COURT OF APPEALS
DECISION
DATED AND RELEASED

July 31, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 93-1658-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN G. B.,

Defendant-Appellant.

APPEAL from judgments of the circuit court for Portage County: JAMES EVENSON, Judge. *Affirmed*.

Before Eich, C.J., Gartzke, P.J., and Sundby, J.

GARTZKE, P.J. Steven G. B. appeals from a judgment convicting him on two counts of first-degree sexual assault of a child, § 948.02(1), STATS.[1]

[1] Section 948.02(1), STATS., provides in pertinent part, "Whoever has sexual contact ... with a person who has not attained the age of 13 years is guilty of a Class B felony." Section 948.01(5), STATS., provides in pertinent part, "`Sexual contact' means any intentional touching by the complainant or defendant, either directly or through clothing

The counts involve defendant's two children and incidents occurring between June 1 and August 1, 1991.

The issues are: (1) whether the trial court erred by giving the jury a supplemental instruction on agreement, WIS J I--CRIMINAL 520 (1985); (2) whether the court erred when refusing to exclude the mother of the children from the courtroom when giving the supplemental instruction to the jury; (3) whether the court erred when refusing to allow defendant to show a pattern of behavior by the mother evidencing her bias; (4) whether the pattern instruction on sexual contact should have been modified; (5) whether sufficient evidence supports the verdicts; and (6) whether defendant's trial counsel was ineffective in the following respects: (a) in the voir dire of jurors; (b) failing to move to exclude or limit evidence of "Child Sexual Abuse Accommodation Syndrome" (CSAAS); (c) failing to object to a witness's "ultimate conclusion" testimony; (d) failing to call defendant's father as a witness; (e) failing to argue burden of proof and presumption of innocence during closing argument; and (f) failing to offer polygraph evidence favorable to defendant. Finding no error requiring reversal, we affirm.

I. EVIDENCE SUBMITTED TO THE JURY

Defendant and, Lauralie, the mother of the children married on December 5, 1987. At that time the mother had one child, Paige, born October 3, 1985, during a previous marriage. In 1988, Paige's father agreed to termination of his parental rights, and defendant adopted her. On October 3, 1988, Kaitlin was born to defendant and the mother. The family was living in Stevens Point. Defendant and the mother separated in January 1990, and in April 1990 he began a divorce action, seeking sole custody of both children. The temporary order awarded custody of Paige to Lauralie and custody of Kaitlin to defendant. The mother claimed defendant had sexually assaulted Paige, and her allegations led to a hearing in September 1990, following which temporary custody of Kaitlin was transferred to the mother and defendant's contact with his daughters was ordered monitored.

(..continued)
by the use of any body part or object, of the complainant's or defendant's intimate parts if that intentional touching is for the purpose of ... sexually arousing or gratifying the defendant."

In March 1991 the family court awarded defendant and the mother joint custody of both children with primary placement to him. That decision followed a psychological evaluation and custody study. Primary placement with defendant did not go into immediate effect because the court gave the mother permission to take the girls to Ohio to visit relatives.

The mother and children left Wisconsin in March 1991 but she failed to return as ordered, and in April 1991 she was charged with absconding. She and the children returned to Wisconsin in late May 1991. Upon their return the mother was released on bond and the charge against her was later dismissed. The girls were placed temporarily in the custody of defendant's parents, the mother's visitation was supervised, and defendant's visitation was allowed only in the presence of his parents. On July 5, 1991, the family court reinstated unrestricted primary placement with defendant and unsupervised visitation for the mother.

Two weeks later defendant agreed to allow the mother to have the children for a one week vacation beginning July 19, 1991. She did not return the children to him. The children were found to be in need of protection or services and were placed in a foster home.

On February 12, 1992, a criminal complaint issued charging defendant with having sexually assaulted Paige and Kaitlin between June 1 and August 1, 1991, the period immediately after their return to Wisconsin from Ohio.

Paige testified at the jury trial that her father had touched her private parts. She denied ever seeing her father touch Kaitlin between the legs. She denied that her mother had told her to lie about what her father had done. Kaitlin did not testify.

The defense presented evidence that Paige had made prior inconsistent statements. According to defendant's pastor, before the divorce Paige told him her mother was urging her to tell others that her father had touched her private parts, her father had not done so, and her mother was telling her to lie. At a second meeting with the pastor, Paige again denied

touching by defendant and accused her mother of urging her to lie. When asked whether her father had told her what to say, Paige denied having been coached.

Dr. Sue Seitz is a psychologist appointed by the family court. Seitz has had extensive experience in treating and evaluating child sexual abuse. She testified that she had sessions with the children before and after the divorce and had interviewed defendant and the mother. Seitz testified she routinely videotapes sessions when there are conflicting allegations of sexual abuse. She had seven hours of videotaped interviews with Paige and had prepared an excerpt tape, portions of which the jury saw. The videotaped excerpts included both pre-divorce and post-absconding sessions with Paige. During both periods Paige said her mother told her to say that her father had touched her. Paige said he had touched her only when he put medicine on her. She complained to Seitz that her mother did not want to share her and her sister with defendant and was going to let the mother's boyfriend be her father. Seitz believes the child was under pressure to maintain her allegations against defendant for purposes of establishing a new family for her mother.

The children's foster-home mother, Ms. Nagorski, testified that in the first weeks following Kaitlin's foster home placement on July 31, 1991, she was masturbating eight to ten times per day. That behavior continued until October 1991, when it began to taper off. Both girls wet their beds, and both made statements about their father's touching them. The foster mother testified she saw Paige masturbate three times.

Dr. Seitz testified that only the children's mother reported masturbation to her as a behavioral problem. Their paternal grandparents, baby sitter, and father did not report masturbation to Seitz.

The State and defense called social worker witnesses. One testified that during her investigation of abuse allegations in November 1990, both children denied that anyone had touched their private parts. A second social worker testified that both children told her their father was touching them. A third social worker, who supervised visits by both parents in the fall of 1991, testified she heard Kaitlin say that mommy "tells me to say that daddy touches my duppie [the child's vagina] but that he doesn't."

A social worker assigned to the case in the summer of 1991, testified she interviewed Paige three times shortly after the mother returned with the children from Ohio, but Paige did not allege abuse until the third interview on July 24, 1991. Although the grandparents or father had brought Paige to the previous interviews, the mother brought Paige to the third interview. At that time Paige said her father pins her down on the floor and touches her private parts and that Kaitlin put Legos where "she goes to the bathroom." Paige said her father touched Kaitlin's private parts, and he threatened to lock Paige in a dark cage if she told anyone. When the social worker asked Paige whether she was lying about her father's telling Kaitlin to put Legos in her vagina and that she would be locked in a dark cage, Paige admitted that those were lies. The social worker did not ask Paige whether she was lying when she said that her father touched her private parts and the private parts of her sister.

The mother's physician, Dr. Bahrke, testified that a child's bed-wetting, being unusually afraid, excessive masturbation and physical evidence like irritation of the vagina, could evidence abuse but could also be symptoms of other problems and do not prove sexual assault. When he examined Kaitlin in light of the allegations about Legos, he saw no physical evidence of abuse.

