STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP2675-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSHUA J. FELTZ,

Defendant-Appellant.

APPEAL FROM A JUDGMENT AND ORDER OF THE
CIRCUIT COURT FOR MILWAUKEE COUNTY,
ELLEN R. BROSTROM, JUDGE

BRIEF FOR PLAINTIFF-RESPONDENT

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C O U R T O F A P P E A L S

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ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because it would add nothing to the arguments in the briefs. The opinion should not be published because this appeal involves only the application of settled law to the facts of this case.

ARGUMENT

I. The evidence was sufficient to prove that Feltz was guilty of the second count of repeatedly sexually assaulting a child.

The defendant-appellant, Joshua J. Feltz, was charged with two counts of repeatedly sexually assaulting a child (13). This offense is committed when a defendant sexually assaults the same child three or more times within a specified period of time. Wis. Stat. § 948.025(1)(a) (2013-14).

As ultimately amended, the first count alleged that Feltz sexually assaulted TS at least three times between May 6, 2003, and September 1, 2004 (70:9-10, 51). The second count alleged that Feltz sexually assaulted TS at least three more times between September 2, 2004, and May 5, 2006 (70:9-10, 51).

The question on this appeal is whether, apart from any sexual assaults occurring before September 2, 2004, there was enough evidence to prove that there were at least three additional assaults on or after that date.

The deferential test for assessing the sufficiency of the evidence is the same regardless of whether the trier of fact is a judge or a jury, *State v. Routon*, 2007 WI App 178, ¶ 17, 304 Wis. 2d 480, 736 N.W.2d 530, and whether the evidence is direct or circumstantial. *State v. Poellinger*, 153 Wis. 2d 493, 503, 451 N.W.2d 752 (1990).

The test is not whether the reviewing court is convinced of the defendant's guilt, but whether the court can conclude that the trier of fact could be convinced beyond a reasonable doubt by the evidence it had a right to believe and accept as true. *State v. Perkins*, 2004 WI App 213, ¶ 14, 277 Wis. 2d 243, 689 N.W.2d 684; *Poellinger*, 153 Wis. 2d at 503-04. Thus, the

reviewing court must search the record for evidence that supports the finding, *State v. Schulpius*, 2006 WI App 263, ¶ 11, 298 Wis. 2d 155, 726 N.W.2d 706, viewing the evidence in the light most favorable to the finding. *Perkins*, 277 Wis. 2d 243, ¶ 14; *Poellinger*, 153 Wis. 2d at 504.

With respect to the direct testimony of witnesses, the credibility of the witnesses and the weight to be given their testimony are exclusively for the trier of fact to determine. *Perkins*, 277 Wis. 2d 243, ¶¶ 14-15; *Poellinger*, 153 Wis. 2d at 504, 506. It is not the function of an appellate court to redetermine questions of credibility. *State v. Hughes*, 2000 WI 24, ¶ 2 n.1, 233 Wis. 2d 280, 607 N.W.2d 621; *Johnson v. Merta*, 95 Wis. 2d 141, 151, 289 N.W.2d 813 (1980).

But facts can be established by reasonable inferences as well as direct evidence. *Perkins*, 277 Wis. 2d 243, ¶ 14; *Poellinger*, 153 Wis. 2d at 504. Indeed, circumstantial evidence is often stronger and more satisfactory than direct evidence. *Poellinger*, 153 Wis. 2d at 501.

Inferences are drawn by logical deduction from admitted or established facts viewed in the light of common knowledge or experience and common sense. *Belich v. Szymaszek*, 224 Wis. 2d 419, 425, 592 N.W.2d 254 (Ct. App. 1999). *See State v. Messelt*, 185 Wis. 2d 254, 264, 518 N.W.2d 232 (1994); *Poellinger*, 153 Wis. 2d at 508. An inference can be drawn from another inference as long as it is reasonable to draw the second inference from the first. *Yelk v. Seefeldt*, 35 Wis. 2d 271, 280-81, 151 N.W.2d 4 (1967); *Piaskowski v. Bett*, 256 F.3d 687, 693 (7th Cir. 2001) (citing *Yelk*). *See* 29 Am. Jur. 2d, *Evidence*, § 217 (database updated May 2014).

It is the function of the trier of fact to draw these inferences. *Poellinger*, 153 Wis. 2d at 504. The trier of fact can choose among conflicting inferences that may be supported by

the same evidence, and can adopt the inference that is consistent with guilt instead of innocence. *State v. Bodoh*, 226 Wis. 2d 718, 727-28, 595 N.W.2d 330 (1999); *Poellinger*, 153 Wis. 2d at 504.

