviewing a police report that the incarceration was for manufacturing methamphetamines, and "believe[d] [he] was aware" that Charles was under the influence of methamphetamines when Charlie talked to him. Keck testified that he did not focus on impeaching Charles, however, because his trial strategy was to undercut Charlie's testimony. Using evidence that Charles recently had returned to Wisconsin, that Cynthia repeatedly asked Charlie whether anyone ever had touched him inappropriately, and that Charlie had recanted his claim at some point, Keck sought to show that Charlie fabricated the assaults because he wanted his parents to reunite, and that the fabrication was cemented through police and social worker interviews. The court found that not attacking Charles' credibility was logically tied to Keck's strategy of impeaching Charlie.

¶10 Trial strategy decisions reasonably based in law and fact generally do not constitute ineffective assistance of counsel. ***State v. Snider***, 2003 WI App 172, ¶22, 266 Wis. 2d 830, 668 N.W.2d 784. While it also might have been reasonable for Keck to draw Charles' credibility into question, there is no indication that Charles had a motive to lie. Basing an ineffective assistance of counsel claim on Keck's failure to do so engages in the kind of hindsight the Supreme Court renounced in ***Strickland***, 466 U.S. at 689.

¶11 Jacob next asserts that Keck was ineffective for failing to object to Charles' testimony suggesting that Charlie was telling the truth. Charles told the jury that in the past if Charlie lied, "he [couldn't] keep a straight face, wouldn't look me in the eyes," but on this day, "he was looking me right in the eyes. The only thing he was doing was dancing from foot to foot all nervous." The prosecutor asked if Charlie's behavior was consistent with times Charles had seen him lie. Charles answered: "No. I never seen him dance from foot to foot and dance around like he was doing. He was fidgeting real good." Jacob challenges these portions of Charles' testimony as improper comment on Charlie's truthfulness. *See* ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984) ("No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth."). Whether a witness has improperly testified as to the credibility of another witness is a question of law which we review independently. ***State v. Huntington***, 216 Wis. 2d 671, 697, 575 N.W.2d 268 (1998).

¶12 Keck conceded that Charles' testimony "probably went beyond what's permissible," but he did not see it as "particularly harmful" because, again, the defense strategy was to discredit Charlie. Even were we to conclude Keck was deficient for not objecting, Jacob ultimately has not established prejudice. Cynthia

testified that Charles had moved back to the area in the past year and "had nothing to do with" Charlie until then. The jury thus could have concluded that Charles' observations did not merit the weight it might typically accord a parent's or, based on its collective life experience, it might have discounted Charles' testimony on grounds that some parents believe whatever their children tell them. Jacob cannot ask this court to speculate whether Keck's performance resulted in prejudice. *See* ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993).

¶13 Jacob next asserts that Keck was ineffective for permitting Charles to testify without objection to Charlie's statements about details of the assault. Charles testified that Charlie told him only that "Jacob had touched his pee-pee" but offered no further particulars and Charles "didn't want to grill him on it." Charles then told Cynthia that the authorities would have to be notified. Jacob insists that this testimony is impermissible hearsay. Keck testified that he did not consider it objectionable since Charlie already had testified.

¶14 Regardless of whether Charles' testimony was hearsay, the details provided were minimal and the testimony explained how the sexual assault allegations came out and the incident was first reported. *See* ***State v. Frank***, 2002 WI App 31, ¶22, 250 Wis. 2d 95, 640 N.W.2d 198. Moreover, Jacob was not prejudiced. Charlie was available for further cross-examination on the topic. Given sufficient other evidence of Jacob's guilt, Charles' reference to what Charlie told him was not sufficiently prejudicial to call the verdict into question.

¶15 The next claim of error is that Keck failed to impeach Charlie with his prior inconsistent statements. The police report indicated that Charlie had said that Jacob both "hurt[] him in the butt" and "touched [his] pee-pee," but Charlie did not allege on the videotape or in his trial testimony that Jacob "hurt[] him in

the butt." Another involved a dildo, or "fake pee-pee," Charlie referenced. Charlie said in his videotaped statement that "[w]e … had this Candies box with a fake pee-pee" in it, and Jacob made him suck it "like it was a bottle." The earlier police report, however, stated that Charlie said one of his brothers showed him the "fake pee-pee," that he did not know where it was kept and Jacob never had shown it to him. The jury did not see the police report. Accordingly, Jacob argues, the only evidence before the jury was that he made Charlie suck on the dildo.

¶16 Keck explained that he did not explore these inconsistencies on cross-examination because he consciously avoids that type of questioning of any child sexual assault witness unless he is certain of the child's response. The court concluded that Keck's approach was part of a rational plan for Jacob's defense and therefore did not constitute ineffective assistance.

