COURT OF APPEALS
DECISION
DATED AND FILED

May 7, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1257-CR **Cir. Ct. No. 2010CF850**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEO D. MATSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Leo Matson appeals a judgment convicting him of sexually assaulting his girlfriend's eight-year-old daughter. He also appeals an order denying his postconviction motion in which he alleged ineffective assistance of trial counsel. Matson contends his counsel was ineffective by failing to object

to the admission of a DVD of a social worker's interview with the victim and for failing to argue to the jury that the victim's statements were not credible because her answers to preliminary questions demonstrated an inability to tell the difference between truth and lies. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 The victim told her mother that Matson touched her "private parts" with his hands at a playground. Later that night, the victim told a police officer Matson touched her legs, but just on the outside, and "on my skin on the side." She also said Matson touched her "bottom" and kissed her on the lips.

¶3 Later that night, the victim was examined by a sexual assault nurse examiner. The victim told the nurse Matson kissed her and touched her buttocks, breasts, inner thigh and groin over her clothing.

¶4 Five days later, a social worker interviewed the victim and recorded the interview on a DVD. The social worker asked the victim a series of questions designed to demonstrate whether she knew the difference between truth and lies. When asked whether the social worker's statement, "I am a fireman" was the truth, the victim responded that it was true. After being told not to guess about answers or make something up, when asked what the social worker had for breakfast, the victim responded "eggs." The victim later acknowledged she did not know what the social worker had for breakfast. However, she said she understood that telling lies would result in punishment and telling the truth was important.

¶5 At trial, the victim was unable to respond to almost any questions. However, she confirmed that the statements made to the social worker on the DVD were accurate. Those statements repeated her allegations that Matson had kissed her and touched her breasts, buttocks and groin with his hand. Unlike her previous statements, however, she testified that the touching had been underneath her clothing.

¶6 Matson's trial counsel argued to the jury that the victim's allegations were inconsistent, but did not specifically direct the jury's attention to the victim's inability to distinguish truth from lies. At the postconviction hearing, Matson's trial counsel said he was not sure whether he could have had the DVD excluded from evidence, but explained the DVD was "somewhat helpful" to the defense in that it showed "each time she gave a story, it was different." He also explained why he did not argue that the DVD showed the victim's difficulty understanding truth and lies, explaining that his focus was on the lack of Matson's DNA on the victim's clothing and the inconsistencies in her testimony. The circuit court denied the postconviction motion, concluding there was no basis for excluding the DVD and counsel had a reasonable strategy for allowing it to be played to the jury. The court further concluded Matson was not prejudiced by his counsel's closing argument because arguments are not evidence and the jury was instructed not to decide the case on the closing arguments.

DISCUSSION

¶7 Whether a defendant was deprived of his constitutional right to effective assistance of counsel presents a mixed question of fact and law. The circuit court's findings of historical or evidentiary fact are upheld unless they are clearly erroneous. Whether counsel performed deficiently and whether the

defendant proved prejudice to the defense are decided de novo. ***State v. Leighton***, 2000 WI App 156, ¶33, 237 Wis. 2d 709, 616 N.W.2d 126.

¶8 To establish ineffective assistance of counsel, a defendant must show both deficient performance and prejudice to the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). This court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and the defendant must overcome the presumption that counsel's challenged action might be considered sound trial strategy. ***Id.*** at 689. Strategic choices made after thorough investigation of the law and facts are virtually unchallengeable. ***Id.*** at 690. To establish prejudice, the defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one that undermines our confidence in the outcome. ***Id.*** at 694.

¶9 We need not determine whether the DVD was admissible under WIS. STAT. § 906.04 (2011-12)[1] because we conclude, regardless of its admissibility, Matson's trial counsel made a reasonable strategic decision not to object to its admission into evidence. Trial counsel reviewed the victim's statements before trial, noted significant differences in the versions of events and reasonably concluded the DVD interview supported the defense theory that the victim fabricated the allegations. Matson contends his counsel's strategy was not reasonable because the DVD was extremely damaging in that it was the only statement in which the victim alleged Matson touched her under her clothing. That was precisely the point of the defense strategy. Therefore, counsel's

[1] All references to the Wisconsin Statutes are to the 2011-12 version.

conclusion that introduction of the DVD statement would be favorable to the defense constituted a reasonable trial strategy.[2]

¶10 Matson also failed to establish prejudice from introduction of the DVD. The jury heard evidence from the victim's mother that the child was behaving normally when she left their apartment with Matson, but returned very upset and immediately reported that Matson touched her private parts. The jury heard testimony from the initial investigating officer and the SANE nurse that the victim told them Matson touched her breasts and buttocks, kissed her on the lips and asked whether she would be his girlfriend. The jury also watched a police interview with Matson in which he initially said he kissed the child on the cheek and gave her a bear hug to lift her on to a swing set. He later acknowledged kissing her on the lips and rubbing her belly when she complained of a stomach ache. He first denied touching her anywhere in her vaginal area, but later said it was "very possible" his hand could have accidentally slipped and touched her there. Soon after that statement, he recalled his hand did slip and touch her there at which point he claimed he immediately pulled his hand away and apologized. He told the officer the victim was infatuated with him and made sexually suggestive advances toward him. In light of this evidence, introduction of the DVD, even if erroneous, does not undermine our confidence in the outcome.

[2] In his brief on appeal, the appellant provides a partial quote of the circuit court suggesting that "if it is part of a strategy, if the defense says it's strategy, then no further analysis is necessary." The quoted statement omits the rest of the court's sentence "because if it's rational and it's part of a strategy, every lawyer's entitled to have a strategy." By omitting the part of the sentence referring to the rationality of counsel's decision, the appellant's brief substantially misrepresents the circuit court's decision.

¶11 We also conclude Matson has not demonstrated any prejudice from his counsel's closing argument. Matson argues "it is doubtful that the jurors properly assessed [the victim's] credibility in light of her statements in the DVD regarding her ability to discern the truth" and "but for the failure of counsel to forcefully argue that her DVD statements were unreliable, there is a reasonable probability that the jury would have placed less value on them." We disagree. There is no reason to believe the significance of the victim's inability to tell truth from lies was over the jurors' heads or lost on them. The jury did not need to be told that an eight-year-old's initial confusion about the concepts of truth and falsity might factor into its credibility determination.

By the Court.—Judgment and order affirmed.

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