Since drawing an inference is a finding of fact, the reviewing court must accept the inferences drawn by the fact finder even if other inferences could also be drawn from the evidentiary facts. *Routon*, 304 Wis. 2d 480, ¶ 17; *Poellinger*, 153 Wis. 2d at 504; *State v. Friday*, 147 Wis. 2d 359, 370, 434 N.W.2d 85 (1989). An inference may be rejected on appeal only if it is unreasonable as a matter of law. *See State v. Wenk*, 2001 WI App 268, ¶ 8, 248 Wis. 2d 714, 637 N.W.2d 417; *Bodoh*, 226 Wis. 2d at 727-28; *Friday*, 147 Wis. 2d at 370-71.

A reviewing court may not substitute its own determination of guilt or innocence for that of the trier of fact unless the evidence is so insufficient that no trier of fact could have reasonably found the defendant guilty. *State v. Dukes*, 2007 WI App 175, ¶ 13, 303 Wis. 2d 208, 736 N.W.2d 515; *State v. Webster*, 196 Wis. 2d 308, 320, 538 N.W.2d 810 (Ct. App. 1995); *Poellinger*, 153 Wis. 2d at 507. If there is any possibility that the trier of fact could have found the facts and drawn the inferences necessary to find guilt beyond a reasonable doubt, a reviewing court cannot overturn that finding even if the court believes the defendant should not have been convicted. *Dukes*, 303 Wis. 2d 208, ¶ 13; *Webster*, 196 Wis. 2d at 320; *Poellinger*, 153 Wis. 2d at 507.

TS testified that Feltz sexually assaulted her at least twelve times, either in a playhouse in her yard or in the house of Feltz's grandparents next door (66:96-100; 67:31, 64-65).

Thus, the evidence was sufficient to establish that Feltz sexually assaulted TS more than the six total times necessary to prove two separate counts of repeated sexual assault. The

problem was sorting out these dozen or more assaults into the two separate charging periods.

TS testified that the initial episode, which itself consisted of at least three temporally and conceptually separate sexual assaults, happened either the summer before or the summer after she was in first grade (66:86-89; 67:33, 65). TS was in the first grade during the 2003-04 school year (67:28), so the first assaults occurred between May 2003 and September 2004.

TS said that the sexual assaults continued while she was in the second grade and during the summer following second grade (67:65). TS was in the second grade during the 2004-05 school year (67:28), so the assaults would have continued from September 2004 to September 2005.

TS said she was sexually assaulted more than once during this period (67:31).

But given TS's testimony that there was a pattern to the way the sexual assaults would happen, i.e., generally fellatio followed by masturbation followed by intercourse, rather than each incident being different (66:86-89, 96-100), one such episode of sexual activity during this period would have been enough to prove the charge of repeated sexual assaults.

Each different way of committing a sexual assault was a legally separate assault. *State v. Bergeron*, 162 Wis. 2d 521, 534-36, 470 N.W.2d 322 (Ct. App. 1991); *State v. Eisch*, 96 Wis. 2d 25, 291 N.W.2d 800 (1980). The statutorily prohibited volitional act of fellatio was one sexual assault. The separately prohibited separate volitional act of masturbation was a second sexual assault. And the separately prohibited separate volitional act of intercourse was a third sexual assault.

So there were generally three separate sexual assaults committed in every episode of sexual activity, enough to meet

the requirement that there be at least three sexual assaults to prove a discrete count of repeated sexual assaults.

But even if proof of three separate episodes of sexual activity was required, there were multiple incidents of sexual assault during the charging period for the second count (67:31), narrowing the inquiry to the more specific number of multiple assaults. There were at least two. Was there at least one more?

TS testified that sexual assaults "happened pretty much every time that [Feltz] would come to visit" his grandparents (67:29-30).

In the years from 2003 to 2006 Feltz visited his grandparents about four times a year (69:92-93, 109-10).

So if Feltz sexually assaulted TS pretty much every time he visited his grandparents, and he visited his grandparents four times during the year from September 2004 to September 2005, it can reasonably be inferred that Feltz sexually assaulted TS at least three out of those four times, and perhaps more, during that period.

If Feltz visited his grandparents four times a year, he would have visited them more than six times in the charging period from September 2004 to May 2006. Thus, Feltz could have sexually assaulted TS more than six times, but at least three times, during the period he was charged with the second count of repeatedly sexually assaulting a child.

The evidence was sufficient to prove that Feltz was guilty of the second count of repeatedly sexually assaulting a child because the jury could have found beyond a reasonable doubt that he sexually assaulted the same child at least three times during the period charged in that count.

