COURT OF APPEALS
DECISION
DATED AND FILED

July 9, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1079-CR **Cir. Ct. No. 2009CF902**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROY H. BEALS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BARBARA A. KLUKA and JASON A. ROSSELL, Judges.[1] *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

[1] The Honorable Barbara A. Kluka entered the judgment of conviction. The Honorable Jason A. Rossell denied Beals' postconviction motion.

¶1 CURLEY, P.J. Roy H. Beals appeals the judgment convicting him of repeated first-degree sexual assault of the same child, contrary to WIS. STAT. § 948.025(1) (2005-06).[2] Beals, who was convicted of sexually assaulting his ex-wife's daughter in 2005 when she was eight years old, raises four issues on appeal. Beals argues that: (1) trial counsel was ineffective for failing to object to the admission of videotaped testimony from the victim recorded in 2007; (2) the admission of the 2007 video warrants a new trial in the interest of justice; (3) the trial court erred in allowing "other acts" evidence from the 2007 video, as well as from videotaped testimony from the victim recorded in 2009; and (4) the trial court erroneously exercised its discretion pursuant to WIS. STAT. § 908.08 in admitting the 2009 video. We affirm.

BACKGROUND

Nature of the Case

¶2 In August 2009, Beals was charged with sexually assaulting S.D., his ex-wife's daughter. S.D. alleged that the assaults occurred between May and August 2005, when she was about eight years old and in third grade. Beals pled not guilty, and his case went before a jury.

¶3 At trial, S.D. testified about her abusive home life with Beals and the assaults in detail. S.D. explained that when her mother married Beals—which occurred when she was about four years old—she was initially happy because she "thought of him as a father figure." But then Beals "turned into a monster,"

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

becoming "very abusive." For example, Beals hit S.D.'s younger brother with a TV remote so hard that there were marks on his back, and he hit S.D.'s feet with gardening sticks with such force that S.D. had difficulty walking. S.D. explained that this continued abuse prevented her from telling anyone about the instances when Beals sexually assaulted her. S.D. testified that the sexual assaults occurred when she was in the third grade. S.D. testified that Beals would ask her to sit on his lap, at which time she would feel something against her lower back that was not Beals' hands. She thought that this "something" was Beals' "private part." She further testified that Beals touched other parts of her body as well. S.D. testified that at the time she felt uncomfortable and confused about why Beals would do something like that. She did not tell him to stop and did not tell anyone what had happened, however, because she was scared of Beals. S.D. explained that even after she and her brother had lived for a while with her grandmother in Belize, and even after her mother had divorced Beals, she did not believe that Beals was truly gone from her life. This was because S.D.'s mother had attempted to leave Beals before, and Beals had found them. S.D. testified that she finally decided to tell her aunt about the assaults in 2009, which was a few years after she had last lived with Beals. S.D. explained that she trusted her aunt and felt less embarrassed talking to her about the assaults because her aunt had revealed that she too had been sexually abused as a child.[3]

[3] This specific testimony—S.D.'s explaining that she trusted her aunt and felt less embarrassed talking to her about the assaults because her aunt had revealed that she too had been sexually abused as a child—was introduced via videotaped testimony from a 2009 interview.

¶4 The State also presented testimony from several other witnesses, including S.D.'s father, grandmother, aunt, and mother, as well as from Kenosha police officer Gregory Munnelly.

¶5 S.D.'s father, Raul D.—who had contact with S.D. in 2006 when he took S.D. and her brother to Belize to live with their maternal grandmother—testified that his daughter appeared "troubled." Raul D. explained that by "troubled," he meant that S.D. did not speak to anybody and kept to herself.

¶6 S.D.'s maternal grandmother, Neria P.—with whom S.D. and her brother lived in Belize for a few months in 2006 and for about a year in 2007—testified that when S.D. moved in with her, S.D. did not "look[] right" to her. "She looked scared. She didn't speak. It was a little girl that didn't smile." Neria P. testified that S.D. would lock herself in her room, and when asked, "never wanted to tell [her] anything." Neria P. testified that over the course of the year S.D. eventually began speaking more, and told Neria P. that Beals was bothering her and hitting her. Neria P. further testified that she then told S.D.'s mother that she would not return the children to her unless she separated from Beals.

