COURT OF APPEALS
DECISION
DATED AND FILED

July 7, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP976-CR **Cir. Ct. No. 2006CF737**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAYMOND A. HABERSAT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 KESSLER, J. Raymond A. Habersat appeals from a judgment of conviction for one count of first-degree sexual assault of a child, contrary to WIS.

STAT. § 948.02(1) (2005-06),[1] and from orders denying his motion for postconviction relief. He argues that he is entitled to a new trial because: (1) the trial court erroneously admitted other acts evidence; and (2) trial counsel provided ineffective assistance in numerous ways. We reject Habersat's arguments and affirm.

BACKGROUND

¶2 Habersat was charged with having sexual contact with Cody P.,[2] a five-year-old neighbor boy. The complaint alleged that Habersat, a friend of Cody and his family, sexually assaulted Cody by placing his mouth on Cody's penis while they were alone in Habersat's garage. The case proceeded to trial, at which time the defense theory was that Cody's mother, Tracey, had coerced Cody into making up the assault to get back at Habersat after an unspecified falling out. In support of that theory, the defense argued that discrepancies about when Cody allegedly reported the assault to his mother and her delay in contacting the police suggested Cody's mother was lying.

¶3 The State moved to admit other acts evidence concerning Habersat's 1991 conviction for first-degree sexual assault of a child, i.e., a four-year-old boy. The trial court granted the motion, concluding that evidence concerning the sexual assault of the other boy could be admitted to establish intent and motive. Thus, the jury learned that when Habersat was arrested in connection with the alleged

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

[2] To protect Cody's identity, we refer to both Cody and his mother using their first names.

assault on Cody, he told police that in the past, he had pled guilty to,[3] and had been convicted of, first-degree sexual assault of a child. The following information on that prior conviction was read to the jury:

> Habersat stated that ... he was using a bathroom in Frontier Park in Butler, Wisconsin. There was also some type of company picnic at the park. Habersat stated that when he went into the bathroom there was a four[-]year-old boy who had soiled his pants. Habersat stated he cleaned up the four[-]year-old boy who was alone. He was about to leave when the four[-]year-old [boy] asked him to come back. The boy wanted [help washing his hands].
>
> Habersat stated that he still does not know why he (Habersat) did, but he (Habersat) had oral sex (mouth to penis) with the boy. Habersat stated he was working the picnic as a caterer and was putting equipment in the truck when he was confronted by the boy's mother who called the police.

¶4 The jury also heard from numerous witnesses about Cody's allegations against Habersat, as well as from Cody himself. Tracey testified that Cody, using a stuffed animal as a reference, told her and her fiancé that Habersat had put his lips on Cody's penis, although Cody did not use those words to describe the incident. Tracey said that Cody reported this to her on August 5, 2005.[4] She testified that she and her fiancé called the manager of the condominium association that same day, told him that Habersat had sexually assaulted Cody and asked if the association could remove Habersat from the building. Cody said that the manager, Brian Molnar, told her to "wait a day or two, that he was going to figure something out and see if they could have

[3] The record indicates that Habersat actually pled no contest to the 1991 sexual assault, but the jury was told that he said he pled guilty.

[4] All references to August refer to August 2005.

[Habersat] physically removed from there." Tracey did not contact the police until August 23.

¶5 Tracey said she did not tell Cody to say that he had been assaulted by Habersat or what to say in court. Tracey denied that she allowed Cody to spend time with Habersat on August 5 and 6 after Cody disclosed the abuse, and she said that she and Cody did not go out to celebrate the birthday of Habersat's fiancée, Kellen Grucza, on August 5, although Tracey acknowledged having given a birthday card to Grucza prior to Cody's disclosure.

¶6 The State showed the jury a videotape of Cody being interviewed by a psychotherapist from the Child and Adolescent Psychiatry and Behavioral Health Clinic of Children's Hospital of Wisconsin. In that videotape, Cody testified that while he was lying on the hood of Habersat's truck, Habersat pulled down Cody's pants and put his mouth on Cody's penis.[5]

¶7 Cody also testified briefly. The seven pages of transcript consist mainly of the State and trial counsel attempting to elicit from Cody answers to a series of questions such as whether he knew his colors, the difference between a truth and a lie, his first-grade teacher's name and his birth date. Ultimately, neither side asked Cody any questions about the alleged assault itself.