Dr. Williams, a psychologist, testified he met with Paige sixteen times from June to November 1990. The mother brought Paige to the sessions. Paige told him that her father touched her in the vaginal area. He testified that symptoms of sexual abuse can be symptoms of other problems, and that masturbation does not prove child abuse.

The prosecution retained a psychologist, Dr. Emiley, to testify regarding "child sexual assault accommodation syndrome." An essential feature of the syndrome is that an abused child will recant accusations of abuse. (Later in this opinion we more fully describe his testimony regarding the syndrome.) He testified that although the syndrome was first described in 1983, it is not a recognized disorder in DSM-3R, the standard psychological reference book listing mental disorders and symptoms.

The defense called another psychologist, Dr. Hoorwitz. He testified that the sexual abuse accommodation syndrome is controversial, and

no consensus exists that it is accurate. He identified factors that may indicate false accusations, including inconsistencies and facts suggesting pressure on a child to falsify, such as a highly contested custody case. Masturbation could be a reaction to any number of stressors, including sexual assault, and "for children of this age, a very likely reason is for self-soothing purposes in the face of a loss of some kind."

Dr. Matusiak, a psychologist who assessed the mother and the children in Milwaukee three days before she surrendered to authorities on May 24, 1991, reviewed Dr. Seitz's videotapes. He criticized her methodology and the use of leading questions. He stated he does not use leading questions. During his interviews Paige volunteered that her father had touched her private parts. Dr. Matusiak did not tape his interviews.

The jury heard evidence that the mother had studied symptomology of child sexual abuse. In April 1991 during the period the mother had absconded with the children to Ohio, a police search of her Stevens Point residence revealed articles and writings on child sexual abuse.

Defendant denied having sexually abused his daughters. He denied having seen his children masturbate. In October 1990 he reported to social services that Kaitlin said that her "duppie" hurt and that her mother had done it.

Dr. Lopez, the children's pediatrician, testified that he had seen both girls on many occasions in 1989, 1990 and 1991 for urinary infections and rashes in the genital area, for which he prescribed antibiotics and creams. When the mother brought Paige in on May 17, 1990, she said she was concerned defendant might have sexually abused Paige. Dr. Lopez is trained to identify sexual abuse. While it is possible for sexual abuse to occur with no physical evidence, he saw no such evidence when he examined Paige. In response to his questions, Paige denied her father had touched her genital area. He testified he saw no evidence of sexual abuse of Paige in his examinations of her. He had never been suspected of child abuse, "[m]ainly because of the way I felt that they, both the children, interacted with their father, which was always in a loving manner and care to both of them."

About May 15, 1990, the mother and defendant had an altercation which led to his arrest for sexual assault. Although he was not prosecuted for that incident, she testified she vowed to "get his ass," and the next day she made her first report to social services about her concerns for her daughters. She testified she was frightened when defendant got primary placement of the children in the divorce judgment, because Paige had been telling her that he was touching her private parts. She took the children to Ohio to "protect them from being molested." She denied ever attempting to manipulate her children into making false accusations of sexual abuse against defendant. She never saw any of her children being molested by defendant.

After the jury found defendant guilty on both counts, the court sentenced him to four years on the first count, and four years to run consecutively on the second count, but placed him on probation for eight years to run consecutive to count one.

II. SUPPLEMENTAL INSTRUCTION TO JURY ON AGREEMENT

About 4:00 p.m. on the second day of its deliberations, after some sixteen hours of deliberation, the jury sent the following note to the trial judge:

> We are completely at a standstill and do not see any conclusion in order for unanimous decision. The additional information you gave us did not change the feeling of any of us. We do not know where to go from here.

The prosecution requested that the jury be given an "***Allen*** charge." The defense objected. The court agreed to give the charge, and explained its decision as follows:

> My basis for doing this, it has been an extended trial. The jury has obviously worked very diligently as it is addressing it as thoroughly as they can. But I believe one effort should be made to ask them once more, or ask them at this point to attempt to resolve their differences, and if they cannot do so, then, of course, we will

> address that at that point of time, but at this point I will give that instruction and instruct the jury be brought back.

The judge then instructed the jury, using the pattern WIS J I--CRIMINAL 520 (1985). That is not the instruction used in the case giving rise to the term "***Allen***" charge, ***Allen v. United States***, 164 U.S. 492 (1896). But attorneys and trial courts continue to refer to the instruction as the ***Allen*** charge. It has been approved in ***Ziegler v. State***, 65 Wis.2d 703, 223 N.W.2d 442 (1974), *overruled on other grounds*, ***State v. Williquette***, 190 Wis.2d 677, 694 n.11, 526 N.W.2d 144, 151 (1995); ***Madison v. State***, 61 Wis.2d 333, 212 N.W.2d 150 (1973); and ***Kelley v. State***, 51 Wis.2d 641, 187 N.W.2d 810 (1971).

The court instructed the jury:

> [Y]ou jurors are as competent to decide the disputed issues of fact in this case as the next jury that may be called to determine such issues. You are not going to be made to agree, nor are you going to be kept out until you do agree. It is your duty to make an honest and sincere attempt to arrive at a verdict. Jurors should not be obstinate; they should be open minded; they should listen to argument [sic] of others, and talk matters over freely and fairly, and make an honest effort to come to a conclusion on all of the issues presented to them.
>
> I do direct that you retire to the jury room at this point to reconsider the evidence that been submitted to you.

Defendant does not challenge the language of the instruction itself. He asserts that the trial court erred when deciding to give the instruction at all. He rightly asserts, and the State agrees, that giving the instruction is discretionary with the trial court, and the exercise of discretion requires a reasoning process by which the facts of record are considered to reach a conclusion based upon the proper legal standards. ***McCleary v. State***, 49 Wis.2d 263, 277, 182 N.W.2d 512, 519 (1971).

The paucity of legal standards in this area is shown by defendant's having to rely primarily upon a 1912 decision, ***Barlow v. Foster***, 149 Wis. 613, 628-30, 136 N.W. 822, 828 (1912). In ***Barlow***, the controlling issue submitted to the jury was simple, and there was little, if any excuse, for their not reaching agreement and less for leaving the controversy for another jury to deal with. The court said,

> There is no set rule for such matters. Under some circumstances, it might not be fair treatment of a jury to keep them out twenty-four hours, and in another, it might almost be an abuse of discretion to discharge them till after the lapse of a much longer time. The judge must be master of the situation, restrained only by the boundaries of a very broad discretion.

Id. at 629, 136 N.W. at 828.

This is not a statement of legal standards. Rather, it describes the problem.

The AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, does little more than confirm the discretionary nature of the decision whether to give supplemental instructions to deadlocked juries. Standard 15-4.4(b) states that the court may require the jury to continue the deliberations if it has been unable to agree but "shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals." The commentary states,

> [T]he real question is whether the jury was required to deliberate an unreasonable length of time or for unreasonable intervals, or was threatened with the prospect of such unreasonably lengthy deliberations. The general rule is that the length of time a jury may be kept deliberating is a matter within the discretion of the trial judge, but abuse of that discretion requires reversal.