¶7 S.D.'s maternal aunt, Michelle P., testified that S.D. told her about the assaults. Michelle P. was very close with S.D. and S.D's mother; S.D.'s mother had moved in with Michelle P. in 2006 after divorcing Beals, and Michelle P. spent a considerable amount of time with S.D. after S.D. moved back from Belize. Michelle P. testified that in August 2009, while cooking with S.D. and telling her about her own experiences being sexually abused as a child, S.D. "broke down," began gasping and crying, and told her that Beals had abused her. Michelle P. then called S.D.'s mother to tell her what S.D. had told her.

¶8 S.D.'s mother testified that, upon hearing about the assaults from Michelle P., she took S.D. to the police department to file a report. She testified that initially she got angry with S.D. for not telling her directly, and asked S.D. why she did not tell her about the assaults earlier. S.D. began crying and said that she had tried to tell her previously, but could not.

¶9 Kenosha police officer Munnelly testified regarding the report he received from S.D.'s mother and his interview with S.D. Munnelly testified that S.D. was "very upset," "crying," "[a]ppeared to be very scared," and was "clutching onto her mother" when she told him that Beals had touched her private areas over and under her clothes. Munnelly testified that S.D. had told him that the touching began when she was in the third grade.

¶10 Beals and several of his family members testified as well. Beals testified that there were "numerous, numerous times" when he was alone with the children, but denied sexually assaulting S.D.

Video Testimony, Objections, and Subsequent Rulings

¶11 In addition to the live witness testimony, two videos were introduced at trial.[4] The first video recorded an interview that the Houston Child Advocacy Center had with S.D. in 2007. At the time, S.D. and her brother were staying with Raul D. in Houston, as they had just moved back from Belize. While the children were in Belize, S.D.'s brother said that Beals had put his penis in his mouth. In Houston, both S.D. and her brother were interviewed at the Child Advocacy

[4] The videos are in the record and this court has reviewed them. However, when referring to the videos, we actually refer to the transcripts of the videos that are in the record, as this is what the parties refer to and as the accuracy of the transcripts is not disputed.

Center regarding possible sexual contact with Beals. The second video recorded an interview that the Child Advocacy Center at the Children's Hospital of Wisconsin in Kenosha had with S.D. in 2009, about a week before the complaint charging Beals with sexual assault was filed.

The 2007 Videotape

¶12 At a pre-trial motion hearing, the parties made various arguments regarding the 2007 video. Beals moved the trial court to allow him to play portions of the 2007 tape as needed for impeachment. The State did not object, but instead informed the court that the State may use parts of the tape. The court responded that there would be no problem with the video being played so long as a proper foundation was laid. At this hearing, the court also addressed the State's request to introduce other acts evidence. The State sought to introduce Beals' other acts of violence against the family as well as sexual assault against S.D.'s younger brother. Beals objected. The court concluded that it could not rule on the State's motion until it heard the witnesses testify at trial.

¶13 At trial, after laying the proper foundation, the State played the 2007 tape. The first portion of the 2007 tape established S.D.'s age, her grade in school, her understanding of the importance of telling the truth, and her relationship to Beals. When the interviewer asked S.D. if she knew why she was being interviewed, S.D. stated,

> I am here today because, um, when I was living with my mom and she was living with her husband he would um, he would scold us, he would knock us. Since he was my stepfather he would tell me I had to call him dad, but I didn't feel comfortable calling him dad. But if I did call him by his first name he would slap me or knock me or something.

S.D. continued to describe how Beals was physically aggressive toward her, her mom and her brother. Then, when asked, S.D. told the interviewer which parts of her body are private. The following exchange then occurred:

> Q. Okay. And what's another part that no one should touch?
>
> A. Um, I'm not sure. I do know something what he did to my brother.
>
> Q. Okay, hold on one second. Is there a part behind you that no one should touch?
>
> A. Yes.

S.D. then told the interviewer about a time when Beals pushed her mother into a wall.