II. Feltz failed to prove that the attorney who represented him at his trial was ineffective.

A criminal defendant who claims his attorney was ineffective has a dual burden to prove both that his attorney's performance was deficient and that the deficient performance prejudiced his defense. *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433; *State v. Thiel*, 2003 WI 111, ¶ 18, 264 Wis. 2d 571, 665 N.W.2d 305; *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). A claim of ineffective assistance fails if the defendant fails to prove either one of these requirements. *State v. Williams*, 2006 WI App 212, ¶ 18, 296 Wis. 2d 834, 723 N.W.2d 719; *State v. Taylor*, 2004 WI App 81, ¶ 14, 272 Wis. 2d 642, 679 N.W.2d 893.

To prove that his attorney's performance was deficient the defendant must overcome a strong presumption that counsel acted reasonably, and establish that counsel's representation fell below an objective standard of reasonableness. *State v. Mayo*, 2007 WI 78, ¶ 60, 301 Wis. 2d 642, 734 N.W.2d 115; *Thiel*, 264 Wis. 2d 571, ¶ 19; *State v. Johnson*, 133 Wis. 2d 207, 217, 395 N.W.2d 176 (1986). The reasonableness of an attorney's acts is judged deferentially on the facts of the particular case viewed from counsel's contemporary perspective to eliminate the distortion of hindsight. *State v. Maloney*, 2005 WI 74, ¶ 25, 281 Wis. 2d 595, 698 N.W.2d 583; *Johnson*, 133 Wis. 2d at 217.

Deficient performance is prejudicial when it is so reasonably probable that the result of the proceeding would have been different without the error that a court cannot have confidence in the reliability of the existing outcome. *Allen*, 274 Wis. 2d 568, ¶ 26; *Thiel*, 264 Wis. 2d 571, ¶ 20.

It is not enough for a defendant to speculate on what the result of the proceeding might have been if his attorney had not

erred. *State v. Erickson*, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999); *State v. Flynn*, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994); *State v. Wirts*, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). When the defendant alleges that his attorney was ineffective for failing to take some action, he must show with specificity what that action would have accomplished if it had been taken, and how its accomplishment would have probably altered the result of the proceeding. *State v. Byrge*, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999), *aff'd*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477; *Flynn*, 190 Wis. 2d at 48.

On appeal the circuit court's findings of fact will be upheld unless they are clearly erroneous. *State v. Balliette*, 2011 WI 79, ¶ 19, 336 Wis. 2d 358, 805 N.W.2d 334; *State ex rel. Flores v. State*, 183 Wis. 2d 587, 609, 516 N.W.2d 362 (1994). *See Thiel*, 264 Wis. 2d 571, ¶ 23. Findings are clearly erroneous when they are contrary to the great weight and clear preponderance of the credible evidence supporting a different finding. *Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 644, 340 N.W.2d 575 (Ct. App. 1983).

Whether counsel's performance was deficient and/or prejudicial to the defense are questions of law which are determined independently. *Thiel*, 264 Wis. 2d 571, ¶ 23.

A. Feltz failed to prove that he was prejudiced by the testimony of the investigating officer that TS appeared to be truthful during the initial interview.

Even assuming that the attorney who represented Feltz at his trial performed deficiently by engaging in a course of questioning that led the investigating officer to testify that TS appeared to be truthful during the initial interview, Feltz failed to prove he was prejudiced by this testimony.

It is important to be clear on just what the officer said. The officer did not say that TS was being truthful, or that the officer believed that TS was being truthful. What the officer said is that "it appeared that she was being truthful" (68:40).

The fact that TS appeared to be truthful did not mean that what she said was necessarily true. She could have been deliberately lying or she could have been honestly mistaken about what she said happened. There was merely a facade or outward show of truthfulness.

This statement did not really advise the jury of anything they did not know or assume anyway. Of course the officer must have thought that TS appeared to be truthful or she would not have asked the district attorney to file charges based on what TS told her. If the officer did not think that TS appeared to be truthful, but appeared to be lying, there would not have been any prosecution.

Moreover, the officer's testimony specifying what the jury would have known or assumed anyway was admissible evidence which the jury could properly consider in their deliberations.

This testimony did not violate the rule of *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984), that no witness should be permitted to give an opinion that another witness is telling the truth.

A police officer's testimony regarding what she believed during her investigation does not improperly comment on whether the victim's testimony at the trial was truthful. *State v. Ware*, 2015 WI App 13, ¶¶ 24-27, 2014 WL 7373146 (authored unpublished opinion); *State v. Snider*, 2003 WI App 172, ¶¶ 25-27, 266 Wis. 2d 830, 668 N.W.2d 784.