¶17 We agree. Keck's failure to impeach can be justified as a legitimate trial tactic. "Impeaching a child witness with a prior inconsistent statement is a double-edged sword—it may cast doubt upon the child's credibility; on the other hand, it may cast both the defendant and defense counsel in a negative light." ***State v. DeLeon***, 127 Wis. 2d 74, 85, 377 N.W.2d 635 (Ct. App. 1985). Here, highlighting discrepancies might have served to show that Charlie fabricated his story and changed it as he went along, but it also risked the jury perceiving Keck as a bully, Jacob as certainly culpable, and Charlie as purely sympathetic. In any event, the jury also heard Cynthia testify that she and Jacob kept a vibrator and a penis-shaped dildo in a Candies shoebox. She testified that "about two nights before this all happened," she noticed teeth marks on the dildo. She asked Jacob about them, but he "kind of avoided" answering. Furthermore, informing the jury that Charlie at one point had made an even more egregious allegation—i.e., that

Jacob also "hurt[] him in the butt"—almost certainly would have harmed Jacob's defense. Keck's performance was consistent with a reasoned strategy.

¶18 The next challenge involves a drawing Charlie made. The State introduced it as an exhibit during its direct examination of Charlie. Charlie told the prosecutor that the drawing, labeled "Jake Killing Me," depicted "Jake with a knife and the red stuff is running out the bottom." The "red stuff," he said, was "blood." Jacob contends that the exhibit was irrelevant and prejudicial and that Keck was ineffective for failing to object to its introduction, to the testimony about it and to its publication to the jury.

¶19 Keck testified that he was "surprised" by the exhibit's introduction and that it "seem[ed] to have a profound effect on the jury." He recognized that it was "harmful" to Jacob, but saw "no real grounds to object to it." Clearly, Keck could have objected that the picture was unfairly prejudicial and outweighed any probative value it might offer and therefore violated WIS. STAT. § 904.03. We conclude that his failure to do so was, indeed, deficient performance.

¶20 It is not enough for a defendant to show that an error had "some conceivable effect on the outcome of the proceeding," however. ***State v. Pitsch***, 124 Wis. 2d 628, 641, 369 N.W.2d 711 (1985) (citation omitted). Demonstrating prejudice means showing that defense counsel's alleged error actually had some adverse effect on the defense. ***Strickland***, 466 U.S. at 693. Thus, Jacob must show a reasonable probability that, but for Keck's deficient performance, the result of the proceeding would have been different." *See* ***id.*** at 694; *see also* ***Moats***, 156 Wis. 2d at 101.

¶21 Cynthia testified that Charlie admitted to a family friend that he made up the story about being assaulted and that he told Cynthia he felt

responsible for Jacob being in jail and that now "he thought that me and his dad could get back together." The drawing thus could have been motivated by more than one reasonable explanation. Based on the totality of the evidence and the strength of the State's case here, we conclude that counsel's error was not prejudicial. *See* ***Strickland***, 466 U.S. at 695-96.

¶22 Jacob next contends that trial counsel was ineffective for allowing Charlie's unredacted videotaped statement into evidence because it contained substantial irrelevant and prejudicial evidence, namely, references to assaults involving Jacob, Jr., and Cynthia's and Jacob's other children. Keck explained that he did not seek to edit those references from the videotape because at some point pretrial the State was considering adding another charge for another child. In addition, he thought the videotape might help impeach Charlie's testimony because "[t]he more a child goes on about something and expands on it, the less credible he gets." The trial court concluded that these reasons harmonized with the defense strategy.

¶23 We agree, although not enthusiastically. Moving to redact the videotape strikes us as the more prudent course. Nonetheless, the jury obviously did not believe all that Charlie said on the tape because it acquitted Jacob of the charge relating to Jacob, Jr. Thus the jury might have concluded that, if Charlie's assertions about the other children had merit, the State would have brought the necessary charges. We cannot say that the error, if it was error, was prejudicial.

Real Controversy Not Tried

¶24 Finally, Jacob contends he is entitled to a new trial in the interest of justice because the real controversy was not fully or fairly tried. *See* WIS. STAT. § 752.35.[4] He cites to the cumulative effect of the errors discussed above to support his claim. We do agree that trial counsel made some borderline calls. A defendant is entitled to a fair trial, however, not a perfect one, and to an adequate lawyer, not the best one. ***State v. Hanson***, 2000 WI App 10, ¶20, 232 Wis. 2d 291, 606 N.W.2d 278. Since we ultimately rejected all of Jacob's arguments, we decline to order a new trial.

*By the Court*.—Judgment and order affirmed.

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

[4] Ordinarily we review a trial court's denial of a motion for a new trial in the interest of justice under the erroneous exercise of discretion standard. *See* ***State v. Albright***, 98 Wis. 2d 663, 674, 298 N.W.2d 196 (Ct. App. 1980). Jacob does not assert, however, that the court erroneously exercised its discretion; rather, he asks us to exercise our authority under WIS. STAT. § 752.35.