

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 7, 2010

A. John Voelker
Acting 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. 2009AP1471-CR

Cir. Ct. No. 2006CF442

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARTY J. FRANZKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: MARK J. MCGINNIS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Marty Franzke appeals a judgment convicting him of attempted first-degree sexual assault of his daughter, Jessi B. He also appeals an order denying his postconviction motion in which he alleged ineffective assistance of trial counsel. He argues: (1) the State presented insufficient

evidence to support the conviction; (2) his counsel was ineffective for failing to request jury instructions on intoxication and mistake; (3) he is entitled to a new trial based on the prosecutor's misstatement of the evidence during his closing argument; and (4) based on these alleged errors, he requests a new trial in the interest of justice because justice miscarried and the true controversy was not fully tried. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 The Information charged Franzke with repeated sexual assault of Jessi between 1998 and 2000, attempted sexual assault in 2000, and a specific sexual assault in 2006. The jury convicted Franzke only of the attempted sexual assault. The allegations surfaced after Jessi told her friends about the incidents. Jessi testified the attempted assault occurred at her grandmother's house. She was asleep when her father came home and got into her bed where he "tried to do the same thing but [she] wouldn't let him, so he put his hand over [her] mouth and kind of choked [her] in a way." She explained that the "same thing he tried before" meant touching her private parts. She prevented him from doing so by saying she had to go to the bathroom and had to blow her nose. During the attempted sexual assault, he put his hand over her mouth and throat and she resisted by "kicking a lot." He told her he would kill her if she told anybody.

¶3 Jessi reported the incident to her grandmother the night it occurred, but did not mention the sexual component. She only indicated her father had choked her and she was afraid. Social service reports indicated Franzke came home intoxicated, went upstairs and was choking Jessi and screaming at her, telling her that she never lets him go out.

¶4 The State's only other witness was a police officer, Thomas Poss, who interviewed Jessi regarding the incidents. When he interviewed Franzke, Franzke maintained he did not remember the incident at his mother's house because of his level of intoxication, but stated that the incident probably occurred.

¶5 The defense presented four witnesses. Attorney Daniel Hoff testified he represented Franzke in a child support matter. Franzke's alcohol problem was an issue, but there was no allegation of sexual abuse. Franzke's current wife and his fifteen-year old son each testified that they witnessed no inappropriate sexual behavior with Jessi.

¶6 The final defense witness, Terrence Campbell, a forensic psychologist, criticized the manner in which the police investigated Jessi's accusations. He concluded Poss's influence on Jessi could not be ascertained because the initial investigative interview was not recorded and Poss's recall of the initial interview was biased because he did not conduct a thorough investigation before the interview. Campbell further concluded Jessi's second interview was influenced by the first interview because interviewers form impressions at the first interview and attempt to substantiate their initial impressions. Campbell suggested Jessi's memory of the events may have been faulty and she would have a vivid recollection of the events if she experienced a traumatic event.

¶7 On cross-examination, the prosecutor questioned Campbell about his association with the False Memory Syndrome Foundation. After Campbell indicated he was a member of the advisory board, the following exchange took place:

Q So you are familiar with other people that would have been on the Scientific Advisory Board of that organization, correct?

A Yes.

Q Including, and I may not pronounce the first name correctly, but Hollida Wakefield?

A Hollida Wakefield, yes.

Q And an individual named Ralph Underwager?

A Ralph Underwager was never on the FMS board.

Q But Hollida Wakefield was, correct?

A Yes.

Q And Hollida Wakefield, is that someone that you would consider yourself in agreement with on many of these issues?

A Yes.

Q So you would agree with the statement by Hollida Wakefield given in an interview in 1993 in the Journal of Pedophilia that, "We can't presume to tell pedophiles specific behaviors, but in terms of goals, certainly the goal is that the experience be positive, at the very least not negative, for their partner and their partner's family. And nurturing. Even if it were a good relationship with the boy, if the boy was not harmed and perhaps even benefited, if it tore the family of the boy apart, that would be negative.

It would be nice if someone could get some kind of big research grant to do a longitudinal study of, let's say, a hundred twelve year old boys in relationships with loving pedophiles. Whoever was doing the study would have to follow that at five year intervals for twenty years. This is impossible in the U.S. right now. We're talking a long time in the future."

That is someone that you align your views with, sir?