Standard 15-4.4(b), cmt. at 15-135.

The commentary suggests that it is for the trial court to consider that the "reasonableness of the deliberation period depends on such factors as the length of the trial, the nature and complexity of the case, the volume and nature of the evidence, the presence and multiple counts or multiple defendants, and the jurors' statements to the court concerning the probability of agreement." ***Id***. at 15-135. It correctly implies that the longer the trial, the greater its complexity, the greater the volume of the evidence, and the presence of multiple counts for multiple defendants, are facts tending to justify giving the instruction. It adds that the jurors' statements to the court are to be considered.

The ABA Standards and its commentary are reasonable. It is reasonable to infer that the more complex the case, for example, the greater the amount of time the jury may need. It is reasonable that the greater the volume of the evidence, the greater the amount of time the jury may require. The same is true of multiple counts. Common sense suggests that jurors faced with a mountain of evidence may be urged to keep at their task even though the jurors have become discouraged with their progress.

In the case before us, neither side offered much guidance to the trial court in making its decision whether to give the charge that the State had requested. The most the trial court thought necessary by way of a response to the urging was to refer the extended nature of the trial. And while the court did not review on the record the amount of evidence that had been presented to the jury, we not only may but are required independently to review the record to determine whether it provides a basis for the trial court's exercise of discretion. ***State v. Pharr***, 115 Wis.2d 334, 343, 340 N.W.2d 498, 502 (1983).

The record supports the trial court's determination. Both sides agree that this was not a simple case. The trial was long. The jury heard much conflicting testimony. It heard from a number of doctors and psychologists, and it had testimony by specialists as to their theories as to how a fact-finder may determine whether allegations of child sexual abuse are true.

Before the jury informed the court it was having difficulty reaching an agreement, it had requested a list of the exhibits and all of the exhibits. The court provided the jury with the list but not the exhibits themselves. The jury had requested the notes from Jean Nagorski, the foster mother, and the reports of Dr. Lopez but neither were provided. The jury had

asked for clarification on the second element of the charge as to determining "such purpose directly or indirectly from all of the facts and evidence concerning these offenses." The jury was instructed on the question. On the second day of its deliberations, the jury had asked to review the videotape of Paige and Dr. Seitz, and the videotape was played for them, at least in part. It requested a review of the testimony of Paige and Nagorski, and the reporter re-read their testimony.

Thus, the trial court had before it a complex trial, the jury's requests for explanations and elaborations on the complexities, and its mild statement of perplexity and frustration that the additional information given to it had not changed the feeling "of any of us" and they did not "know where to go from here." The jury's note contains no indication that conflicting views of the jurors had hardened to an irreducible stalemate.

The trial court's approach was reasonable. The court advised counsel that it believed "*one* effort should be made to ask them *once more*, or ask them at this point to *attempt* to resolve their differences, and if they cannot do so, ..." (Emphasis added.) The court indicated no intent to force a verdict. Some four-and-one-half hours later that evening, the judge inquired of the jury, asking whether they could reach a verdict. The response was encouraging--that the jurors were "making progress ... and requested more time." Only an hour-and-a-half later the jury returned verdicts of guilty.

Nothing indicates that the court subjected the jury to more than an encouragement to resolve their differences, consistent with the freedom of jurors to disagree. The tone of these proceedings shows a jury attempting to work through complexities, receiving encouragement to continue their attempt and finally reaching a result of their free will. That is the very type of deliberation process the instruction is designed to achieve.

We conclude that the trial court was rightly reluctant to close down the trial at the first indication from the jury that it was having difficulty. We cannot criticize the court's giving the supplemental instruction.

III. EXCLUDING MOTHER FROM THE COURTROOM

Defendant asserts that the mother's presence in the courtroom when the court gave the supplemental instruction "amplified" its effect. The court refused to exclude the mother on grounds that it lacked authority to do so. This is said to be an error of law. We disagree.

Section 757.14, STATS., provides

> The sittings of every court shall be public and every citizen may freely attend the same, except if otherwise expressly provided by law on the examination of persons charged with crime; provided, that when in any court a cause of a scandalous or obscene nature is on trial the presiding judge or justice may exclude from the room where the court is sitting all minors not necessarily present as parties or witnesses.

Section 757.14, STATS., is a general command to trial courts to permit all members of the public to attend any part of the trial. It is true that even in the face of § 757.14, a trial court may close a courtroom for "compelling" circumstances. ***La Crosse Tribune v. Circuit Court***, 115 Wis.2d 220, 235, 340 N.W.2d 460, 467 (1983). But to do so, "[t]here must ... be a reasonable likelihood that, unless the courtroom is closed, the very purpose of the trial will be subverted or other cherished and legislatively recognized values would be jeopardized." ***Id***. at 236, 340 N.W.2d at 467. That likelihood did not exist in the case before us.

The mother's presence during the supplemental instruction undoubtedly reminded the jury that the effect of their verdict and, in the alternative, a mistrial, would extend to the children and beyond the children to her. But that was true of defendant as well. The jury must have known that. Nothing suggests that the mother's conduct in the courtroom when the supplemental instruction was given was out of the ordinary. Like any other member of the public, she had a right to attend the trial, and the trial court's decision to permit her to remain was consistent with its obligation under the statute, § 757.14, STATS.

IV. RIGHT TO PRESENT A DEFENSE

Defendant asserts that the trial court erred when it permitted him to introduce some but not all the evidence he proposed to submit to show that the mother had engaged in a pattern of conduct before and after her marriage to defendant, conduct he asserts was designed to falsify court records and deny her daughters the right to a father. After an offer of proof, the trial court excluded evidence of the mother's conduct before the marriage on grounds of relevance and remoteness. Defendant asserts on appeal that whether or not the evidentiary ruling was correct, it denied him his right to present an essential element of his defense.

Defendant offered to prove that the mother had been married to Paul Borowicz. On July 12, 1985, before Paige was born, Borowicz began a divorce action in Arizona against the mother.

The Arizona dissolution decree recites that no children had resulted from the marriage even though Paige had been born on October 3, 1985, and even though the birth certificate states Borowicz was her father. The trial court refused to admit this evidence on grounds that the relationship between the mother and Borowicz was irrelevant because it predated her relationship with defendant.

Defendant's offer continued that in 1986, after the mother and Paige moved to Ohio, she applied for public assistance and was required to name Paige's father. She named Borowicz, Jim Augustine and John Huber. She later told authorities that Augustine was the natural father. The trial court ruled that this evidence was irrelevant and remote because it preceded the mother's relationship with defendant.

The offer continued that in October 1986, the mother asked defendant to take her from Ohio and to marry her. The trial court did not expressly rule on this part of the offer, but presumably the court allowed the evidence, since it was part of the relationship between defendant and the mother.

The offer continued that on October 28, 1986, a support enforcement action was brought in Ohio against Jim Augustine but was later dropped because the mother failed to prosecute the action. The trial court ruled that if the mother brought the action, it was relevant but if the State brought the action, it was not relevant. The documentary evidence shows that the mother was named as the plaintiff and presumably brought the action.

The offer continued that on December 8, 1987, defendant and the mother married. In January 1988 they conceived Kaitlin. The mother subsequently asked defendant to adopt Paige, and in June 1988 he did. The mother told the attorney who handled the adoption that Borowicz's name was on Paige's birth certificate, but there could be a problem about another man's being the father. The attorney concluded that no notice was necessary to the other man. The trial court ruled the evidence was admissible.

The offer continued that in September or October 1989 defendant and the mother separated, and in late 1989 or early 1990 she asked Augustine whether he would accept Paige as his daughter. Augustine said he would but only if a blood test showed that he was the father. No test was taken. The trial court ruled that the evidence was admissible, because it affected defendant's parental rights.

The offer continued that on January 2, 1990, the mother told a social worker that defendant had adopted Paige without the consent of Borowicz and there was going to be a "contest," probably referring to Paige's custody. The trial court ruled that the evidence was admissible, since it pertained to the defendant's paternal rights and was relevant to the mother's credibility.

Defendant points out that in ***Davis v. Alaska***, 415 U.S. 308, 316-17 (1974), the Supreme Court said the partiality of a witness is subject to exploration at trial and is "always relevant as discrediting the witness and affecting the weight of his testimony. We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." (Citations and internal quotation omitted.)

The Supreme Court later said, however,

It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.

Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986).

The defendant attacks the credibility of Paige on the theory that her mother put her up to testifying he had sexually assaulted both her and Kaitlin, all for the purpose of destroying his relationship with the children. The right to present bias evidence extends to showing why a witness testified against the defendant. ***Olden v. Kentucky***, 488 U.S. 227, 232 (1988). In ***Olden***, defendant was accused of having raped a woman. His defense was that he and she had engaged in consensual sexual acts; that out of fear of jeopardizing her relationship with another man, she lied when she told that man that defendant had raped her; and she continued to lie on the stand. ***Id***. at 232. The ***Olden*** court held that the state court erred when it prevented defendant from inquiring into the matter on cross-examination, since the woman's testimony was crucial to the prosecution's case. ***Id***. at 232-33.

The trial court erroneously exercised its discretion when it ruled that evidence of the mother's statements regarding Paige's paternity made before her relationship with defendant were inadmissible for remoteness. Evidentiary rulings are discretionary. ***State v. Alsteen***, 108 Wis.2d 723, 727, 324 N.W.2d 426, 428 (1982). Discretion is properly exercised when the court employs a rationale based on the record and commits no error of law. ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981). Remoteness in time may render evidence inadmissible when the elapsed time is so great as "to negative all rational or logical connection" between the fact sought to be proved and the evidence offered in proof. ***Simpson v. State***, 83 Wis.2d 494, 512, 266 N.W.2d 270, 278 (1978).

Defendant offered the evidence to show that both before and after their marriage the mother's conduct exhibited a pattern of preventing Paige from having a father--any father. The trial court did not explain why no rational or logical connection existed between the fact sought to be proved--the mother's intent to prevent Paige from having a father--and the evidence offered to prove it. We think the court erroneously exercised its discretion when it ruled that the evidence was too remote.

The trial court similarly erroneously exercised its discretion when it ruled that the evidence of the mother's pre-marriage conduct was irrelevant. Evidence tending to make the existence of a fact more probable is relevant. Section 904.01, STATS. A trial court has broad discretion when determining the relevance of offered evidence, ***State v. Brecht***, 143 Wis.2d 297, 320, 421 N.W.2d 96, 105 (1988), but here the trial court provided no analysis of the evidence in terms of the fact to be proved--the mother's intent to prevent Paige from having a father.

Improper denial of an opportunity to impeach a witness for bias can be harmless error. ***Crane v. Kentucky***, 476 U.S. 683, 691 (1986), and ***Delaware v. Van Arsdall***, 475 U.S. 673, 684 (1986).

We are not satisfied that the pre-marriage evidence defendant offered in support of his theory that the mother would do anything to keep the children from having a father was so critical to his defense as to require us to order a new trial. Only a part of the evidence in support of that defense was kept from the jury. Keeping out that part did not prevent defendant from arguing the substance of his position to the jury. His counsel was able to argue, and did argue, on the basis of the record that the mother wanted to keep the children at "any cost."

The jury heard other evidence regarding the pattern. It heard that Paige had said that her mother told her to say that her father had improperly touched her; that her parents had had a custody battle for the children; that the mother had absconded to Ohio with her children when she was not granted physical custody; that she asked Augustine if he would accept Paige as his daughter; and that the mother told social workers that defendant had adopted Paige without her father's consent.

We conclude the error was harmless.

V. INSTRUCTIONAL ERROR

The trial court gave the jury the pattern instruction, "First-Degree Sexual Assault of a Child: Sexual Contact with a Person Who Has Not Attained the Age of 13 Years," WIS J I—CRIMINAL 2103 (1989).

Defendant timely objected to the instruction. While the instruction describes three elements of the offense, he feared that the jury could be confused because the first described element--sexual contact--also describes the offense. He urged that the instruction be modified to describe two elements rather than three. Otherwise, he argued, the jury could find him guilty of sexual assault if they found that he had (as he admitted) intentionally touched his daughters' vaginal areas without finding he had touched them for the purpose of becoming sexually aroused or gratified.

We show below the relevant part of the instruction given to the jury, with defendant's proposed deletions and additions indicated by striking and shading, respectively:

> First, that the defendant had sexual contact with the persons named, Paige [] and Kaitlin [].
>
> ~~Second, that the defendant had sexual contact with the persons named, Paige [] and Kaitlin [], for the purpose of sexually arousing or gratifying the defendant.~~
>
> ~~Third~~, Second, that the persons named, Paige [] and Kaitlin [], had not attained the age of 13 years at the time of the alleged sexual contact.
>
> The first element of each charge requires that the defendant had sexual contact with the persons named in that count.
>
> ~~Sexual contact is any intentional touching by the defendant of~~ In order to find that sexual contact occurred, you must find that the defendant intentionally touched the

vaginal area of Paige [], and the vaginal area of Kaitlin []. The touching may be of the vaginal area directly or it may be through the clothing. The touching may be done by any body part or by any object, but it must be an intentional touching.

~~The second element of each charge requires~~ In order to find that sexual contact occurred, you must also find that the defendant intentionally touched ~~had sexual contact with~~ the persons named in that count for the purpose of becoming sexually aroused or gratified.

The purpose to become sexually aroused or gratified must be found as a fact before you may find the defendant guilty of sexual assault. You cannot look into a person's mind to find purpose. You may determine such purpose directly or indirectly from all the facts in evidence concerning this offense. You may consider any statements or conduct of the defendant that indicate state of mind. You may find purpose from such statements or conduct, but you are not required to do so. You are the sole judges of the facts, and you must not find the defendant guilty unless you are satisfied beyond a reasonable doubt that the defendant had sexual contact for the purpose of becoming sexually aroused or gratified.

The ~~third~~ second element of each charge requires that the persons named in that count had not attained the age of 13 years at the time of the alleged sexual contact. Knowledge of Paige []'s and Kaitlin []'s age by the defendant is not required and mistake regarding the age is not a defense.

We do not agree that the jury would understand from the trial court's instructions that they were to find defendant was guilty of sexual assault if they found he had intentionally touched his daughters in the vaginal area, without also finding he had done it for the purpose of becoming sexually

aroused or gratified. The sexual arousal or gratification element is repeated three times in the instruction, each time in mandatory terms.[2]

We reject defendant's contention that the jury showed confusion when it asked two questions to the court about the second element of the crime described in the instruction--the purpose of the touching. The jury sought an interpretation of the language, "You may determine such purpose directly or indirectly from all of the facts in evidence concerning these offense." Their questions reflect no confusion regarding the requirement that the State prove that sexual arousal or gratification was the purpose of the touching.

VI. THE EVIDENCE SUPPORTS THE VERDICT

Defendant asserts it is impossible that a jury which fully considered the evidence in this case would return verdicts of guilty beyond a reasonable doubt. And yet this jury returned the verdicts rendered under circumstances evidencing careful attention to the jurors' duties as outlined in the instructions.

The question is not whether the court of appeals would have found the defendant guilty. That is not our function. We review the briefs and record to correct error, if error occurred, and direct a new trial if the error was prejudicial. We may not substitute our judgment for that of the jury, unless the evidence, viewed most favorably to the State and to the conviction, so lacks probative value and force that no jury, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990).

This is no hollow litany of our task. We have stated the restrictive standard the appellate courts of this state must enforce when we decide whether the jury could have found guilt. We must apply that standard, whether or not we agree with the verdict, and whether or not we would have reached the same verdict on the same evidence. There is no escaping the conclusion from the following summary of the evidence presented at the trial that the jury could, acting reasonably, find guilt beyond a reasonable doubt.

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[2] The instruction as given survived the revision of WIS J I--CRIMINAL § 2103 in 1989.

Paige testified that defendant had touched her in a private part between her legs the previous summer, which would have been the summer of 1991, when she lived with him at his house. He is charged with having had sexual contact with his daughters between June 1 and August 1, 1991. Paige described with her hand what he did to her and said that it was not done while the defendant was putting medicine on her. She said he told her to keep bad secrets.

The foster-home mother of Paige and Kaitlin assumed her duties on July 31, 1991. She testified that although Kaitlin was only two years old she was masturbating eight to ten times a day. Over the years the foster mother had had more than fifty children in her home but she never had seen masturbation of that nature. The masturbation eventually slacked off but there seemed to be a correlation between that activity and Kaitlin's visits with her father. The foster mother testified that beginning about the middle of October 1991 Paige and Kaitlin began telling her that the defendant had been touching her private parts and hurting them. They never said that the mother told them to say so.

A social worker for Marathon County had conducted an independent child abuse investigation of the children. She testified at the defendant's trial that she interviewed Paige on July 24, 1991. During that interview Paige told the social worker that defendant had pinned her and Kaitlin on the floor in their room and had touched their private parts. He also touched their private parts when she went to the bathroom.

Paige described with her finger what her father had done to her and Kaitlin, and she told the social worker this had happened ten times. She told the social worker this had happened since they had returned from Ohio and it only happened when defendant's parents were not present. She said she did not like it and had told her father to stop. During that interview the social worker summarized to Paige what she had told the worker and deliberately included things Paige had not said in order to check on Paige's accuracy. Paige corrected the errors and did not change her previous responses.

Having concluded that the evidence supports the verdict, we move to defendant's next contention, that his trial counsel provided ineffective assistance under the state and federal constitutions.

VII. INEFFECTIVE ASSISTANCE

After defendant's brief-in-chief was filed, his substituted appellate counsel moved for remand to the trial court to pursue an ineffective assistance of counsel claim. We granted the motion. The trial court held an evidentiary hearing on the claim and rejected it. We affirm the ruling.

Defendant asserts his trial counsel's representation was ineffective because the jury voir dire was inadequate; counsel should have sought to exclude or limit the CSAAS evidence; should have objected to a physician's conclusion that the girls' masturbation was evidence of sexual abuse; should have called defendant's father as a witness; should have argued the burden of proof and presumption of innocence to the jury; and should have attempted to introduce favorable polygraph evidence.

Defendant has a right to the assistance of counsel under art. I § 7 of the Wisconsin Constitution, and the Sixth and Fourteenth Amendments to the United States Constitution. The right includes the right to effective assistance. ***State v. Wilson***, 179 Wis.2d 660, 680, 508 N.W.2d 44, 52 (Ct. App. 1993). The test for ineffective assistance of counsel under both constitutions is the same. ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996).

To succeed on an ineffective assistance claim, defendant must show that trial counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The deficient performance and prejudice components of an ineffectiveness assistance claim raise questions of mixed fact and law. ***Id***. at 698. We will not reverse the trial court's findings of fact unless they are clearly erroneous. Section 805.17(2), STATS. Whether the facts show that counsel's performance was deficient and whether the performance prejudiced defendant are questions of law. We do not defer to the decision of the trial court on those questions of law. ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 715 (1985).

A. Voir Dire

Defendant asserts that trial counsel should have spent more time during voir dire on questions regarding child sexual abuse, children lying about sexual abuse or improprieties and fantasizing, and the jurors' knowledge and feelings about such matters. He asserts that counsel's failure to strike jurors who might have harbored hidden biases or prejudices was ineffective assistance. The trial court ruled that defendant failed to show how the voir dire was insufficient and how its insufficiency, if any, prejudiced him. The court found that although, as in every case, more questions could have been asked, defendant did not show or even suggest that any juror was partial or biased. The court concluded that defendant had failed to show that trial counsel had provided ineffective assistance, and in any event, the record failed to show prejudice to him. We affirm the ruling.

The voir dire by the trial court, the prosecution and the defense covered the usual subjects--each juror's knowledge about the attorneys and the witnesses. The jurors were asked whether they had been involved in divorces and proceedings to determine whether a child is in need of protection or services. They were asked about their attitudes toward psychologists and psychiatrists, whether they had been victims of a crime, their attitudes towards statements and testimony by children, and whether they would accept a child assault victim's testimony.

After voir dire along those lines, the trial court divided the twenty-four jurors into five groups and questioned each group separately in chambers. The court asked the members of each group whether they had close family members or friends who had been victims of child sexual abuse; whether any juror had claimed having been sexually abused; and whether any juror or members of their close family or friends had made claims of sexual abuse against anyone. When a juror answered affirmatively, the court asked additional questions and permitted the State and defense attorneys to do so.

While defendant criticizes the voir dire for having failed to reveal "any hidden bias or prejudices," we have not been told how such biases or prejudices could otherwise be revealed.

We affirm the trial court's conclusion that defendant has not shown a basis for a finding of ineffective assistance of counsel as a result of the voir dire.

B. Evidence of Child Sexual Abuse Accommodation Syndrome (CSAAS)

Dr. Emiley testified for the State that the Child Sexual Abuse Accommodation Syndrome was first described in an article by Dr. Summit. Dr. Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177 (1983). Summit describes five characteristics common to sexually abused children: secrecy, helplessness, accommodation, delayed and unconvincing disclosure and recantation.

