

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 14, 2012

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2011AP1232-CR

Cir. Ct. No. 2009CF824

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS J. METZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: WILLIAM H. CARVER and JOHN A. JORGENSEN, Judges.¹ *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¹ The Honorable William H. Carver presided over trial and entered the judgment of conviction. The Honorable John A. Jorgensen entered the order denying the defendant's postconviction motion.

¶1 PER CURIAM. Thomas J. Metz appeals from a judgment of conviction and an order denying his motion for postconviction relief. He contends that a new trial should be ordered in the interest of justice or based on ineffective assistance of counsel because the prosecutor's questioning and argument at trial misleadingly implied that Metz had not expressly denied the accusation against him until he testified. Metz further contends that the prosecutor's questioning of a police officer at trial impermissibly invaded the province of the jury by eliciting the officer's opinion of what she thought of Metz's response to the accusation. We reject both of these claims and affirm the judgment and order.

¶2 Metz was convicted following a jury trial of second-degree sexual assault of a child contrary to WIS. STAT. § 948.02(2) (2009-10).² The charge stemmed from an allegation that Metz rubbed the vagina of his cousin's eleven-year-old daughter, Nikita J., while staying at their house overnight. After sentencing, Metz filed a motion for postconviction relief, requesting a new trial and some sentence credit. The circuit court denied the request for a new trial, but granted the sentence credit. This appeal follows.

¶3 Metz first contends that a new trial should be ordered in the interest of justice or based on ineffective assistance of counsel because the prosecutor's questioning and argument at trial misleadingly implied that Metz had not expressly denied the accusation against him until he testified. According to Metz, the prosecutor knew or should have known that Metz had denied any wrongdoing when initially questioned by his probation agent prior to his interview with

² All references to the Wisconsin Statutes are to the 2009-10 version.

police.³ Thus, Metz believes that the prosecutor violated this court’s holding in *State v. Weiss*, 2008 WI App 72, ¶15, 312 Wis. 2d 382, 752 N.W.2d 372, that “[p]rosecutors may not ask jurors to draw inferences that they know or should know are not true.”

¶4 At trial, the prosecutor attacked Metz’s credibility by comparing his clear denials at trial with his less-than-adamant denials to police.

¶5 In her opening statement, the prosecutor told the jurors to pay attention to what Metz told police:

And when the police talked to Mr. Metz about the allegation, the officer asked him directly, has your hand ever gone underneath Nikita’s clothing? Instead of saying absolutely not, no, no way, Mr. Metz says, I don’t think so. She’s old enough that I wouldn’t have to change her. That’s what he says.

¶6 The prosecutor then presented the testimony of Officer Kari Pettit, who had questioned Metz concerning Nikita’s allegation. Pettit testified that she asked Metz if he had any improper contact with Nikita or one of her sisters, and Metz “said that he didn’t think so, but then he stated that if he did, it would have been an accident from giving a hug or some accidental touching against one of the kids.” Pettit also asked Metz “if he ever had his hands underneath Nikita’s clothes.” Pettit recounted Metz’s response as follows:

³ Metz’s prior statement to his probation officer declared in relevant part:

On 8/25/09 I get [sic] not crawl in bed with Nikita. I did not touch her in any inappropriate way. I did not touch her in 2005 or 2006 in any inappropriate way sexually. I have no idea why she is making these allegations of sexual assault. I do not know where this is coming from.

[Pettit]: He said I don't think so. She's old enough I didn't have to change her.

[Prosecutor]: Okay. And those were his exact words?

[Pettit]: Yes.

[Prosecutor]: How do you know that?

[Pettit]: Because I had written it down, and I put it in quotations, and I wouldn't put it in quotations if I didn't know it was exact.

[Prosecutor]: What did you think of that response?

[Pettit]: I thought it was a little odd since she was 11.

[Prosecutor]: Okay. Did he ever admit to having any sexual contact with Nikita?

[Pettit]: No.

[Prosecutor]: Did he ever adamantly deny it?

[Pettit]: No.

[Prosecutor]: Did he ever say, you don't know what you're talking about, you're wrong, I would never do that?

[Pettit]: No.