¶14 At approximately the nine-minute and fifty second mark, the 2007 tape was stopped and the jury was dismissed from the courtroom. Beals moved for a mistrial, arguing that the State had impermissibly introduced other acts evidence of violence by Beals toward S.D., her younger brother, and her mother. He also argued that the video was unfairly prejudicial, as portions of it showed S.D. crying as she related what Beals had done to her and her family. The court acknowledged that only evidence of what Beals did to S.D. was admissible, and that it had not yet ruled on the other acts evidence. The court then instructed the jury to disregard all of the video that it had just seen and heard:

> You are to totally disregard everything you have just heard and seen on this particular tape. It is not evidence in the case. You are not to consider it as evidence in the case. You are going to see a portion of the tape now which you may consider as evidence, and what you're going to see in the next couple of minutes is admitted as evidence in this case.

¶15 The State then proceeded to play one minute and approximately twenty-seven seconds of the 2007 tape in which S.D. answered specific questions about whether anyone has touched her inappropriately. At Beals' postconviction hearing, the parties agreed that this is the portion of the 2007 tape that was played:

> Q. ….So now I'm going to ask you some questions about your body parts, okay?
>
> A. Mm. Hmm.
>
> ….
>
> Q. Has someone ever touched you on your private part or your bottom?
>
> A. I'm not sure because sometimes I don't remember it and sometimes I do. I know one time, um, I think I was sleeping and I woke up, and I just saw him next to my bed. I didn't know if he had did anything to me. My mom asked me, she said, [S.D], are you sure he didn't do nothing to you at night while you're sleeping? And I said I don't know, mom. And, I was just afraid for [sic] him because I didn't know if he would do things to me while I'm sleeping. ([S.D.] continues crying)[.]
>
> Q. Okay. Okay. Um, has someone tried to touch your body that you know of?
>
> A. Um, ([S.D.] pauses) one time he was staring at my legs and he said, did you shave? And then I said no. And then I told my mom, he was looking at my legs. And my mom said why was he looking at your legs? I said I don't know. But, um, I try to stay away from him. ([S.D.] starts crying). I don't go close to him. Because I knew he was about to be bad, but I don't go by him at all because I didn't know if he did anything. (Crying continues) Sometimes, like, he was staring at me or staring at my brother, and lots of things. And I would stay as close to my mom as possible as I could. I didn't stay around him. (Crying continues). I'm not sure, though, because I try not to remember things.
>
> Q. Okay, has someone made you touch them on their body?
>
> A. Um, ([S.D.] pauses) no. One time, um, one time. I think. I think um, no.

> Q. Okay. Has someone put their mouth on your body?
>
> A. Like what do you mean?
>
> Q. Just anywhere.
>
> A. Like what he did to my brother?
>
> Q. Or just anything.
>
> A. Um, ([S.D.] pauses) I don't remember. And, the only person that would see me, in my, without a shirt or anything is my mom or my grandmother.
>
> Q. Okay. Has someone made you put your mouth on their body?
>
> A. No.

The 2009 Videotape

¶16 Prior to trial, the State moved pursuant to WIS. STAT. § 908.08 to introduce the 2009 interview of S.D. Specifically, the State argued admission was appropriate because of S.D.'s young age, the events at issue constituted a sexual assault by her then-stepfather, S.D. had been emotional and tearful during other interviews, and "[t]he admission of the videotape[d] statement would reduce the mental and emotional strain of testifying and reduce the number of times [she] will be required to testify."

¶17 The court decided to allow the admission of the videotape. Specifically, the court stated:

> Okay. This is – I will find that some of these factors don't apply. But it does appear under [WIS. STAT. § 908.08] subsection four, first of all, that this is a child who is capable of understanding the significance of what she is discussing here and able to verbalize about them. There's no specific information about her general physical or mental health, but I certainly have no information that there is – there are limitations in that regard.

> These events that she described certainly do reflect criminal conduct against her. And the alleged perpetrator here is a stepfather. So, there is a close relationship.
>
> There are allegations – I don't know if they're going to come into the trial – but allegations with respect to the child's perceptions of other relationships between Mr. Beals, this child's brother, and this child's father.
>
> She doesn't blame herself for the events. So, Subsection G does not particularly … apply.
>
> I don't know that the child has manifested symptoms associated with post[-]traumatic stress based on what I see in that interview. And whether the admission would reduce the mental or emotional strain of testifying. It's a little bit different when the child is over 12 already. So, I assume she's going to be present and called to testify at the trial and subject to cross-examination.
>
> So, on balance looking at those factors I do conclude that the interests of justice would warrant the admission of those portions of the CAC tape which are not otherwise barred by some other evidentiary ruling or statute.