A To clarify the record, I have been cross-examined on that issue before. It's always described to me as Ralph Underwager supposed[ly] made that statement. I've - - no one has ever said to me that Hollida Wakefield has made the statement. So I am confused.

Q Well, I have some information that it was a joint interview in the Journal of Pedophilia in the winter of 1993. That is not really answering the question about whether that is some[one] you align yourself with. I will move on from there.

¶8 In his closing argument, the prosecutor attempted to discredit Campbell's testimony by saying "and on my question, he indicated that he was on the same board as someone else who wants to have a study whereby kids are put in homes with what are called loving pedophiles." The defense attorney immediately objected, noting the prosecutor misstated the evidence. After a sidebar discussion, the court did not directly rule on the objection, but directed the prosecutor to continue.

DISCUSSION

¶9 Franzke contends there was insufficient evidence to support the conviction because the State failed to prove unequivocally that he formed the intent to commit a crime and would have committed the crime but for the intervention of another person or an extraneous factor. He also contends there was insufficient evidence that he intended to become sexually aroused or gratified by the acts Jessi described and he challenges Jessi's credibility. When reviewing sufficiency of the evidence, this court must sustain the jury's verdict unless the evidence, viewed most favorably to the State, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). It is the jury's function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. *State v. Toy*, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985).

¶10 The jury had the right to believe Jessi's testimony that Franzke attempted to sexually abuse her and would have completed the crime but for her resistance, kicking and eventually seeking her grandmother's protection. Whether Jessi was confused because she had been sleeping and whether she made up the entire incident are matters for the jury to decide. Her testimony was not incredible as a matter of law. Likewise, Franzke's intent, his level of intoxication and whether he believed his daughter was his wife are questions committed to the trier of fact. The jury was free to piece together the bits of testimony it found credible to construct a chronicle of the circumstances surrounding the offense. *State v. Sarabia*, 118 Wis. 2d 655, 663-64, 348 N.W.2d 527 (1984).

¶11 Franzke contends his trial counsel was ineffective for failing to request theory of defense instructions of voluntary intoxication and mistake. At the postconviction hearing, his attorney stated he contemplated requesting these instructions, but decided not to do so. He concluded those instructions seemed inconsistent with the general defense that Jessi fabricated the allegations. Counsel was aware inconsistent defenses may be raised. However, he stated it did not seem wise to say the incident did not happen, but if it did, it was an accident. Counsel's decision constituted a reasonable trial strategy. Telling the jury none of the incidents occurred, but if one of them did, it was a mistake caused by his intoxication would create a risk that the jury would view the alternative defense as a concession and would convict him of one or more of the other offenses. Counsel's strategic choices made with full understanding of the facts and law are virtually unchallengeable on appeal. *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984).

¶12 Franzke asserts he is entitled to a new trial because the prosecutor misstated the evidence in his closing argument. While we agree the record in this

case does not support the prosecutor's assertion that Underwager was on the same board as Campbell and he erroneously described the statement regarding a proposed longitudinal study, we conclude the error was harmless for several reasons. First, Campbell never answered whether he agreed with the views expressed, as the prosecutor noted in his cross-examination. Being on the same board with someone who proposed a controversial study does little to impugn a witness's testimony. Second, the jury acquitted Franzke of the charges for which there was no corroborating evidence, suggesting Campbell's testimony succeeded in undermining Jessi's credibility. Third, defense counsel immediately called the jury's attention to the fact that the prosecutor misstated the evidence. Fourth, the court instructed the jury:

Remarks of the attorneys are not evidence. If the remarks suggested certain facts not in evidence, disregard that suggestion.

Consider carefully the closing arguments of the attorneys, but their arguments and conclusions and opinions are not evidence. Draw your own conclusions from the evidence, and decide upon your verdict according to the evidence, under the instructions that are given to you by me.

The jury is presumed to have followed the court's instruction. *State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989).

¶13 Finally, Franzke has not established any basis for granting a new trial in the interest of justice. His argument is based on his claim of ineffective assistance of counsel that we have rejected and his claim regarding the prosecutor's improper closing argument that we have concluded was harmless error. We conclude the controversy was fully and fairly tried, justice has not miscarried and there is no reason to believe retrial would result in a different

verdict. *See State v. Schumacher*, 144 Wis. 2d 388, 400-01, 424 N.W.2d 672 (1988).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