¶7 During his direct examination, Metz denied having any inappropriate sexual contact with Nikita. On cross-examination, the prosecutor contrasted Metz's clear denials with the less-than-adamant statements he made to Pettit.

[Prosecutor]: Mr. Metz, you were pretty sure today in the answers to your questions. When your attorney asked whether or not you did anything inappropriate with your cousin, you said no, correct?

[Metz]: Correct.

[Prosecutor]: But that's not what you told the officer when she came and spoke with you, correct?

[Metz]: Correct.

[Prosecutor]: You told the officer, I don't think so, correct?

[Metz]: That's correct.

[Prosecutor]: Said she's old enough I didn't have to change her, correct?

[Metz]: Mm-hm.

[Prosecutor]: Nikita was 11 years old at this time, correct?

[Metz]: Correct.

[Prosecutor]: So you never adamantly denied like you did today in court to the officer that you did this, did you?

[Metz]: Not adamantly, no.

...

[Prosecutor]: When Officer Pettit asked you directly if you had touched any of the girls inappropriately. You indicated not that I meant to, correct?

[Metz]: Correct.

[Prosecutor]: And today on the stand you said no.

[Metz]: Correct.

[Prosecutor]: Absolutely not.

[Metz]: Correct.

[Prosecutor]: And that's not what you said to the officer[] that day.

[Metz]: No.

[Prosecutor]: And you knew why Officer Pettit was there to talk to you, correct?

[Metz]: Correct.

[Prosecutor]: You knew that ahead of time?

[Metz]: Correct.

¶8 In her closing argument, the prosecutor continued to compare Metz's clear denials at trial with the less-than-adamant denials he made to Pettit:

You know that someone is alleged of having committed a sexual assault. You know that an officer is coming to talk to you about that assault. You have had time to think about that. The officer asks you, did your hand ever touch Nikita under her underwear? And instead of saying no, absolutely not, I would never do that, what do you say? You say, I don't think so. She's old enough that I don't have to change her.

That's one side of Thomas Metz. The one who wasn't performing that day. Then you get Thomas Metz today on the stand, a man who turns to the jury and says no, absolutely not. I did not do that. Was he that adamant when these allegations got brought forth? No.

The judge talked to you about common sense. Use your common sense. If you were accused of something you didn't do, would you not adamantly deny it? No, I didn't do that. I would never do that. I couldn't do that. I love that girl. That's not what happened. That's not what happened that day.

¶9 The prosecutor returned to this subject a short time later at the close of her initial argument.

But the defendant has everything to gain today by getting on the stand and telling you this didn't happen.

But when he was asked the first time, when he was confronted with allegations that he had sexually assaulted a child, he didn't say—he even admitted, I didn't adamantly deny it. I didn't say I didn't do it. I said I don't think so. Does that sound like someone who's innocent? No. It doesn't.

We talk about credibility. This is an individual who today has everything to gain by getting on the stand and denying what happened. That girl has nothing to gain.

¶10 Finally, in rebuttal, the prosecutor revisited this subject once more. After recounting the allegation Pettit had communicated to Metz, the prosecutor observed:

And what was his response? I don't think so. She's old enough I didn't have to change her.

Now, [defense counsel] talked about how this was, oh, he was thinking about when he used to change her diapers when she was little. He testified he changed the two girls' diapers but never hers. There would be no reason to confuse that. The reason he said that was because he didn't know how to react even though he knew why she was there. He didn't say no, I never would have done this. I love this girl. I never would have touched her like that. He said, I don't think so, she's old enough that I didn't have to change her. Use your common sense. If you knew an officer was coming to talk to you about a sexual assault investigation and the officer asked a very pointed question, did you touch her underneath her clothing, what would you say? Absolutely not. I didn't do this. I couldn't have done this. You would not say, I don't think so.

¶11 Citing these passages, Metz asserts that the prosecutor invited jurors to falsely conclude that he had not denied the accusation against him until he testified at trial. Accordingly, he maintains that this appeal is governed by *Weiss*.