¶18 On the first day of trial, the State told the court that a portion of the videotape that the parties had agreed to redact was not in fact redacted:

> When I was watching [S.D.'s] tape from 2009, after the edits were made I realized that I had missed one of the edits we had agreed upon….
>
> I spoke to [Beals' attorney]. I told him I wrote down the exact seconds that it occurs and I can hit the mute button. I believe that's acceptable to [him].

¶19 Beals' attorney agreed that muting the 2009 tape at the spot that should have been redacted was satisfactory. A short time later, the State played the 2009 video for the jury without objection.[5]

[5] At Beals' postconviction hearing, trial counsel testified that he recalled the appropriate portion of the tape being muted at trial.

¶20 The 2009 tape was also played for the jury during deliberations. It is unknown whether the appropriate parts were muted at the time.

Verdict and Postconviction Proceedings

¶21 The jury ultimately found Beals guilty, and he was sentenced. Beals then filed a postconviction motion, which the trial court denied. Beals now appeals.

ANALYSIS

¶22 Beals raises four issues on appeal. He argues that: (1) trial counsel was ineffective for failing to object to the admission of the 2007 video; (2) the admission of the 2007 video warrants a new trial in the interest of justice; (3) the trial court erred in allowing "other acts" evidence; and (4) the trial court erroneously exercised its discretion in admitting the 2009 video. We discuss each issue in turn.

(1) Trial counsel was not ineffective for failing to object to the admission of the 2007 video.

¶23 Beals' first argument is that trial counsel was ineffective for failing to object to the admission of the 2007 video. According to Beals, trial counsel was ineffective for several reasons, which can be distilled to the following: (a) trial counsel failed to object to the "other acts" evidence elicited by the video until the video had played for nearly ten minutes, which was, Beals argues, far too late; (b) trial counsel failed to object to testimony in the second portion of the video where, when asked if anyone had "put their mouth on [her] body," S.D. responded, "[l]ike what he did to my brother?"; and (c) trial counsel failed to object to the 2007 video in its entirety, as it was unfairly prejudicial to the defense.

¶24 To succeed on his ineffective assistance of counsel claim, Beals must show that trial counsel's performance was deficient, and that this deficient performance was prejudicial. *See* ***State v. Mayo***, 2007 WI 78, ¶33, 301 Wis. 2d 642, 734 N.W.2d 115; *see also* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, Beals must show facts from which a court could conclude that trial counsel's representation was below objective standards of reasonableness. *See* ***State v. Wesley***, 2009 WI App 118, ¶23, 321 Wis. 2d 151, 772 N.W.2d 232. To demonstrate prejudice, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *See* ***Strickland***, 466 U.S. at 694. If Beals fails to make a sufficient showing on one ***Strickland*** prong, we need not address the other. *See* ***id.*** at 697.

¶25 The issues of performance and prejudice present mixed questions of fact and law. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, but the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently, *see* ***id.*** at 236-37.

¶26 Turning to Beals' arguments, we first conclude, with respect to the first ten minutes of the tape, that there was no prejudice. As noted, after trial counsel objected to this portion of the video, the trial court instructed the jury that it was not evidence and that it should be disregarded. Additionally, in giving closing instructions, the trial court told the jury it could evaluate other acts evidence "only to provide a context" to understand S.D.'s fear of Beals and to show her state of mind, and that it must disregard all evidence that had been struck

from the record. We presume that the jury followed these instructions. *See* ***State v. Adams***, 221 Wis. 2d 1, 12, 584 N.W.2d 695 (Ct. App. 1998).