Finally, the circuit court gave instructions that effectively told the jury not to consider properly admitted evidence which they could have legitimately considered in their deliberations.

The court recited the pattern instruction on credibility, advising the jury that they were the sole judges of the credibility, i.e., believability, of the witnesses (71:4). The court then told the jury more specifically, "Officer Jody Young testified that she concluded that [TS] seemed truthful during Officer Young's investigation. Regardless of Officer Young's impression of [TS], truthfulness or untruthfulness of any witness is a matter solely for you the jury to determine" (71:5).

In common understanding, as explicated by recognized dictionaries, *see State v. Williquette*, 129 Wis. 2d 239, 248, 385 N.W.2d 145 (1986); *Perry Creek Cranberry Corp. v. Hopkins Ag. Chem. Co.*, 29 Wis. 2d 429, 435, 139 N.W.2d 96 (1966), the phrase "regardless of" means in spite of or with no heed to. The American Heritage Dictionary of the English Language 1519 (3d ed. 1996); Webster's Third New International Dictionary 1911 (unabridged ed. 1986).

So a reasonable jury would have understood this instruction to mean that they should disregard the officer's opinion in judging for themselves and themselves alone whether TS was credible.

It is presumed that juries follow admonitory instructions. *State v. Marinez*, 2011 WI 12, ¶ 41, 331 Wis. 2d 568, 797 N.W.2d 399; *State v. Searcy*, 2006 WI App 8, ¶ 59, 288 Wis. 2d 804, 709 N.W.2d 497; *State v. Pitsch*, 124 Wis. 2d 628, 644 n.8, 369 N.W.2d 711 (1985). Such instructions are presumed to erase any prejudice unless the record suggests that the jury disregarded the admonition, *State v. Sigarroa*, 2004 WI App 16, ¶ 24, 269 Wis. 2d 234, 674 N.W.2d 894; *State v. Bembenek*, 111 Wis. 2d 617,

634, 331 N.W.2d 616 (Ct. App. 1983), which is not suggested in this case.

Under all three of these circumstances, the officer's testimony that TS appeared to be credible during her initial interview with the police could not have improperly influenced the result of the trial, or undermined complete confidence in the result.

B. Feltz failed to prove either that his attorney performed deficiently by allowing the prosecutor to argue that the victim was provided moral guidance in school or that he was prejudiced by this argument.

Although a witness' beliefs or opinions on matters of religion cannot be used to enhance the witness' credibility, Wis. Stat. § 906.10 (2013-14), this rule does not prohibit use of the witness' subscription to an ideology that is political or philosophical, rather than religious, to enhance her credibility. 28 The Late Charles Alan Wright and Victor J. Gold, Federal Practice and Procedure, Evidence, § 6153 at 342 (2d ed. 2012).

Reference to religion is prohibited because it is presumed to threaten unfair prejudice, either corrosive or supportive of credibility. Wright and Gold, § 6153 at 342. Reference to religion can unfairly impair credibility by revealing opinions that offend the religious beliefs of a jury of conventional believers. Wright and Gold, § 6153 at 342-43. Obversely, reference to religion can unfairly enhance credibility by revealing that the witness shares beliefs revered by a jury. Wright and Gold, § 6153 at 343.

But where a jury would not consider their religious beliefs to be implicated one way or another, there is no need to

prohibit reference to the witness' secular beliefs that may be relevant to her credibility. Wright and Gold, § 6153 at 343.

In this case, the prosecutor started to argue that TS was credible because she went to a Christian school (71:34).

Had the prosecutor been allowed to continue with this argument there might have been a problem. But defense counsel immediately objected, and after a discussion off the record, the prosecutor abandoned her reference to religion and rephrased her argument (71:34). The prosecutor then argued that TS "goes to a school where moral guidance is provided" (71:34).

There was no reason to object to this argument because there was nothing objectionable about it.

The word "moral" does not have any reference to religion or to beliefs or opinions on matters of religion.

Rather, "moral" relates to an ethical view of character, conduct, intentions and social relations, involving universal principles of good and bad conduct. Black's Law Dictionary 1162 (10th ed. 2014). "Moral" relates to generally accepted customs, patterns or standards of correct behavior. Webster's Third New International Dictionary at 1468. "*Moral* applies to personal character and behavior . . . measured against prevailing standards of rectitude." The American Heritage Dictionary at 1173.

It is perfectly permissible for a prosecutor to argue that a witness is credible. *State v. Lammers*, 2009 WI App 136, ¶ 16, 321 Wis. 2d 376, 773 N.W.2d 463. And here it was perfectly permissible for the prosecutor to argue that TS was credible because she went to a school where generally accepted,

universal, prevailing ethical principles of correct behavior, rather than religious principles, were taught.