Emiley elaborated on CSAAS as follows: The syndrome involves "incestual" cases as distinguished from sexual assaults by strangers. It involves a member of the family or relative of the victim, usually about eight years old. The perpetrator may introduce inappropriate touching, like bathing or tickling or applying medicine. The perpetrator is interested in establishing an incestuous relationship.

The syndrome is based on secrecy and the perpetrator's ability to bind the child to silence by making the child feel responsible for the offense or for family problems resulting from the consequences of the child's revealing the activities. The child becomes a confidant to the father and a rival to the mother. The mother is demoted to the level of the child. She may have suspicions or awareness and defends herself by denying the existence of the appearances. The perpetrator can effectively bring the child to silence for an extended period.

Recantation is the last feature of the syndrome. Because income may be lost and separation may occur if the assault is revealed, the child says it never happened. Recantation by children of tender years in cases is not uncommon.

At the hearing on defendant's ineffective assistance claim, his two trial counsel acknowledged that they knew before the trial that the State intended to use CSAAS as evidence. One of his trial attorneys had represented

him after his divorce proceedings during the custody battle that preceded the criminal charges. She testified that her associate had researched the CSAAS issue, and they concluded that it was "really pretty lame testimony" that the defense could easily rebut. Defense counsel believed that introduction of the CSAAS evidence and the battle of experts would "significantly weaken the State's case." Trial counsel did not move to exclude the CSAAS evidence and did not object to it at trial. Counsel knew that the Wisconsin Supreme Court had not ruled on the admissibility of CSAAS evidence, but many states had admitted CSAAS evidence, and counsel believed it would have been admitted in this case.

The trial court concluded--and we agree--that defense counsel presented a reasoned and informed position, and an objection would have been contrary to the defense strategy developed before the case. "When counsel has made a strategic choice in determining a course of action during a trial, we apply an even greater degree of deference to counsel's exercise of judgment in considering whether the challenged action constitutes ineffective representation." ***State v. Vinson***, 183 Wis.2d 297, 307-08, 515 N.W.2d 314, 318-19 (Ct. App. 1994).

While the trial court did not spell out the strategic choice in detail, counsel testified that not objecting to the CSAAS evidence was consistent with their plan to make the trial a contest between experts rather than a credibility battle by defendant against his daughters. Counsel testified the defense had, in their view, the better experts, and by discrediting the evidence through their experts they could discredit the State's overall position. Counsel believed their evidence would show that the CSAAS syndrome was "not even remotely diagnostic, and there are many other explanations of those same kinds of behavior." We conclude, as did the court, that trial counsel's performance, insofar as CSAAS evidence was concerned, was not deficient. *See* ***State v. Hamilton***, 892 S.W.2d 774, 784-85 (Mo. Ct. App. 1995) (strategic choice not to object not ineffective assistance, even though strategy was unsuccessful).

Moreover, defendant has failed to show that trial counsel's strategy regarding CSAAS evidence, even if defective representation, has prejudiced him. *See* ***Strickland***, 466 U.S. at 687 (trial counsel's representation not shown to be constitutionally deficient in absence of showing that defendant was prejudiced by trial counsel's performance). To demonstrate that the unobjected-to admission of the CSAAS evidence prejudiced him, defendant

must show that the evidence is inadmissible. ***Hays v. Alabama***, 85 F.3d 1492, 1496 (11th Cir. 1996) (prejudice not shown from failure to object when evidence not shown to be inadmissible). Defendant notes that other jurisdictions have recognized that CSAAS evidence is highly speculative and should not be admitted without close scrutiny.[3] The State cites cases from a number of states which admit the evidence.[4]

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[3] Not all the cases defendant cites have withstood the test of time. ***Lantrip v. Commonwealth***, 713 S.W.2d 816, 817 (Ky. 1986) (no evidence that "sexual abuse accommodation syndrome" has attained scientific acceptance); ***State v. York***, 564 A.2d 389, 391-2 (Me. 1989) (expert testimony that a victim's behavior was characteristic of a sexually abused child did not have adequate scientific foundation), *but see* ***State v. Preston***, 581 A.2d 404, 407 (Me. 1990) (expert testimony describing occurrence of delayed or piecemeal reporting by child sexual abuse victims and used for rebuttal purposes had adequate scientific foundation); ***Goodson v. State***, 566 So.2d 1142, 1147 (Miss. 1990) ("[T]he prosecution made no effort to show that behavioral science has developed to the point where even the most knowledgeable experts in the field may give opinions that sexual abuse has occurred with the required level of reliability"), *but see* ***Hall v. State***, 611 So.2d 915 (Miss. 1992) (trial court did not abuse discretion allowing expert to testify that behavior of alleged victim was common with that of a sexually abused child); ***State v. J.Q.***, 617 A.2d 1196, 1211 (N.J. 1993) (CSAAS evidence inadmissible to prove guilt or innocence, but admissible to explain why sexually abused children often delay reporting abuse, recant or deny abuse occurred); ***Commonwealth v. Dunkle***, 602 A.2d 830, 832 (Pa. 1992) (CSAAS evidence inadmissible because it does not have general acceptance in the field); ***State v. Hudnall***, 359 S.Ed.2d 59, 61-62 (S.C. 1987) (CSAAS admissible to explain inconsistent behavior, not reliable to prove abuse occurred), *but see* ***State v. West***, 438 S.E.2d 256, 259 (S.C. Ct. App. 1993) (overruling ***Hudnall*** and clarifying that expert testimony and behavior evidence are admissible to prove a sexual offense has occurred where the probative value of such evidence outweighs its prejudicial effect.)

[4] ***People v. Gray***, 231 Cal. Rptr. 658, 660-61 (Cal. Ct. App. 1986) (CSAAS admissible as rebuttal evidence to rehabilitate victim's testimony, not to prove abuse has occurred); ***Keri v. State***, 347 S.E.2d 236, 238 (Ga. Ct. App. 1986) (CSAAS evidence admissible to explain child's recantations because such conduct beyond ordinary understanding of jury); ***People v. Dempsey***, 610 N.E.2d 208, 221 (Ill. Ct. App. 1993) (CSAAS admissible as rebuttal evidence to rehabilitate victim's testimony, not to prove abuse has occurred); ***Steward v. State***, 652 N.E.2d 490, 499 (Ind. 1995) (same); ***State v. Doan***, 498 N.W.2d 804, 809 (Neb. Ct. App. 1993) (CSAAS admissible to explain secrecy, belated disclosure, and recantation by child sex abuse victim, but expert witness may not give testimony which directly or indirectly expressed an opinion that child is believable, credible or that witness's account has been validated); ***People v. Gallow***, 569 N.W.2d 530, 531 (N.Y. App. Div. 1991) (CSAAS evidence admissible to explain child's recantations because such conduct beyond ordinary understanding of jury).