¶27 We disagree with Beals' contention that we should not presume that the jury followed the instructions in this case because the jury was allowed to consider information from the second portion of the video that was "similar" to the first. The first portion of the video—the portion the jury was told not to consider—contained numerous instances of Beals' violence against the entire family. The second portion, in contrast, focused almost wholly on whether Beals had had any sexual contact with S.D.:

> Q. Has someone ever touched you on your private part or your bottom?
>
> A. I'm not sure because sometimes I don't remember it and sometimes I do. I know one time, um, I think I was sleeping and I woke up, and I just saw him next to my bed. I didn't know if he had did anything to me. My mom asked me, she said, [S.D], are you sure he didn't do nothing to you at night while you're sleeping? And I said I don't know, mom. And, I was just afraid for [sic] him because I didn't know if he would do things to me while I'm sleeping. ([S.D.] continues crying)[.]
>
> Q. Okay. Okay. Um, has someone tried to touch your body that you know of?
>
> A. Um, ([S.D.] pauses) one time he was staring at my legs and he said, did you shave? And then I said no. And then I told my mom, he was looking at my legs. And my mom said why was he looking at your legs? I said I don't know. But, um, I try to stay away from him. ([S.D.] starts crying). I don't go close to him. Because I knew he was about to be bad, but I don't go by him at all because I didn't know if he did anything. (Crying continues) Sometimes, like, he was staring at me or staring at my brother, and lots of things. And I would stay as close to my mom as possible as I could. I didn't stay around him. (Crying continues). I'm not sure, though, because I try not to remember things.

> Q. Okay, has someone made you touch them on their body?
>
> A. Um, ([S.D.] pauses) no. One time, um, one time. I think. I think um, no.
>
> Q. Okay. Has someone put their mouth on your body?
>
> A. Like what do you mean?
>
> Q. Just anywhere.
>
> A. Like what he did to my brother?
>
> Q. Or just anything.
>
> A. Um, ([S.D.] pauses) I don't remember. And, the only person that would see me, in my, without a shirt or anything is my mom or my grandmother.
>
> Q. Okay. Has someone made you put your mouth on their body?
>
> A. No.

¶28 Therefore, because the two portions of the tape did not contain similar subject matter, we cannot conclude that the jury was incapable of discerning between the portion of the video it was instructed to disregard and the admissible portion. There is no indication that the jury did not follow the trial court's instructions, and consequently, no prejudice. *See* ***Strickland***, 466 U.S. at 694, 697.

¶29 We also disagree with Beals' contention that we should not presume that the jury followed the instructions in this case because S.D. was allowed on recall "to testify about the violent acts she witnessed by Mr. Beals" against her, her brother, and her mother, and the jury was therefore confused about what was admissible and what was not. Beals' pointing out that testimony about his pattern of violence against the entire family was later properly admitted to provide a

context for S.D.'s fear and state of mind would seem to undermine his contention that trial counsel erred by not timely objecting to it earlier in the videotape. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 ("Failure to raise an issue of law is not deficient performance if the legal issue is later determined to be without merit.").

¶30 Second, with respect to the second portion of the video—*i.e.*, the portion that the jury was allowed to consider—we conclude that Beals has not shown prejudice. Beals argues that trial counsel was ineffective for failing to object to testimony in the second portion of the video where, when asked if anyone had "put their mouth on [her] body," S.D. responded "[l]ike what he did to my brother?" However, this brief mention of potential acts against S.D.'s brother is *de minimus* when considered in the context of the trial testimony in its entirety. As noted, numerous witnesses testified on the State's behalf at trial. S.D. testified in vivid and disturbing detail regarding not only the sexual assaults, but also the pattern of violence that prevented her from telling anyone for several years. S.D.'s aunt—with whom she had a close relationship—testified that S.D. told her about the assaults, and in keeping with S.D.'s reluctance to share such personal information, explained that S.D. only told her about the assaults after she related what had happened to her as a child. Also, S.D.'s father and grandmother both testified that they noticed that S.D. appeared sad and withdrawn, and that something was "not right" with her. Given the ample testimony supporting the conviction, we cannot say that the omission of S.D.'s brief mention of what Beals "did to [her] brother" on the 2007 tape would have made a difference at trial. *See* ***Strickland***, 466 U.S. at 694. Thus, because Beals cannot show prejudice in this regard, trial counsel was not ineffective. *See* ***id.*** at 697.

¶31 Furthermore, for the aforementioned reasons, we cannot conclude that trial counsel was ineffective for failing to object to the admission of the tape in its entirety. Because trial counsel was not ineffective regarding either the delayed objection to the first part of the video or the testimony about S.D.'s brother, counsel was not ineffective with respect to the entire video. *See*, *e.g.*, ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976) (adding together numerous failed arguments does not create one successful argument).