¶8 The defense presented testimony designed to impeach Tracey's testimony and suggest that Tracey had told Cody to falsely allege that he had been

[5] The videotape was not transcribed. However, this court has reviewed the tape and, based on that review, provides the brief summary of the testimony above. Cody's conversation with the psychotherapist involved a series of questions and short answers, as well as the use of dolls that allowed Cody to show the psychotherapist what had occurred. The interview lasted approximately thirty minutes.

abused. Habersat's fiancée, Grucza, testified that Cody spent all of August 5 running errands with her, Habersat and several other relatives. Grucza said Tracey, Cody and Tracey's two-year-old daughter joined Habersat, Grucza and their family for a birthday dinner at a restaurant at about 5:30 p.m. that night, and for cake at Grucza's home at about 10 p.m. A credit card statement indicating a charge of $68.45 at the restaurant for August 5 was entered into evidence.

¶9 Grucza also testified that Cody spent August 6 with Grucza's family (including Habersat) at the Wisconsin State Fair. She said she did not have any ticket stubs or anything else to verify they were at the Wisconsin State Fair.

¶10 The defense called Molnar, the property manager of the condominium, to testify about the phone call he received from Tracey. He said that Tracey called him "the second or third week of August" and asked him if he "was aware that there was a registered sex offender living on the property." Tracey identified Habersat as the sex offender. Molnar said he told Tracey he was not aware of that and told her that if she was having a problem she should call the police. Molnar denied that Tracey told him that Habersat had sexually assaulted Cody.

¶11 The defense also introduced the videotape of an earlier interview with Cody, which was played for the jury. In closing, the defense pointed out discrepancies in the two interviews, including the fact that Cody did not answer certain questions at the first interview that he answered in the second interview.

¶12 The jury found Habersat guilty as charged. The trial court sentenced him to thirty years of initial confinement and fifteen years of extended supervision. Habersat secured new counsel and filed a postconviction motion seeking a new trial on grounds that trial counsel provided ineffective assistance in

five ways. The trial court issued a written decision denying four of Habersat's arguments and ordered a ***Machner***[6] hearing on the fifth: whether trial counsel provided ineffective assistance when he failed to introduce photographs allegedly taken of Cody at the Wisconsin State Fair on August 6. After the ***Machner*** hearing was conducted, the trial court rejected Habersat's argument and denied his postconviction motion. This appeal follows.

DISCUSSION

¶13 Habersat argues that the trial court erroneously admitted evidence concerning Habersat's 1991 assault of a four-year-old boy and that trial counsel provided ineffective assistance in a variety of ways. We consider each issue in turn, ultimately concluding that Habersat is not entitled to a new trial on any of these grounds.

I. Admission of other acts evidence.

¶14 Whether other acts evidence should be admitted requires the application of a three-part test set out in ***State v. Sullivan***, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998). ***Sullivan*** directs courts to consider: (1) whether the evidence is being offered for an acceptable purpose under WIS. STAT. § 904.04(2), such as establishing motive and intent; (2) whether the evidence is relevant; and (3) whether "the probative value of the other acts evidence [is] substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." ***Sullivan***, 216 Wis. 2d at 772-73. When the

[6] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

first two prongs have been satisfied, "the evidence is admissible under ***Sullivan*** unless the opponent demonstrates" that the third prong has been satisfied. ***State v. Payano***, 2009 WI 86, ¶80, 320 Wis. 2d 348, 768 N.W.2d 832 (footnote omitted). On appeal, "[t]he applicable standard for reviewing a [trial] court's admission of other acts evidence is whether the court exercised appropriate discretion." ***Sullivan***, 216 Wis. 2d at 780.

¶15 Here, the trial court admitted evidence concerning Habersat's 1991 sexual assault of a four-year-old boy for the purpose of establishing motive and intent.[7] Habersat does not contest that the first two ***Sullivan*** prongs have been satisfied. He argues, however, that "[t]he probative value of the other acts evidence was substantially outweighed by the prejudice to [Habersat]." He explains:

> In this case, Cody P., the alleged victim, could not answer questions in front of the jury. He could not tell the jury what had allegedly occurred. This failure in the [S]tate's case made it even more necessary for the [S]tate to admit the other acts evidence and made this evidence substantially more prejudicial.
>
> ... [I]n this case, where the victim is unable to meaningfully testify, the admission of the other act was substantially prejudicial and should have been excluded under the ***Sullivan*** test.

(Bolding and italics added.)

[7] The Hon. Jeffrey A. Wagner admitted the other acts evidence. The Hon. Daniel L. Konkol presided over the jury trial and the ***Machner*** hearing.

¶16 We are not convinced that the trial court erroneously exercised its discretion when it admitted the other acts evidence. Rather, we agree with the State:

> Here, the probative value [of the evidence] is high because the other acts evidence has a high degree of relevance....
>
> Unfair prejudice occurs when the other acts evidence has a tendency to influence the verdict by improper means, or appeal to the jury's sympathies, arouse its sense of horror, provoke the instinct to punish, or base[d] the decision on something outside the established propositions of the case. ***Sullivan***, 216 Wis. 2d at 789-90. The risk of unfair prejudice is substantially reduced if the jury is given a cautionary instruction about the proper use of the evidence. [Citing ***State v. Hunt***, 2003 WI 81, ¶¶72-73, 263 Wis. 2d 1, 666 N.W.2d 771.] A proper cautionary instruction was given in Habersat's case. Contrary to Habersat's unsupported assertion, the risk of unfair prejudice was not increased because Cody's videotaped statement was presented at trial and that Cody had difficulty verbally responding to questions on the witness stand. The unfair prejudice step of the ***Sullivan*** analysis depends upon the nature of the other acts evidence, not the form of presentation of other evidence in the case.

¶17 Habersat has not proven that "the probative value of the other acts evidence was substantially outweighed by the danger of unfair prejudice." *See* ***Sullivan***, 216 Wis. 2d at 772-73. Therefore the trial court did not erroneously exercise its discretion when it granted the State's motion to admit evidence of the other acts for purposes of establishing motive and intent.

II. Ineffective assistance of trial counsel.

¶18 Habersat argues that the trial court should have granted him a new trial because his trial counsel provided ineffective assistance. To establish an ineffective assistance of counsel claim, a defendant must show both that trial counsel's performance was deficient and that he was prejudiced by the deficient

performance. ***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. ***Id.*** at 697. We review the denial of an ineffective assistance claim as a mixed question of fact and law. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). We will not reverse the trial court's factual findings unless they are clearly erroneous. ***Id.*** However, we review the two-pronged determination of trial counsel's performance independently as a question of law. ***Id.*** at 128.

¶19 With respect to trial counsel's performance, 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.'" ***State v. Elm***, 201 Wis. 2d 452, 464, 549 N.W.2d 471 (Ct. App. 1996) (citation omitted). "A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." ***Id.*** at 464-65.

¶20 With respect to the prejudice prong, the defendant must demonstrate that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Strickland***, 466 U.S. at 687. In other words: "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.*** at 694. "The focus of this inquiry is not on the outcome of the trial,

but on 'the reliability of the proceedings.'" ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted). "[I]n determining whether a defendant has been prejudiced as a result of counsel's deficient performance, [a court] may aggregate the effects of multiple incidents of deficient performance in determining whether the overall impact of the deficiencies satisfied the standard for a new trial under ***Strickland***." ***Thiel***, 264 Wis. 2d 571, ¶60. With these standards in mind, we examine Habersat's ineffective assistance claims.

A. Failure to present photographs of Cody.

¶21 Habersat argues that his trial counsel performed deficiently when he failed to introduce at trial photos that Habersat claims show that Cody was at the Wisconsin State Fair on August 6, which would have impeached Tracey's testimony that Cody did not go the Wisconsin State Fair with Habersat and Habersat's family on that day. This issue was the sole focus of a ***Machner*** hearing, at which trial counsel, Grucza and Grucza's daughter testified.

¶22 Trial counsel testified that he received a compact disc (CD) from Grucza during the trial that Grucza said contained photographs "that would substantiate the claim that the child was, in fact present with them at the State Fair the day after [Grucza's] birthday." Trial counsel said that both Grucza and Habersat had mentioned photographs to him before trial and trial counsel recalled "indicating to them, that if you have photographs which establish that, then you need to get those to me." However, he said, no photographs were ever provided to him until Grucza gave him the CD at trial.

¶23 Trial counsel said he did not look at the photographs on the CD during the trial, for two reasons:

> First of all, it was a computer disk, I didn't have an opportunity to look to see what was on it and then print it out,[8] given the fact that we were in the middle of the trial.... [Second,] I felt that there was a great likelihood that the Court would not allow for the photographs to be used at trial, because of the lateness with which we would [have] disclosed that evidence to the Government.