¶12 In *Weiss*, the prosecutor told the jury during closing argument and again during rebuttal that the first time the defendant denied the accusation against him was at trial, even though the prosecutor knew that the defendant had denied his guilt to police officers from the very beginning, on two separate occasions. *Weiss*, 312 Wis. 2d 382, ¶¶5, 7, 9. We observed: “[The prosecutor] knew better. She had the two police reports saying otherwise Prosecutors may not ask jurors to draw inferences that they know or should know are not true.” *Id.*, ¶15. Although trial counsel did not object to this statement, after reviewing the complete record, we nonetheless reversed in the interest of justice. *Id.*, ¶¶16-17.

¶13 We disagree with Metz that this appeal is governed by *Weiss*. Viewed in isolation, some of the prosecutor's questions and arguments here may appear to incorrectly suggest that Pettit was the first person to interview Metz

about the sexual assault and that Metz never adamantly denied the allegation, including in other interviews.⁴ However, when read in context, it is evident that the prosecutor was really suggesting only that Metz failed to adamantly deny the allegation in his interview with Pettit. The prosecutor then compared Metz's clear denials at trial with his less-than-adamant denials to Pettit in an effort to undermine Metz's credibility. Thus, unlike the prosecutor in *Weiss*, the prosecutor here did not engage in misrepresentation.

¶14 Because we do not believe that the prosecutor's questions and arguments violated *Weiss*, we decline to grant Metz a new trial in the interest of justice. See WIS. STAT. § 752.35. The power of discretionary reversal is formidable and should be exercised sparingly and with great caution. *State v. Williams*, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719. For the reasons already discussed, we are not convinced that it should be applied here.

¶15 We also decline to grant Metz a new trial based on ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that such performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We affirm the circuit court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the circuit court. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

⁴ The most troublesome statements made by the prosecutor came from closing argument. There, the prosecutor argued: "Was he that adamant when these allegations got brought forth? No." The prosecutor also argued: "But when he [was] asked the first time, when he was confronted with the allegations that he sexually assaulted a child, he didn't say—he even admitted, I didn't adamantly deny it."

¶16 Because no *Weiss* violation occurred here, trial counsel was not deficient for failing to object on that ground. See *State v. Wheat*, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441. Furthermore, trial counsel was not deficient for failing to introduce Metz’s prior statement to his probation agent. In that statement, Metz referenced other sexual assaults, stating, “I did not touch [Nikita] in 2005 or 2006 in any inappropriate way sexually.” Thus, the statement contained very damaging inferences that Metz had been accused of sexual assault before with the same victim and counsel had an objectively reasonable reason for not introducing it. For these reasons, we see no basis for Metz’s claim of ineffective assistance of counsel.

¶17 Metz next contends that the prosecutor’s questioning of a police officer at trial impermissibly invaded the province of the jury by eliciting the officer’s opinion of what she thought of Metz’s response to the accusation. Specifically, Metz points to Pettit’s testimony that she thought his response that he did not “think” he ever had his hands under Nikita’s clothes because “she’s old enough I didn’t have to change her” was “a little odd since [Nikita] was 11.” Again, because trial counsel did not object to this statement, Metz seeks relief either in the interest of justice or based upon ineffective assistance of counsel.

¶18 In Wisconsin, a witness may not testify “that another mentally and physically competent witness is telling the truth.” *State v. Jensen*, 147 Wis. 2d 240, 249, 432 N.W.2d 913 (1988) (quoting *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984)). Whether a witness has improperly testified as to the credibility of another witness is a question of law we review without deference to the circuit court. *State v. Huntington*, 216 Wis. 2d 671, 697, 575 N.W.2d 268 (1998).

¶19 Reviewing the prosecutor’s questioning here, we are satisfied that she did not impermissibly invade the province of the jury by eliciting Pettit’s opinion of what she thought of Metz’s response to the accusation. To begin, the fact that Pettit found Metz’s diaper-changing comment odd does not say anything about Metz’s truthfulness or provide a conclusion about the comment that the jurors would not have reached anyway. Moreover, during her testimony, Pettit acknowledged that she had “no real way of knowing if Mr. Metz was telling [her] the truth.” For these reasons, we decline to grant Metz relief on this claim.

By the Court.—Judgment and order affirmed.

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