¶32 Finally, we note that the record does not support Beals' contention that the tape in its entirety was unfairly prejudicial because S.D. cried "throughout most of the [2007] interview." Although the jury was instructed to disregard the first portion of the video, Beals takes issue with both portions of it. Regarding the first part of the video—which, as noted, the jury was instructed to disregard—the transcript does not mention S.D. "getting emotional" until after seven and one-half minutes, and does not mention that S.D. "starts to cry" until about the eight-minute mark. Our review of the videotape is consistent with the notes on the transcript. Given that the first part of the tape played was approximately nine minutes and fifty seconds, S.D. was actually quite composed for most of what the jury saw, and ultimately disregarded, during the first portion of the video. Indeed, it is only after the nine-minute-fifty-second mark—in a part of the tape that was *not* played for the jury—that the transcript mentions that any portion of S.D.'s testimony was "inaudible due to [S.D.] crying." With regard to the second portion of the video, while we agree that S.D. did relay what happened to her and her family with emotion and did in fact cry, we cannot agree with Beals that she was "crying hysterically, making it difficult to hear exactly what she was saying," nor can we agree that the emotion with which S.D. described Beals' behavior toward her made the admission of the video unfairly prejudicial.

¶33 In sum, there is no prejudice with regard to the first part of the 2007 videotape because the jury was instructed to disregard it, and there was no prejudice with regard to the remaining portion of the videotape because the alleged harm was *de minimus* compared with the overwhelming testimony supporting Beals' conviction in this case. Trial counsel was not ineffective with regard to the 2007 videotape.

(2) A new trial in the interest of justice is not warranted.

¶34 Beals additionally argues that the admission of the 2007 video warrants a new trial in the interest of justice. *See* WIS. STAT. § 752.35 (The court of appeals has the discretionary power to reverse a conviction in the interest of justice.); ***State v. Armstrong***, 2005 WI 119, ¶113, 283 Wis. 2d 639, 700 N.W.2d 98. "[A] new trial may be ordered in either of two ways: (1) whenever the real controversy has not been fully tried; or (2) whenever it is probable that justice has for any reason miscarried." ***State v. Hicks***, 202 Wis. 2d 150, 159-60, 549 N.W.2d 435 (1996) (supreme court's power of reversal); § 752.35 (applying principles to court of appeals).

¶35 Beals essentially submits that a new trial is warranted in the interest of justice for the same reasons he claims trial counsel was ineffective. He claims that the testimony about his pattern of violence toward the family clouded the issue of whether he sexually assaulted S.D, and that, therefore, the real controversy was not fully tried.

> [S]ituations in which the controversy may not have been fully tried have arisen in two factually distinct ways: (1) when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case; and (2) when the jury had before it evidence not properly admitted which so clouded

> a crucial issue that it may be fairly said that the real controversy was not fully tried.

Hicks, 202 Wis. 2d at 160.

¶36 For all of the reasons we discussed with respect to his ineffective assistance of counsel claim, we disagree with Beals. This is not an "exceptional case." *See* ***State v. Avery***, 2013 WI 13, ¶38, 345 Wis. 2d 407, 826 N.W.2d 60 ("The power to grant a new trial in the interest of justice is to be exercised 'infrequently and judiciously,'" and should be "exercised only in 'exceptional cases.'") (citations omitted). As noted, the jury had before it testimony from numerous witnesses that supported the conviction. Any background information about the pattern of violence that prevented S.D. from immediately coming forward about Beals' sexual assaults did not cloud the issue in controversy.

(3) The trial court did not err in allowing the alleged "other acts" evidence.

¶37 Beals next argues that the trial court erred in admitting "other acts" evidence at trial. "We apply the erroneous exercise of discretion standard to … evidentiary issues in this case." *See* ***State v. Shomberg***, 2006 WI 9, ¶10, 288 Wis. 2d 1, 709 N.W.2d 370. Our inquiry is "'highly deferential.'" *See* ***id.***, ¶11 (citation omitted). "'The question on appeal is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record.'" *See* ***id.*** (citation omitted); *see also* ***State v. Sullivan***, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998) (outlining the analytical framework used to determine the admissibility of other acts evidence under WIS. STAT. §§ 904.04(2) and 904.03). We uphold evidentiary rulings if we conclude that the trial court "'examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and

