OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

May 21, 2025

To:

Hon. Phillip A. Koss
Circuit Court Judge
Electronic Notice

Michele Jacobs
Clerk of Circuit Court
Walworth County Courthouse
Electronic Notice

John D. Flynn
Electronic Notice

Timothy E. DeHart #705792
Jackson Correctional Inst.
P.O. Box 233
Black River Falls, WI 54615-0233

You are hereby notified that the Court has entered the following opinion and order:

2023AP2108-CR State of Wisconsin v. Timothy E. DeHart (L.C. #2021CF172)

Before Neubauer, Grogan, and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Timothy E. DeHart appeals from a judgment of conviction and an order denying postconviction relief, arguing that his trial counsel was ineffective. Based upon our review of the briefs and Record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2023-24).[1] Because DeHart has failed to establish the elements of constitutionally deficient performance of counsel, we affirm.

[1] All references to the Wisconsin Statutes are to the 2023-24 version.

DeHart lived with his fiancée, Helen, her son, Matthew, and her stepsister, Joan.[2] Although Joan was an adult at the time in question, she was cognitively delayed and unable to care for herself; Helen was her guardian. Helen installed a camera in the kitchen to check that Joan was safe while cooking. One day, while she was visiting a relative with her son, Helen looked at the camera feed and saw DeHart "grab [Joan], … put[] his hand on her breast," and then "stick[] his hands down her pants." When Helen confronted him, DeHart admitted to having had Joan perform oral sex on him. Helen had DeHart sign a quit claim deed disclaiming his interest in the house. Helen then called law enforcement, which ultimately led to DeHart being charged with five counts of second-degree sexual assault of a person who suffers from a mental deficiency which renders that person incapable of appraising her conduct.

At trial, Helen testified to the events described above. The State asked her about Joan and their life together, at one point asking whether Joan had previously had any "sort of romantic relationship that [Helen was] aware of." Helen responded in the negative, stating further that "as far as [Joan] ever having romantic relationships, no, she never did have a romantic relationship. She never had sex with anybody. She never had any of that, no." DeHart's counsel did not object. Helen also testified that, during the COVID-19 pandemic, DeHart was a paid caregiver for Joan through a program that supports cognitively disabled people to maximize their independence. He was paid to "make sure [she was] safe, protect [her], watch [her], [and] help her with her daily chores."

[2] In order to protect their confidentiality, consistent with WIS. STAT. RULE 809.19(1)(g), this court refers to the individuals by pseudonyms.

Dr. Michael Kula, a psychologist for the State, testified that Joan's intellectual functioning was "at the extreme low end of the borderline range, just outside of the mildly cognitively impaired range." Kula stated that Joan had a diagnosis of "Intellectual Disability – Mild" and that she performed at about a fourth-grade level on academic tests. When questioned about Joan's "ability to evaluate the significance of her conduct," Kula did not agree that she "does not completely lack" this ability; he explained that her "discernment … drops significantly" in situations with more complex stimuli and social contexts and that "she also has a tendency towards impulsivity."

Joan also testified. She appeared to be nervous and shy. Although not reflected in the trial transcript, she held a stuffed animal during questioning. She testified that DeHart would kiss her on the mouth, touch her "butt," "boob," and "crotch," and have her "[s]uck on" his penis. She also said that he put his "private part" in "[her] private part" one time.

DeHart testified in his defense. He admitted that he knew Joan has "some form of disability" but disputed that "her condition rendered her … incapable of appraising her conduct." He knew that Helen was Joan's guardian, and he admitted that he worked as a caregiver for Joan. He also admitted to the alleged sexual contact with Joan. Although Helen had told him that Joan "functioned at the level of a child," he testified that "she definitely knows right from wrong and she can—she's able to make her own decisions."

The jury found DeHart guilty on all five counts. After sentencing, DeHart moved for a new trial. He argued that his trial counsel was ineffective for failing to object to Helen's statement that Joan had never had sex before and for failing to object to Joan holding a stuffed animal while testifying. The State conceded that Helen's statement was generally inadmissible.

It argued, however, that the trial court would have allowed Joan to hold the stuffed animal regardless of objection so that failure to object was not deficient and that, in any event, DeHart suffered no prejudice from either alleged incident of ineffective assistance.

The trial court conducted an evidentiary hearing on DeHart's motion at which trial counsel testified. Counsel explained that his trial strategies included arguing that Joan "was in fact capable of appraising her conduct [with regard to] sexual contact" and arguing that DeHart "did not know that she was incapable of appraising her sexual conduct." He did not object to Helen's statement regarding Joan's virginity because "it didn't occur to [him] that this would constitute a breach of the rape shield law." He testified that had he realized it, he would have objected. Regarding the stuffed animal held by Joan, counsel "couldn't think of a statutory reason to object to it." He also felt that he was "caught in a bit of a box" because if he had asked to be heard outside the presence of the jury to address the issue, the jury could have noticed that Joan initially appeared with and then without the stuffed animal, which "might look bad as well."

