COURT OF APPEALS
DECISION
DATED AND FILED

September 21, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2422-CR **Cir. Ct. No. 2006CF147**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID W. DOMKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Oconto County: MICHAEL T. JUDGE, Judge. *Reversed and cause remanded*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. David Domke appeals a judgment convicting him of repeated sexual assault of his step-daughter, Alicia. He also appeals an order denying his postconviction motion in which he alleged ineffective assistance of trial counsel, Terrance Woods. Because we conclude Woods performed

deficiently in two respects,[1] the cumulative effect of which undermines our confidence in the outcome of the trial, we reverse the judgment and order and remand the matter for a new trial.

¶2 To establish ineffective assistance of counsel, Domke must show deficient performance and prejudice to his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance Domke must show his counsel's representation fell below an objective standard of reasonableness. *See* ***id.*** at 687-88. He must overcome the presumption that his counsel's conduct falls within the wide range of reasonable professional assistance and show that counsel's actions cannot be considered sound trial strategy. *See* ***id.*** at 689. Strategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable, but strategic choices

[1] Domke alleged four instances of deficient performance by Woods. We disagree with his assertions regarding two of the issues. First, Woods did not perform deficiently and Domke was not prejudiced by Woods's failure to object to testimony from Alicia's friend, Lauren, regarding Alicia's first disclosure that she had been sexually abused. Applying the criteria set out in ***State v. Sorenson***, 143 Wis. 2d 226, 245-46, 421 N.W.2d 77 (1988), we conclude Lauren's testimony was admissible under the residual hearsay exception, WIS. STAT. § 908.03(24) (2007-08). Alicia told her close friends about the sexual assault after making them "pinky swear" not to tell anyone. She previously had a good relationship with Domke and feared disclosure of his sexual abuse would break up her mother's marriage to Domke. Alicia had no motive to fabricate the accusation. Under these circumstances, her statement to Lauren bore sufficient indicia of reliability to satisfy the residual hearsay exception.

We also conclude that Woods reasonably introduced into evidence the report by physician's assistant Tracey BeFay. Although Woods's testimony at the postconviction hearing did not identify a reasonable strategic basis for introducing the report, his closing argument before the jury used the report to give an example of a prior inconsistent statement by Alicia. We also disagree with Domke's description of the testimony regarding that report as providing "inflammatory details" about the assaults. The report and the testimony merely underscored the lack of physical evidence to support Alicia's claims under circumstances where one would not expect physical evidence to support claims of oral sex or Domke rubbing himself against her buttocks. Therefore, Domke established neither deficient performance nor prejudice from Woods's introduction of the medical report.

made after less than complete investigation are reasonable only to the extent that reasonable professional judgment supports the limitations on the investigation. ***Id.*** at 690. To establish prejudice, Domke must show a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one that undermines our confidence in the outcome. ***Id.*** at 694.

¶3 One of the State's witnesses, social worker Kim Rusch, testified without objection regarding Alicia's depiction of the sexual assaults. Rusch's testimony was inadmissible hearsay. At the postconviction hearing, Woods explained his belief that the testimony of a therapist was admissible over a hearsay objection. He was not aware that the exception for medical diagnosis or treatment set out in WIS. STAT. § 908.03(4) does not apply to a social worker. *See* ***State v. Huntington***, 216 Wis. 2d 671, 695, 575 N.W.2d 268 (1998). The State defends Woods's lack of knowledge about the ***Huntington*** rule, arguing that counsel should not be expected to have complete knowledge of all aspects of criminal law, no matter how obscure. The rule set out in ***Huntington*** is not obscure. A reasonable attorney would have discovered the limits of the exception for medical diagnosis or treatment and would have interposed a hearsay objection.

¶4 The State also contends Rusch's testimony was admissible under the rule of completeness. *See* ***State v. Sharp***, 180 Wis. 2d 640, 653-54, 511 N.W.2d 316 (Ct. App. 1993). The rule of completeness requires that a statement be admitted in its entirety when it is necessary to explain the admitted portion of the statement, to place it in context, or to avoid misleading the trier of fact. ***Id.*** The rule of completeness is not a vehicle to admit all hearsay evidence merely because it is used to impeach a witness with inconsistencies. Rusch's hearsay testimony

was not necessary to provide any context or to avoid giving a misimpression to the jury from using a partial statement.

¶5 Rusch's testimony was prejudicial not only in its repetition of Alicia's allegations, but also due to Woods's improvident questions on cross-examination. Woods asked Rusch whether Alicia might have dreamed that she had been sexually assaulted. Rusch responded, "No. I do not believe it could have been a dream." Woods then asked a second time whether it might have been a dream. Rusch responded, "No, in my professional opinion, it was not a dream." The trial court concluded Woods's questions about a possible dream constituted a trial strategy that backfired.

¶6 Appellate courts do not second guess a reasonable trial strategy based on a full understanding of the law and facts. However, we do second guess an attorney whose performance is based on an irrational trial tactic or if it is exercised by professional authority based upon caprice rather than upon judgment. ***State v. Felton***, 110 Wis. 2d 485, 503, 329 N.W.2d 161 (1983). There was such a low probability that Rusch would concede that it might have been a dream that a reasonable attorney would not have asked the question, thereby avoiding the possibility of inviting Rusch to vouch for Alicia's credibility. Rusch had between twenty and twenty-five therapy sessions with Alicia, strongly suggesting Rusch did not believe she was dealing with an unfounded dream. The prosecutor exacerbated the prejudice by highlighting Rusch's testimony in his closing argument, noting that it "absolutely supported Alicia's credibility." Because a reasonable attorney could have and would have precluded all of Rusch's testimony with a hearsay objection and, if Rusch testified at all, would not have asked questions that invited Rusch to comment on Alicia's credibility, Woods's performance was prejudicially deficient.

¶7 Woods's more serious error consisted of calling Alicia's mother as a witness for the defense. Based on police reports, Woods believed she would support her husband against her daughter's allegations. However, before trial Domke informed Woods that his wife had been "vacillating in that regard." Without interviewing Domke's wife, Woods called her as a witness. Rather than asking Alicia's mother whether her daughter had a reputation for truthfulness, Woods asked whether she believed Alicia's claim of assault when first made. When Woods asked Alicia's mother if she had told the police that Alicia was not very truthful, the prosecutor objected, citing ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984) (no witness is competent to testify whether another witness is telling the truth). The court overruled the objection and said the prosecutor would be allowed to ask the witness her opinion of Alicia today. On cross-examination, the prosecutor elicited testimony that Domke's wife believed her daughter "100 percent," and firmly believed Alicia was telling the truth.

¶8 The trial court concluded Woods performed deficiently when he called Alicia's mother because he failed to reasonably investigate what her testimony would be. The court concluded, however, that Domke's defense was not prejudiced because this case boiled down to Alicia's word against Domke's, and the amount of detail Alicia provided strongly supported her testimony, making it unlikely her mother's testimony affected the result. We disagree. Because the credibility of Alicia and Domke was the paramount issue in this case, our confidence in the outcome is undermined by the testimony of a witness who was close to both of them and who was impermissibly permitted to assess which of them was telling the truth. The collective prejudice arising from Domke's wife's testimony and Rusch's testimony requires a new trial due to Woods's ineffective representation of Domke.

By the Court.—Judgment and order reversed and cause remanded for further proceedings.

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