Defendant has not demonstrated on appeal that CSAAS evidence must be excluded or accepted on a limited or restricted basis in Wisconsin. Nor can he. CSAAS evidence is introduced through expert testimony. This state allows expert testimony in the discretion of the trial court. ***State v. Friedrich***, 135 Wis.2d 1, 15, 398 N.W.2d 763, 769 (1987). Only once has our state supreme court departed from the general rule that whether to allow expert testimony is left to the discretion of the trial court. In ***State v. Dean***, 103 Wis.2d 228, 307 N.W.2d 628 (1981), our supreme court withdrew polygraph evidence from the discretion of the trial courts by holding that such evidence is not admissible in criminal proceedings. All other areas of expert testimony have been left to the discretion of the trial court. *See* ***State v. Friedrich***, 135 Wis.2d at 16-17, 398 N.W.2d at 770 (psychological profile evidence for sexual offender); ***State v. Stinson***, 134 Wis.2d 224, 235, 397 N.W.2d 136, 140 (Ct. App. 1986) (bite mark evidence); ***State v. Shaw***, 124 Wis.2d 363, 364-65, 369 N.W.2d 772, 772-73 (Ct. App. 1985) (fingernail striation comparison evidence); ***State v. Johnson***, 118 Wis.2d 472, 475-76, 348 N.W.2d 196, 198 (Ct. App. 1984) and ***State v. Hamm***, 146 Wis.2d 130, 144, 430 N.W.2d 584, 590 (Ct. App. 1988) (reliability of eyewitness identification).

That the trial court might have excluded the CSAAS evidence or might have restricted its use, had the proper objections or motions been made, does not show prejudice to defendant. To show prejudice, defendant must demonstrate that counsel's errors "actually had an adverse effect on the defense. It is not enough for the defendant to show that the errors had some conceivable effect...." ***Strickland***, 466 U.S. at 693. That evidence "could have" or "might have" been admissible does not prove prejudice.

We affirm the trial court's conclusion that defendant has not shown that he was deprived of his constitutional right to effective assistance by counsel's handling of the CSAAS evidence.

C. "Ultimate Conclusion Testimony"

Dr. Bahrke, a physician in family practice, testified on behalf of the State that through his education and experience, he is able to identify behaviors or symptoms of children indicative of sexual abuse. According to Dr. Bahrke, it is common to see sexually abused children of the ages of Paige and Kaitlin who are unusually afraid either of a certain individual or place, or experience abrupt changes in behavior, sleep disorders, insomnia, nightmares and bed-wetting. He added, "Excessive masturbation would be a common symptom ...." He understood that the two-and-one-half-year old child, Kaitlin, had masturbated upwards of fifteen and twenty times a day for a month.

Dr. Bahrke was then asked, "In your opinion, doctor, to a reasonable degree of medical certainty, what is that evidence of?" He answered, "I would consider that evidence for sexual abuse. Particularly in a child like this, we will see kids masturbate to that frequency in front of people, but usually not a normal child. It's a child that's less aware of his surroundings, or some sort of disability of some kind."

Trial counsel chose not to object to the last question and answer because the objection probably would be overruled and an objection or motion to strike the testimony could direct further attention to it. Defendant argues that failure to object was nevertheless deficient assistance because "ultimate conclusion testimony is not admissible as it is tantamount to expert testimony that the victim was telling the truth," citing ***State v. Jensen***, 147 Wis.2d 240, 432 N.W.2d 913 (1988), and ***State v. Haseltine***, 120 Wis.2d 92, 352 N.W.2d 673 (Ct. App. 1984).

We reject defendant's argument. ***Jensen*** and ***Haseltine*** do not bar Dr. Bahrke's quoted testimony. The ***Jensen*** court held that an expert witness must not be allowed to convey to the jury his or her beliefs as to the veracity of a complainant with regard to a sexual assault. ***Jensen***, 147 Wis.2d at 256-57, 432 N.W.2d at 920. The ***Haseltine*** court held that it is error to allow a psychiatrist to testify that in his opinion there "was no doubt whatsoever" that defendant's daughter was an incest victim. ***Haseltine***, 120 Wis.2d at 95-96, 352 N.W.2d at 675-76. Dr. Bahrke did not testify that in his opinion Kaitlin was a victim of

sexual abuse. He testified that, in his opinion, excessive masturbation is "evidence for sexual abuse."[5]

We conclude that failure of counsel to object to Dr. Bahrke's testimony was not ineffective performance.

D. Defendant's Father

Defendant contends that trial counsel was ineffective for failing to call defendant's father as a witness. He asserts that his father would have been able to provide a "nearly complete alibi all of June and provide corroboration of defendant's activities for part of July 1991 and verify that [the father] had never witnessed any sexual abuse."

The trial court held that because the father would provide an alibi and corroborate defendant's recollection of the events for only part of the charging period, counsel's decision not to call the father was reasonable. The court added that had the father been called, the jury could infer that he would paint his son in a favorable light, in any event. We agree.

The charging period covering the alleged assaults was June 1 to August 1, 1991. The defendant testified that he had the children for about nine days after July 5, 1991, without his father's supervision. For that reason, the father's alibi testimony would have been far from complete. Moreover, as trial counsel testified, the father's testimony that the girls and defendant were never

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[5] We note but need not rely on ***State v. Duane E. Elm***, 201 Wis.2d 452, 549 N.W.2d 471 (Ct. App. 1996). In ***Elm*** a physician-witness was asked whether, based upon the history he took in a case in which defendant was charged with sexual contact of a child and his examination of the child and his training and experiences as an emergency room physician, he had an opinion to a reasonable degree of medical certainty as to the cause of the erythema he had noted. The physician replied, "My opinion is that she was molested." We held the physician's opinion was admissible. We reasoned that he gave his medical diagnosis of the erythema that he observed, and his opinion was that the cause of that erythema was molestation. When Dr. Bahrke testified he considered the extent of the masturbation reported to him as "evidence for sexual abuse," he did not testify that in his opinion Kaitlin had been sexually abused. Indeed, he did not even testify that the cause of Kaitlin's excessive masturbation was sexual abuse.

out of his presence would be viewed as incredible. And, as counsel testified, such testimony would be dangerous because it would suggest to the jury that the father believed he had to be there all the time.

We affirm the ruling that defendant failed to show counsel's failure to call his father as a witness was ineffective assistance.

E. Burden of Proof and Presumption of Evidence

Defendant asserts that the most egregious of all trial counsel's deficiencies was that counsel did not once mention the burden of proof or argue the presumption of innocence in the closing argument. We reject the claim that counsel's performance was deficient in this regard.

First, the trial court's instructions to the jury included the admonition that the burden was on the State to prove guilt beyond a reasonable doubt. Reference to the burden was repeated in substance five times in the instructions. The court instructed the jury on the presumption of innocence, as well.

Then, when the court gave the jury a supplemental instruction, it began by informing the jury that the law presumes every person charged with the commission of an offense is innocent, and it again instructed the jury--this time in three separate parts to the instruction--that they cannot find defendant guilty except under circumstances showing beyond a reasonable doubt that he committed the offense. Much of the balance of the supplemental instruction has to do with explaining the nature of reasonable doubt.

Consequently, there is no possibility that the jury failed to understand that defendant enjoyed a presumption of innocence and that the State had the burden of proving his guilt beyond a reasonable doubt.

Moreover, defendant's attorney chose not to discuss the burden of proof, reasonable doubt and the presumption of innocence, as a matter of strategy. Counsel wanted the jury to believe that defendant was innocent, not just that the State had failed to meet its burden of proof. The jury consisted

largely of women, and counsel had a justifiable fear that the jurors would not acquit the defendant unless they actually believed him to be innocent because they would not want to return the children to a father who might have sexually abused them.

We accept the conclusion of the trial court that trial counsel's closing argument was not ineffective representation.

F. Polygraph Evidence

Defendant passed a polygraph test regarding sexual abuse of his children. The State moved in limine to exclude the polygraph evidence. Believing that ***State v. Dean***, 103 Wis.2d 228, 307 N.W.2d 628 (1981), barred admission of the polygraph evidence, defendant's trial counsel did not argue it was admissible. Defendant asserts that his counsel's failure to seek admission of the evidence is ineffective assistance. We disagree. We held that introduction of polygraph testimony was error and quoted that ***State v. Ramey***, 121 Wis.2d 177, 180-81, 359 N.W.2d 402, 404-05 (Ct. App. 1984), that ***Dean*** stands "for a blanket exclusion of polygraph evidence...."[6]

[6] In ***State v. Wofford***, Case No. 95-0979-CR (Wis. Ct. App. May 16, 1996), we acknowledged the distinction "between an inquiry into the taking of a polygraph and an inquiry into the results of the polygraph examination," citing ***State v. Hoffman***, 106 Wis.2d 185, 217, 316 N.W.2d 143, 160 (Ct. App. 1982) (offer to take polygraph examination relevant to assessment of the offerer's credibility and may be admissible for that purpose). ***Wofford***, slip op. at 7. Defendant does not argue that he seeks to introduce evidence of his willingness to take the polygraph examination. He argues only that trial counsel should have attempted to introduce the polygraph evidence itself.

VIII. CONCLUSION

We conclude that defendant's conviction must be affirmed.

By the Court.—Judgments affirmed.

Not recommended for publication in the official reports.

SUNDBY, J. (*concurring*). I agree that the defendant received a fair trial and there was no trial court error. As difficult as it is for me to believe that there was sufficient evidence to convict the defendant beyond a reasonable doubt, there is no basis under the law upon which to set aside the jury verdict. *See* ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). However, I urge the supreme court to accept review of this decision, if a petition is filed with the court, to re-examine its *per se* rule which excludes polygraph evidence without a stipulation. *See* ***State v. Dean***, 103 Wis.2d 228, 307 N.W.2d 628 (1981).

The defendant alleges his counsel was ineffective for failing to move for admission of a polygraph examination which supported the defendant's claim of innocence. In view of ***Dean***, trial counsel cannot be faulted for attempting to introduce evidence which the supreme court has ruled is inadmissible. I believe ***Dean*** needs to be re-examined.

Since 1981, commentators and some courts have recognized the increased reliability of polygraph evidence and have even suggested that to exclude such evidence violates the defendant's Sixth Amendment right to present evidence in his defense. Two law review articles exhaustively review the changing approach of the courts to polygraph evidence. A 1991 Kentucky Law Journal Note examines the decision of the Eleventh Federal Circuit Court of Appeals in ***United States v. Piccinonna***, 885 F.2d 1529 (11th Cir. 1989) (*en banc*). W. Thomas Halbleib, ***United States v. Piccinonna***: *The Eleventh Circuit Adds Another Approach to Polygraph Evidence in the Federal System*, 80 KY. L.J. 225 (1991). The Eleventh Circuit vacated defendant's conviction and remanded the case with instructions to the district court to consider the admissibility of the result of defendant's polygraph examination. The court adopted an impeachment or corroboration approach and imposed three conditions on the proposed polygraph evidence: (1) the offering party must provide the opposition with adequate notice of its plans to offer polygraph evidence; (2) the opposition must be afforded reasonable opportunity to administer its own test; and (3) the pertinent Federal Rules of Evidence governing impeachment or corroboration apply. ***Id***. at 1536. However, the court stated that the trial judge would retain discretion to exclude the evidence entirely. ***Id***.

A more comprehensive review of the development of polygraph testing and the use of such testing in judicial proceedings is found in James R.

McCall, *Misconceptions and Reevaluation--Polygraph Admissibility After* ***Rock*** *and* ***Daubert***, 1996 U. ILL. L. REV. 363.

The introduction to Professor McCall's article states:

> American lawyers generally believe that evidence of polygraph test results is inadmissible in courts in this country and that polygraph evidence deserves to be treated as an evidentiary "pariah."

Professor McCall's article calls both beliefs into question by examining past and present polygraph admissibility law and the evolution of polygraph theory and technique. Topics addressed in the article include: the appellate opinions from 1975 to 1989 that authorized admission of polygraph evidence in five state and federal jurisdictions; the recent U.S. Supreme Court opinions, including ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993), that compel a re-evaluation of polygraph evidence admissibility which must be more sophisticated and less hostile than past evaluations; and the current status of this re-evaluation which has led to the admission of polygraph evidence in a number of federal courts during the last years.

As Professor McCall notes, the law enforcement use of polygraph testing for crime investigation has been widespread for decades. 1996 U. ILL. L. REV. at 379. In private industry, the use of polygraph testing to detect employee theft and to screen job applications was common by the late 1970s. ***Id***. The federal government has greatly expanded its use of polygraph testing for pre-employment screening and other purposes. ***Id***. The National Security Agency and the Central Intelligence Agency also use the polygraph for intelligence and counter-intelligence investigations, including security clearance screening and espionage detection. ***Id***. Wisconsin district attorneys use polygraph evidence to make charging decisions.

Polygraph evidence is not any more or less reliable than other scientific evidence. Professor McCall labels a "false belief[]" that ***Frye v. United States***, 293 F. 1013 (D.C. Cir. 1923), requires denial of any offer of polygraph results for admission into evidence. 1996 U. ILL. L. REV. at 364. He notes that ***Rock v. Arkansas***, 483 U.S. 44 (1987), has been read by a federal appellate court to require that a *per se* denial of polygraph evidence is unconstitutional when invoked in a criminal prosecution to prevent a polygraph examiner from giving exculpatory testimony. 1996 U. ILL. L. REV. at 365 (citing ***United States v. Williams***, 39 M.J. 555 (A.C.M.R. 1994), *vacated*, 43 M.J. 348 (Armed Forces Cir. 1995), *cert. denied*, 116 S. Ct. 925 (1996)); *see* discussion of ***Williams*** in the text accompanying notes 312-17 of Professor McCall's article. ***Williams*** was overruled on a different issue.

Professor McCall also suggests that ***Daubert v. Merrell Dow*** significantly changes the standard for admitting scientific evidence. ***Id***. at 365. Responding to ***Daubert***, lower federal courts, very recently, have begun to reconsider and reject the *per se* inadmissibility rule. ***Id***.

I urge the supreme court to modify the ***Dean*** *per se* rule and permit the admission of polygraph examination results at the discretion of the trial court.

I am authorized to state that Judge Gartzke, the author of the lead opinion, joins in this concurrence.