¶24 Grucza's daughter testified at the ***Machner*** hearing that she went to the Wisconsin State Fair with her family and Cody on August 6. She said she took photographs at the Wisconsin State Fair, and she identified the photographs on the CD. She said that she gave a CD of photos to her mother the next day.

¶25 Grucza testified that the photographs were taken at the Wisconsin State Fair on August 6. She said that she told trial counsel when he was first hired that she had proof they were at the Wisconsin State Fair. She testified that she gave him "actual photographs" at the first court hearing and that trial counsel subsequently acknowledged having them. She said that when she testified at trial, she did not mention the photographs because she had been sequestered and she "assumed that the pictures were already brought in." She said that after she testified, she asked trial counsel about the photographs and his response was "what photographs?" Therefore, Grucza testified, she gave him a CD containing the photographs the next morning (which was the final day of the trial).

¶26 After the ***Machner*** hearing, the trial court concluded that Habersat had not been deprived of the effective assistance of counsel. The trial court found trial counsel to be the more credible witness and accepted his testimony as true. Thus, the trial court found that trial counsel was not provided with actual

[8] Trial counsel explained that when he received the CD, he did not have a laptop with him in court and, therefore, he could not open the CD to view the photographs.

photographs or the CD of photographs until the morning of the last day of trial. The trial court concluded that trial counsel did not perform deficiently by failing to introduce evidence he did not have prior to trial or for failing "to search around prior to the last day of trial for any device capable of viewing the [CD] and then print[] the photos."

¶27 Furthermore, the trial court concluded that even if the photographs had been admitted and used to verify Gruzca's testimony,

> it would only prove that the child's mother had the wrong date she discovered the sexual assault. The jury was aware of such discrepancy from the testimony. The jury could choose to believe that the mother had the wrong date or that she made up the events. However, she was not the central portion of the case against the defendant. If the mother were wrong on the date she discovered the sexual assault it does not follow that the sexual assault itself was fabricated....
>
> The convicting evidence was the child's video with the child's demeanor, actions, and words. Even if the mother were mistaken about the date, there was no question that the child was sexually assaulted by the defendant. The video of the child's demeanor, actions, and words was overwhelming evidence of the sexual assault by the defendant. The child's demeanor on the witness stand only underscored the matter. The jury went to start their deliberations at 3:23 p.m. and returned their verdict at 4:15 p.m. that same day. The jury's relatively quick verdict emphasized how clear the evidence was against the defendant.

Therefore, the trial court reasoned, even if trial counsel's performance was deficient, there was "no reasonable probability that the result of the trial would have been different."

¶28 The trial court's factual findings are not clearly erroneous and we will not disturb them. *See* ***Johnson***, 153 Wis. 2d at 127. Further, we conclude that Habersat was not provided ineffective assistance. First, we agree with the

trial court that trial counsel's performance was not deficient. Trial counsel was first given a CD containing photographs on the morning of the final day of trial, even though Habersat and Grucza had the CD in their possession for at least a year prior to trial. Trial counsel had never seen the photographs and, after receiving them on the last day of the trial, he questioned whether the trial court would even admit them. Although at the ***Machner*** hearing trial counsel indicated that in hindsight, he believes he "probably should have ... somehow look[ed] to see what was on the disk" and then sought to admit the photographs, ***Strickland*** advises "that every effort be made to eliminate the distorting effects of hindsight." *See* ***id.***, 466 U.S. at 689. It was not deficient performance to decline to drop everything on the last day of trial to find a computer to view the photographs and work them into the case.

¶29 Second, we agree with the trial court's analysis concerning prejudice. We are unconvinced that even if the photographs had been admitted, "the result of the proceeding would have been different." *See* ***id.*** at 694.

B. Failure to move for a mistrial based on confrontation clause violation.

¶30 Habersat argues that his trial counsel acted deficiently when he failed to seek a mistrial after Cody's answers on the witness stand indicated that he "was unavailable for any meaningful cross-examination, in violation of the federal and state confrontation clause." (Bolding and capitalization omitted.) Citing WIS. STAT. § 908.08,[9] Habersat argues that once Cody's videotaped statement was

[9] WISCONSIN STAT. § 908.08, pertaining to audiovisual recordings of children, provides in relevant part:

(continued)

shown to the jury, Cody had to be made available for cross-examination. He contends that his right to confrontation was violated when Cody "could not answer questions." The remedy, he argues, "should have been a mistrial."

¶31 Whether a criminal defendant's constitutional right to confrontation has been violated is a question of constitutional fact. ***State v. Smith***, 2002 WI App 118, ¶7, 254 Wis. 2d 654, 648 N.W.2d 15. On appeal, while we do not upset the trial court's findings of historical facts unless they are clearly erroneous, determining whether those facts fulfill constitutional mandates is a question of law we review independently. *See* ***id.***, ¶8. Applying those legal standards, we conclude that trial counsel did not perform deficiently by failing to seek a mistrial; such a motion would not have been granted because Habersat's right to confrontation was not violated.

¶32 The trial court in its order denying Habersat's postconviction motion recognized that Cody "was a very young witness who did not have a complete understanding of what was happening and who was clearly intimidated by the proceeding." However, as the trial court noted, Cody was produced and was available for cross-examination. Cody struggled answering questions on both direct and cross-examination, but he ultimately was able to testify that he was seven years old and in the first grade, and he was able to identify Habersat. On

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> **(5)**(a) If the court or hearing examiner admits a recorded statement under this section, the party who has offered the statement into evidence may nonetheless call the child to testify immediately after the statement is shown to the trier of fact. Except as provided in par. (b), if that party does not call the child, the court or hearing examiner, upon request by any other party, shall order that the child be produced immediately following the showing of the statement to the trier of fact for cross-examination.

cross-examination, he acknowledged that Habersat used to live near him, that Habersat lived with Grucza, that he did not recall ever going to the State Fair and that he "came here to talk to us about stuff."

¶33 Habersat argues that the transcript indicates that Cody "could not and did not answer questions." That is simply not true. As noted above, the transcript indicates that Cody was able to answer some questions, either verbally or by nodding or shaking his head. In answer to other questions, he indicated he did not know. This is not a situation where Cody refused to answer questions on cross-examination or was completely unable to do so.[10] Rather, trial counsel elicited some answers and then, without explanation, ended his cross-examination. Perhaps he believed he had successfully shown that Cody was not a reliable witness, or perhaps he was concerned about appearing to badger a sympathetic witness. For whatever reason, trial counsel did not ask Cody questions about what occurred in Habersat's garage or about his taped interview. Trial counsel made the decision to cease questioning. Whether asking additional questions, or taking a break and then resuming questioning, would have led Cody to give more confident and detailed answers, or whether he would have refused to answer any questions, are issues about which we decline to speculate. Trial counsel was not deprived of the opportunity to cross-examine Cody. Therefore, trial counsel was not deficient for failing to bring a motion for mistrial based on an alleged violation of Habersat's right to confrontation, as any such motion would have been denied.[11]

[10] Therefore, we decline to discuss under what factual scenario, if any, a defendant can be said to have been deprived of his right of confrontation by a child witness who refused to answer.

[11] The trial court's order was consistent with this conclusion. It stated: "A motion for mistrial from counsel on these grounds would have been meet with a denial."

C. Failure to object to Tracey's testimony concerning August 5.

¶34 At trial, Tracey was asked on direct examination about her relationship with Habersat and Gruzca. She testified that she was good friends with Habersat and Grucza and that Cody "went over there quite often." Then, the State asked when Tracey first learned about the alleged assault. When Tracey indicated the date August 5, the State asked her to describe what was going on that day.[12] Tracey testified as follows:

> A. [Habersat] decided he was going to take Cody to the park, and I was looking for Cody. He didn't tell me he was taking him.... [W]e were trying to call on his cell phone which he did not answer.... [Grucza] was trying to get ahold of him as well that day on the cell phone because they had had prior plans. So nobody could get ahold of him and he did take his vehicle to a park somewhere. I have no clue to where that was.
>
> ....
>
> Q. And so he took Cody without asking you?
>
> A. Yes.
>
> Q. Did Cody eventually come home?
>
> A. Yes.
>
> Q. And how did he get home?
>
> A. [Habersat] brought him back home finally.
>
> Q. Did you have any discussions with Mr. Habersat at that time?
>
> A. We talked to him about, you know, taking off with our—with my son, [my fiancé] and I. You know, it wasn't—we were kind of really upset about the whole situation, that he took him and didn't tell us where he was

[12] Notably, Tracey's testimony varies significantly from that of Grucza, who said that Cody spent the day running errands with her and her family, including Habersat.

> going and that we couldn't reach him on his cell phone and [Grucza] couldn't reach him so—
>
> Q. And this all took place before Cody told you [about the assault]?
>
> A. Yes.

¶35 Habersat argues that trial counsel performed deficiently when he failed to "object to this line of questioning." He explains:

> Trial counsel did not object to this line of questioning. These questions and the answers were irrelevant, highly prejudicial and should have been excluded. The fact that Tracey [] claimed that Raymond Habersat basically abducted Cody on August 5 was irrelevant to the prosecution for sexual assault. There was no allegation that Cody was assaulted on August 5 during that trip to the park. In fact, the allegation was that Cody was assaulted in a garage some time previously. Trial counsel should have objected to this testimony as irrelevant and highly prejudicial and his failure to do so constitutes deficient performance.
>
> Additionally, this irrelevant testimony compounded the idea that Raymond Habersat was just a bad man.

¶36 In response, the State argues there was no allegation that Habersat assaulted Cody that day and that the testimony "cannot be fairly characterized as an abduction or kidnapping." Moreover, the State contends, "[t]he background information on what occurred shortly before and after discovery of a crime is admissible contest evidence." Even if the questions were objectionable, the State argues, Habersat "failed to prove there is a reasonable probability that the jury would have acquitted him but for [Tracey's] brief reference to the fact that Habersat took Cody to the park for a short time without asking her first."

¶37 We conclude that Habersat has failed to establish that he was prejudiced by his trial counsel's alleged deficiency and, therefore, we do not address whether trial counsel's performance was deficient. *See* ***Strickland***, 466

U.S. at 697. Specifically, we conclude that Tracey's reference to Habersat taking Cody to a park without Tracey's permission—where her testimony was also that Cody frequently spent time with Habersat, a friend of the family—was not so prejudicial that if trial counsel had objected and the testimony had been excluded, "the result of the proceeding would have been different." *See* ***id.*** at 694. In this case, the jury had the opportunity to view over an hour of interviews conducted with Cody concerning the assault. The jury also heard testimony from Tracey describing how Cody first disclosed the assault. We are unconvinced that Tracey's brief testimony that Habersat failed to ask to take Cody to the park, especially where there is no allegation that any abuse occurred at that time, would have impacted the jury's ultimate findings such that the testimony undermined confidence in the trial's outcome. *See* ***id.***

D. "Opening door" to admission of Habersat's statement to police concerning pornography.

¶38 Habersat argues that trial counsel performed deficiently when he asked an officer questions which, Habersat alleges, opened the door to the admission of an "extremely damaging" statement Habersat made to the officer. Specifically, during the State's case-in-chief, Detective Timothy Duffy testified about his interview with Habersat at the police station. Duffy said that Habersat did not make any statements about Cody's allegations, but did disclose facts about his prior conviction for sexual assault. On cross-examination, trial counsel asked the officer about what he observed in Habersat's garage when he conducted his investigation. Then, trial counsel asked about a computer that was seized with Grucza's permission and why it was taken. Duffy indicated that the computer was seized to preserve any possible evidence and so it could be searched for illegal files (presumably, child pornography).

¶39 On redirect examination, Duffy said that when he spoke with Habersat about the computer, Habersat "denied that there was anything illegal on it." Duffy said that Habersat "stated that he has no interest in child pornography or adult pornography" and that "[h]e only has the urge for physical contact."

¶40 The trial court rejected Habersat's postconviction motion for relief on this ground, concluding:

> Even if counsel's performance was deficient in opening the door to ... Duffy's testimony about what [Habersat] had told him about his preference for physical contact, the State nevertheless would have introduced other acts evidence to show that he did, in fact, have prior sexual contact *with a child*. The prior conviction for first degree sexual assault of a child was much more damaging to [Habersat] than a general statement that he had a preference for physical contact over pornography.... Under this circumstance, there is not a reasonable probability that the outcome [would have] been any different.

¶41 We agree with the trial court's reasoning and its conclusion that Habersat has failed to prove the prejudice prong of the ***Strickland*** test. We are unconvinced that had the jury not heard that Habersat had a preference for physical contact over pornography, the result would have been different. *See* ***id.***

E. Cumulative effect of trial counsel's alleged deficiencies.

¶42 Habersat argues that even if this court does not view any single trial counsel deficiency as sufficiently prejudicial to justify a new trial, we should grant him a new trial because the cumulative effect of the errors was prejudicial. We are unconvinced. Even in combination, the alleged trial counsel errors do not constitute sufficient cumulative prejudice to justify a new trial under ***Strickland***.

By the Court.—Judgment and orders affirmed.

Not recommended for publication in the official reports.