reached a conclusion that a reasonable judge could reach.'" ***Westport Ins. Corp. v. Appleton Papers Inc.***, 2010 WI App 86, ¶48, 327 Wis. 2d 120, 787 N.W.2d 894 (citation omitted). If we do determine that the trial court erroneously exercised its discretion in admitting or excluding evidence, we must then "conduct a harmless error analysis to determine whether the error 'affected [Beals'] substantial rights.'" *See* ***Martindale v. Ripp***, 2001 WI 113, ¶30, 246 Wis. 2d 67, 629 N.W.2d 698 (citation omitted). In other words, we must determine whether "'there is a reasonable possibility that the error contributed to the outcome of the case.'" *See* ***Westport Ins. Corp.***, 327 Wis. 2d 120, ¶49 (citations omitted). An error is not harmless if it undermines our confidence in the outcome of the proceeding. *See* ***id.***; *see also* ***Martindale***, 246 Wis. 2d 67, ¶32. Whether an error was harmless presents a question of law that this court reviews *de novo*. ***State v. Ziebart***, 2003 WI App 258, ¶26, 268 Wis. 2d 468, 673 N.W.2d 369.

¶38 Beals points to three specific instances where the trial court erred in admitting evidence, each of which we discuss in turn.

¶39 The first piece of evidence Beals claims was erroneously admitted was S.D.'s testimony during the first portion of the 2007 videotape that, "I do know something that [Beals] did to my brother." As noted, however, this testimony was stricken from the record when the trial court ordered the jury to disregard the first nine minutes and fifty seconds of the 2007 videotape. Therefore, this evidence was not admitted, and we cannot conclude that the trial court erred.

¶40 The second piece of evidence Beals claims was erroneously admitted was S.D.'s testimony during the second portion of the 2007 videotape when, upon being asked if someone put their mouth on her body, she answered "Like what

[Beals] did to my brother?" As noted, not only did trial counsel not object to this testimony, *see* ***State v. Hansbrough***, 2011 WI App 79, ¶25, 334 Wis. 2d 237, 799 N.W.2d 887 ("Failure to make a timely objection to the admissibility of evidence waives that objection."); *see also* WIS. STAT. § 901.03(1)(a), but any undue prejudice arising from the introduction of this testimony was *de minimus* in the context of the entire case, *see* ***Ziebart***, 268 Wis. 2d 468, ¶26. Therefore, the trial court did not err in admitting this testimony.

¶41 The third piece of evidence Beals claims was erroneously admitted was the portion of the 2009 videotape that was supposed to be redacted, but was not. Beals concedes that the portion of the video in question—in which S.D. said that Beals used to make her brother "do certain things," which is why they had to live with their grandmother in Belize and why their mother divorced Beals—was muted at trial. Beals nevertheless contends that the trial court erred because it is unknown whether the appropriate parts were muted when the 2009 was played a second time during jury deliberations. Contrary to Beals' assertions, it is his burden to ensure a complete record, *see* ***State v. Marks***, 2010 WI App 172, ¶20, 330 Wis. 2d 693, 794 N.W.2d 547, and we are required as a matter of law to assume that any missing portion of the record supports his conviction, *see* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993) ("when an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling"). Given that it is unknown whether the jury heard this testimony the second time the video was played, we cannot conclude that the trial court erred. Furthermore, even if the jury had heard the aforementioned testimony, the error would have been harmless. *See* ***Ziebart***, 268 Wis. 2d 468, ¶26.

(4) The trial court properly exercised its discretion in admitting the 2009 video.

¶42 Beals' final argument on appeal is that the trial court erroneously exercised its discretion pursuant to WIS. STAT. § 908.08(3)(a)2. in admitting the 2009 video.

¶43 WISCONSIN STAT. § 908.08 concerns the admission of audiovisual recordings of children's statements at trial. Where, as here, the child is at least twelve years old but under the age of sixteen when trial is held, § 908.08(3)(a)2. requires a trial court to find that the admission of the recording is warranted in the interest of justice before admitting such a recording. In considering whether the recording is warranted in the interest of justice, the court may consider the following factors:

> (a) The child's chronological age, level of development and capacity to comprehend the significance of the events and to verbalize about them.
>
> (b) The child's general physical and mental health.
>
> (c) Whether the events about which the child's statement is made constituted criminal or antisocial conduct against the child or a person with whom the child had a close emotional relationship and, if the conduct constituted a battery or a sexual assault, its duration and the extent of physical or emotional injury thereby caused.
>
> (d) The child's custodial situation and the attitude of other household members to the events about which the child's statement is made and to the underlying proceeding.
>
> (e) The child's familial or emotional relationship to those involved in the underlying proceeding.
>
> (f) The child's behavior at or reaction to previous interviews concerning the events involved.
>
> (g) Whether the child blames himself or herself for the events involved or has ever been told by any person not to disclose them; whether the child's prior reports to associates or authorities of the events have been disbelieved

> or not acted upon; and the child's subjective belief regarding what consequences to himself or herself, or persons with whom the child has a close emotional relationship, will ensue from providing testimony.
>
> (h) Whether the child manifests or has manifested symptoms associated with posttraumatic stress disorder or other mental disorders, including, without limitation, reexperiencing the events, fear of their repetition, withdrawal, regression, guilt, anxiety, stress, nightmares, enuresis, lack of self-esteem, mood changes, compulsive behaviors, school problems, delinquent or antisocial behavior, phobias or changes in interpersonal relationships.
>
> (i) Whether admission of the recording would reduce the mental or emotional strain of testifying or reduce the number of times the child will be required to testify.

See § 908.08(4). Whether a videotaped statement satisfies these criteria is a matter we review for an erroneous exercise of discretion. *See* ***State v. Tarantino***, 157 Wis. 2d 199, 211, 458 N.W.2d 582 (Ct. App. 1990).

¶44 We conclude that the trial court properly exercised its discretion in admitting the 2009 video. As noted, the trial court considered all of the applicable factors listed by the statute:

> Okay. This is – I will find that some of these factors don't apply. But it does appear under subsection four, first of all, that this is a child who is capable of understanding the significance of what she is discussing here and able to verbalize about them. There's no specific information about her general physical or mental health, but I certainly have no information that there is – there are limitations in that regard.
>
> These events that she described certainly do reflect criminal conduct against her. And the alleged perpetrator here is a stepfather. So, there is a close relationship.
>
> There are allegations – I don't know if they're going to come into the trial – but allegations with respect to the child's perceptions of other relationships between Mr. Beals, this child's brother, and this child's father.

> She doesn't blame herself for the events. So, Subsection G does not particularly … apply.
>
> I don't know that the child has manifested symptoms associated with post[-]traumatic stress based on what I see in that interview. And whether the admission would reduce the mental or emotional strain of testifying. It's a little bit different when the child is over 12 already. So, I assume she's going to be present and called to testify at the trial and subject to cross-examination.
>
> So, on balance looking at those factors I do conclude that the interests of justice would warrant the admission of those portions of the CAC tape which are not otherwise barred by some other evidentiary ruling or statute.

¶45 While Beals argues that the trial court "failed to address factors (d) and (e)," it is clear from its ruling that it did consider these factors. The trial court determined that, with regard to the attitude of other family members concerning the events alleged in the videotape, there might be evidence introduced about S.D.'s brother and his relationship with Beals. *See* WIS. STAT. § 908.08(4)(d). The trial court also determined that, with regard to S.D.'s familial or emotional relationship with Beals, that is was a "close relationship" because Beals was her stepfather. *See* § 908.08(4)(e). While Beals may disagree with the trial court's reasoning regarding these particular factors, we do not disturb this reasoning under the scope of our review. *See* ***Tarantino***, 157 Wis. 2d at 211. Similarly, Beals' arguments about S.D.'s cognitive ability and the number of times she testified at trial are mere disagreements with how those factors influenced the trial court's decision. Beals does not argue that the facts found by the trial court are themselves clearly erroneous. *See* ***id.***; *see* WIS. STAT. § 805.17(2) ("Findings of fact shall not be set aside unless clearly erroneous.").

¶46 Therefore, we uphold the trial court's factual findings regarding the statutory factors because they are not clearly erroneous. *See* ***Tarantino***, 157

Wis. 2d at 211; WIS. STAT. § 805.17(2). The trial court's reasoning process is reflected in the record, and shows that the court exercised its discretion in accordance with the proper legal standards and facts of the case. Therefore, we affirm the admissibility of S.D.'s 2009 videotaped statement.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.