Of course, a prosecutor's comments on the credibility of a witness must be based on the evidence, *Lammers*, 321 Wis. 2d 376, ¶ 16, or on reasonable inferences drawn from the evidence. *State v. Nemoir*, 62 Wis. 2d 206, 213, 214 N.W.2d 297 (1974). And here they were.

While there was no direct evidence that TS went to a school where moral guidance was provided, that fact can reasonably be inferred from evidence that she attended a religious school in kindergarten and first grade, and that she attended a religious school for the entire three years she had been in high school up to and including the time of the trial (66:79; 67:32-33).

In drawing inferences jurors may use common knowledge and common sense. *Messelt*, 185 Wis. 2d at 264; *Poellinger*, 153 Wis. 2d at 508. In their deliberations jurors may use what they know about life even though their knowledge might not be common to all jurors. *State v. Lobermeier*, 2012 WI App 77, ¶ 5, 343 Wis. 2d 456, 821 N.W.2d 400; *Shaurette v. Capitol Erecting Co.*, 23 Wis. 2d 538, 550-51, 128 N.W.2d 34 (1964).

Using common knowledge and common sense, and what they knew about life, the jury could reasonably infer that moral guidance is provided at religious schools, and was provided to TS at the religious schools she attended.

The jury could also infer that a girl who was shown to have attended religious schools the first two and last three years she was in school attended religious schools during the entire time she was in school.

TS's attendance at religious schools at both the beginning and end of her scholastic career indicates that her guardians wanted her to attend religious schools, and would have continued to send her to religious schools in the interim from second grade to eighth grade. TS testified that she was in the first grade in the 2003-04 school year and in the second grade in the 2004-05 school year without any suggestion that she changed schools (67:28). *See Krause v. Milwaukee Mut. Ins. Co.*, 44 Wis. 2d 590, 600 n.2, 172 N.W.2d 181 (1969) (presumed that situation once established continues until contrary shown); *State ex rel. Coffey v. Chittenden*, 112 Wis. 569, 590, 88 N.W. 587 (1902) (same).

Besides, the established fact that TS attended religious schools almost half the time she was in school, and was attending a religious high school at the time she testified at the trial (66:79), was enough to support the prosecutor's point that she was provided moral guidance in school. Any lack of direct or circumstantial evidence to support the prosecutor's assertion that TS attended schools where moral guidance was provided for her entire life (71:34) would have been harmless.

Therefore, Feltz failed to prove that his attorney performed deficiently by not making another objection to the prosecutor's revised argument that TS went to a school where moral guidance was provided.

Feltz also failed to prove that he was prejudiced by this argument.

It is true that the jury's finding of guilt rested entirely on their finding that TS was credible. But Feltz failed to show why the prosecutor's argument that TS went to a school where moral guidance was provided was so critical to the finding of credibility that in the absence of such an argument it is reasonably probable that the jury would have found TS to be

incredible so that the result of the trial would have been different.

Indeed, the only argument Feltz can muster on the question of prejudice is the conclusionary assertion that "'[t]he slightest wisp of influence could have directed the course of the jury's determination.'" Brief for Defendant-Appellant at 32.

But the test for prejudice is not merely the possibility of a different result, but a reasonable probability. *Allen*, 274 Wis. 2d 568, ¶ 26; *Thiel*, 264 Wis. 2d 571, ¶ 20. And that probability must be demonstrated with specificity instead of speculation. *Erickson*, 227 Wis. 2d at 774; *Byrge*, 225 Wis. 2d at 724; *Flynn*, 190 Wis. 2d at 48; *Wirts*, 176 Wis. 2d at 187. Feltz's gratuitous attack on the ethics of the prosecutor cannot substitute for his failure to prove actual prejudice.

TS's testimony was contradicted in whole or in part by the testimony of Feltz, his sister, and two of his grandparents, making it likely that the critical factor in the jury's assessment of credibility was the demeanor of the witnesses. Absent the prosecutor's argument, which came long after TS testified, her demeanor would have been exactly the same. Therefore, it is likely that the jury's findings of credibility and the result of the trial would have been exactly the same.

Feltz failed to prove that his attorney was ineffective for allowing the prosecutor to argue that TS was provided moral guidance in school.

CONCLUSION

It is therefore respectfully submitted that the judgment and order of the circuit court should be affirmed.

Dated: April 2, 2015.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,062 words.

Dated this 2nd day of April, 2015.

_____

Thomas J. Balistreri
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 2nd day of April, 2015.

_____

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