The trial court denied DeHart's postconviction motion, determining that—although it was deficient for trial counsel to be unfamiliar with the parameters of the rape shield law—the failure to object did not prejudice the defense. With respect to Joan's stuffed animal, the court stated that it would have permitted her to keep it as a tool to lessen the impact of "difficult" in-court testimony even if an objection had been made. And again, there was no prejudice. In fact, the court stated, "this case was over" after testimony from Joan and the doctor. Both alleged errors of counsel played into the defense strategy of painting Helen "as this scorned woman who was only making this up to get at Mr. DeHart," but it "didn't work" because the evidence from the doctor and Joan herself "carried the weight" to show that Joan was not capable of appraising her conduct and that DeHart knew her limitations. DeHart appeals.

Whether a lawyer provided ineffective assistance is a mixed question of law and fact. ***State v. Manuel***, 2005 WI 75, ¶26, 281 Wis. 2d 554, 697 N.W.2d 811. We uphold a trial court's factual findings unless they are clearly erroneous, but we independently determine whether an attorney's performance is constitutionally deficient. ***Id.*** A defendant asserting ineffective assistance bears the burden of proving both that his counsel's representation was deficient and that he suffered prejudice as a result of that deficiency. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If the defendant makes an insufficient showing on one of the two prongs of this test, the court need not address the other to deny the motion for a new trial. *See* ***id.*** at 697.

We conclude that DeHart has failed to meet his burden on either of the alleged incidences of ineffective assistance. We begin with counsel's failure to object to Helen's unsolicited statement that Joan had never had sex before. To meet his burden of proof on prejudice, DeHart must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See* ***id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

As is evident from the transcript (and as the trial court noted), the issue in this case was not consent but Joan's "ability to appraise her conduct" and DeHart's knowledge of her ability. There was extensive testimony on the subject of Joan's ability from a doctor who stated that Joan has an IQ of 70, "which is at the extreme low end of the borderline range of ability"; from Helen, who was Joan's guardian and described her as "basically … a child that just never grows up" mentally; and from Joan herself, who the jury was able to observe and evaluate firsthand. DeHart admitted to knowing that Joan had a "mental disability," knowing that Helen was Joan's guardian, and to himself having been her paid caregiver. The trial court found that this testimony about Joan's limitations "carried the weight" in the case.

Given this evidence and that there was no dispute about consent or even Joan's desire for sexual contact—Helen testified that she believed "there's a part of [Joan] that did like it and enjoy it"—DeHart's argument that Helen's statement was prejudicial to him "because it paint[ed] him as someone who 'took' [Joan's] virginity" and "'losing' one's virginity[] has special significance in society" is insufficient. There are simply no facts to support the assertion that Helen's statement about Joan's lack of prior sexual experience affected the jury or had anything to do with the actual issue in the case, which was, again, Joan's ability to appraise her conduct and DeHart's appreciation thereof. DeHart's contention that Helen's statement "led the jury to conclude that if she has never had sex before, she was incapable of evaluating the significance of her conduct here" is similarly unavailing; it is conclusory and has no support. *See* ***State v. Allen***, 2004 WI 106, ¶¶21-22, 274 Wis. 2d 568, 682 N.W.2d 433 (explaining that an assertion that "is the defendant's opinion only" and "does not allege a factual basis for the opinion" or is not material to the issue presented is insufficient to support a claim of ineffective assistance).

Turning to the stuffed animal Joan held during her testimony at trial, DeHart must show that counsel's failure to object was an omission "outside the wide range of professionally competent assistance." *See* ***Strickland***, 466 U.S. at 690. We defer to strategic decisions by counsel and strongly presume that counsel's conduct was not deficient. ***Id.*** at 689. "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." ***State v. Williquette***, 180 Wis. 2d 589, 605, 510 N.W.2d 708 (Ct. App. 1993) (citation omitted) *aff'd,* 190 Wis. 2d 677, 526 N.W.2d 144 (1995).

Here, trial counsel had a strategic reason for not objecting to the stuffed animal: he thought it would "look bad" to the jury if she initially had the item, and then, after his request for

a conversation outside the presence of the jury, she did not. DeHart argues—again, without support—that the stuffed animal "was very detrimental" to his defense and "conveyed to the jury that [Joan] was child like." But the trial court found that counsel did a good job of communicating the theory that Joan was being held back by her "overprotective, jealous" stepsister and that "it didn't play against his strategy at all." Indeed, during his closing statement, trial counsel argued that Helen "infantilized" Joan. Moreover, the court stated that it would have allowed Joan to have the stuffed animal, even if counsel had objected, "to lessen the impact of in-court testimony." *See* WIS. STAT. § 906.11(1)(c) (requiring a judge to "exercise reasonable control" over presenting evidence to "[p]rotect witnesses from … undue embarrassment"). Thus, DeHart has shown neither deficient performance nor prejudice with respect to this alleged error.

For the foregoing reasons, we conclude that DeHart has not demonstrated constitutionally deficient assistance of counsel and is not entitled to a new trial.

Therefore,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals