COURT OF APPEALS DECISION DATED AND FILED

August 2, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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Appeal No. 2005AP449

Cir. Ct. No. 1998CF539

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JAMES D. MILLER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed and cause remanded.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

¶1 NETTESHEIM, J. The trial court granted a new trial to psychologist James D. Miller on the grounds that his two trial counsel were

ineffective. Miller had been convicted by a jury of sexual exploitation by a therapist as to one accuser and of first-degree sexual assault of a child as to another. Both of the accusers were minor boys at the time of the alleged events. The State appeals, arguing that counsel's failures to move to suppress certain hearsay testimony regarding one accuser and to call an impeachment witness regarding the other did not constitute deficient performance and were not prejudicial. We disagree, and affirm.

BACKGROUND

Procedural History

¶2 Miller was a clinical psychologist whose practice focused on children and adolescents. In 1998, he was charged with one count of sexual exploitation by a therapist, contrary to WIS. STAT. § 940.22(2) (2003-04),[1] and one count of first-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(1). Count one alleged that Miller, while a practicing therapist, had engaged in sexual contact with Justin J.B. between March 1, 1989, and March 31, 1993, when Justin was between the ages of thirteen and seventeen. Count two alleged that on December 9, 1991, Miller had sexual contact with Shawn W.W., a child under the age of thirteen. Miller pled not guilty to both counts.

¶3 Trial was to a jury. Miller testified in his own defense and denied having sexual contact with either boy. Since Miller pursued a statute of limitations defense to count one involving Justin, the trial court split the verdict

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

into two time frames, the first falling outside the statute of limitations, the second within. The jury found Miller not guilty of the acts within the statute of limitations. However, the jury found Miller guilty of the acts falling outside of the statute of limitations, finding further that Justin had been "unable to seek issuance of a complaint due to the effects of the sexual contact or … any statements or instructions" by Miller.[2] The jury also found Miller guilty on count two involving Shawn. Miller was sentenced to three years' imprisonment on count one and to a consecutive ten years' imprisonment on count two. The ten-year sentence was stayed in favor of fifteen years' concurrent probation.

¶4 Miller's conviction was affirmed on direct appeal, ***State v. Miller***, 2002 WI App 197, 257 Wis. 2d 124, 650 N.W.2d 850, and the supreme court denied his petition for review, ***State v. Miller***, 2002 WI 121, 257 Wis. 2d 118, 653 N.W.2d 890. Miller then retained new counsel and filed a motion for postconviction relief under WIS. STAT. § 974.06, claiming that he had received ineffective assistance of trial counsel. He alleged numerous deficiencies, among them that trial counsel had failed to impeach Justin through records of another therapist, Kathleen Lacey, containing statements by Justin suggesting that he had been sexually assaulted prior to treatment by Miller. As to count two involving Shawn, Miller alleged, inter alia, that trial counsel had failed to object to portions of the testimony of Pam Groh, then a Waukesha County Department of Health and Human Services (DHHS) social worker, and of former Oconomowoc Police

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[2] WISCONSIN STAT. § 939.74(4) provides that the statute of limitations for a prosecution under WIS. STAT. § 940.22(2) is tolled for the period of time the "victim … is unable to seek the issuance of a complaint … due to the effects of the sexual contact or due to any threats, instructions or statements from the therapist…." Justin testified that Miller made a point of saying that "what's in these walls stays in these walls."

Department Detective Ernie Lindemann. Miller contended that Groh and Lindemann had provided inadmissible hearsay testimony as to statements Shawn made when they interviewed him the day after the alleged assault.

¶5 A four-day ***Machner***[3] hearing was held before the Honorable Robert G. Mawdsley, the judge who had presided over the proceedings from the beginning. In a cogent and thorough thirty-eight-page written decision, Judge Mawdsley carefully evaluated each claim and acknowledged that trial counsel "performed well in most areas and posed problems for the State up and down the line." Judge Mawdsley agreed with Miller, however, that his trial counsel were ineffective for failing to object to the Groh and Lindemann hearsay testimony and for failing to impeach Justin with the Lacey records. In addition, Judge Mawdsley found that trial counsel's failings were prejudicial. The trial court vacated the judgments of conviction and ordered a new trial.[4] The State appeals.

Factual History

¶6 In 1991, Shawn's mother, Vicki, took Shawn, then almost five years of age, to see Miller on two occasions to explore issues regarding a custody dispute between Vicki and Shawn's father. At the first session, Miller met with both Vicki and Shawn; at the second, he spent fifteen to thirty minutes with both of them and then asked Vicki to leave the room so he could speak to Shawn alone.

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[3] *See* ***State v. Machner,*** 92 Wis. 2d 797, 803-04, 285 N.W.2d 905 (Ct. App. 1979).

[4] The new trial would not extend to the sexual exploitation of Justin after March 1992 because that portion of the charge had been adjudicated by the jury's not guilty verdict.

¶7 Vicki noticed nothing out of the ordinary on her return. Shawn was sitting on the couch where she had left him. He was not crying and did not appear fearful. Vicki acknowledged in response to Miller's questioning that Shawn sometimes complained of stomach pain and headaches. The session ended. As they waited to schedule the next appointment, Shawn asked Vicki if she knew that Miller was "a real doctor." Shawn told his mother that Miller had given him "a checkup" and "grabbed his butt" and "pulled his penis."

¶8 The next day, Vicki called the police and told Groh, the DHHS social worker, what Shawn had told her the day before. Groh then interviewed Shawn with Detective Lindemann sitting in. Groh discussed the "good touch/bad touch" concept with Shawn, using anatomically correct dolls to illustrate. Groh then asked Shawn whether anyone had given him a bad touch; Shawn replied, "[T]he doctor." Shawn first said he did not know the doctor's name, then said, "Dr. Michael Jordan," and laughed. Shawn told Groh the doctor had touched him "[o]n my elbow and foot" and denied that the doctor had touched him anywhere else. Lindemann then told Shawn that his mother wanted Shawn to tell them everything. After more questioning, Shawn indicated that the doctor had touched his abdomen and back; he did not remember whether any other kind of touch occurred.

¶9 Groh then left the room to summon Shawn's mother. Lindemann, alone in the interview room with Shawn, told Shawn it was "okay to tell someone" what happened. Shawn put the doll's hand on its penis and buttocks. When Groh and Vicki returned less than five minutes later, Lindemann instructed Shawn to tell Groh what he had just told Lindemann. Shawn said the doctor touched his penis, demonstrating on the doll. Lindemann asked, "Where else?" and Shawn

touched the doll's buttocks. Shawn indicated that both touches were under the clothing and under the underwear, and thought the touches happened "last night."

¶10 Shawn's allegations led to an investigation of Miller. Oconomowoc Police Department Detective Michael Dodd interviewed four or five of Miller's other young patients. The interviews revealed no evidence that Miller sexually assaulted any of them. Based on the results of the investigation and interviews, Waukesha County Deputy District Attorney Stephen Centinario decided not to charge Miller and wrote a letter to Dodd enumerating eight reasons for his decision. The Centinario letter was not introduced at trial, nor did Centinario testify.[5]

¶11 The matter lay dormant for over five years. In November 1997, Dodd received a telephone call from Justin B., who had been a patient of Miller's from the ages of twelve to almost eighteen. Justin was one of the boys Dodd had

[5] The Centinario letter, although part of the record on the direct appeal, is not included in the record of this appeal. It was offered as an exhibit at the ***Machner*** hearing, but the record is unclear if it was received. We therefore take judicial notice of it. *See* ***State v. Redmond***, 203 Wis. 2d 13, 16 n.1, 552 N.W.2d 115 (Ct. App. 1996). Moreover, both parties allude to the letter.

Centinario's letter opined that the State could not meet the burden of proof. In support, Centinario offered the following reasons: (1) the kind of touching alleged by Shawn was not "very sexual" and "not the usual type of touching of a pedophile"; (2) Shawn had previously undergone surgery on his scrotum, and he may have confused Miller's examination of him with prior physical examinations performed by other medical doctors; (3) Shawn's version of the event had not been consistent or precise and some of the allegations were the result of a leading question; (4) Miller had been cooperative and had provided two statements to the police and had admitted physically examining Shawn; (5) Shawn had alleged physical abuse by his father and this may have impacted Shawn's perception of reality; (6) Shawn's mother had indicated a sense of relief when advised that no charges would be filed, and she was not entirely convinced that a sexual assault had occurred; (7) none of Miller's other patients who were interviewed had alleged any improper conduct by Miller; and (8) Miller's alleged sexual contact with Shawn at their first meeting alone was not in keeping with the usual attempts by a pedophile to obtain sexual favors from a child.

interviewed in 1992. Justin had told Dodd in 1992 that Miller never had done or suggested anything improper to him. In this second conversation, Justin said that he had lied earlier and that Miller had molested him over a period of several years.

¶12 As a result, the investigation of Miller resumed. Ultimately, charges were filed as to both Justin and Shawn. The case went to trial before a jury. As noted, the jury found Miller guilty of the Shawn charge, guilty of the portion of the Justin charge beyond the statute of limitations, but not guilty of the portion of the Justin charge within the statute of limitations. We will supply additional facts as our discussion warrants.

DISCUSSION

Standard of Review

¶13 Criminal defendants are constitutionally guaranteed the right to counsel under the Sixth and Fourteenth Amendments of the United States Constitution and article I, section 7 of the Wisconsin Constitution. The right to counsel includes the right to effective counsel. ***Strickland v. Washington***, 466 U.S. 668, 685-86 (1984). The standard for determining whether counsel's assistance is effective under the Wisconsin Constitution is the same as that under the federal Constitution. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 235-36, 548 N.W.2d 69 (1996).

¶14 To succeed on a claim of ineffective assistance of counsel, a defendant must show both that counsel's representation was deficient and that the deficiency was prejudicial. ***Strickland***, 466 U.S. at 687. To prove constitutional deficiency, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness. ***Id.*** at 687-88; ***State v. Thiel***, 2003 WI 111,

¶19, 264 Wis. 2d 571, 665 N.W.2d 305. To prove constitutional prejudice, "the defendant 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.'" ***Id.***, ¶20 (quoting ***Strickland***, 466 U.S. at 694). The critical focus is not on the outcome of the trial but on "the reliability of the proceedings." ***Thiel***, 264 Wis. 2d 571, ¶20 (citation omitted). We view the case from counsel's perspective at the time of trial. ***State v. Johnson,*** 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

¶15 Appellate review of an ineffective assistance of counsel claim presents a mixed question of fact and law. ***State v. McDowell***, 2004 WI 70, ¶31, 272 Wis. 2d 488, 681 N.W.2d 500, *cert. denied*, 543 U.S. 938 (2004). We will not disturb the trial court's findings of fact unless they are clearly erroneous. ***Id.*** The ultimate determination of whether the attorney's performance falls below the constitutional minimum, however, is a question of law subject to our independent review. ***Id.***

The Shawn Charge: The Hearsay Testimony of Groh and Lindemann

¶16 This issue involves Shawn, the boy whose report triggered the initial investigation of Miller in 1991. The State charged Miller with first-degree sexual assault of a child, pursuant to WIS. STAT. § 948.02(1). Trial counsel defended this charge on the theory that, at age four, Shawn had confused Miller's appropriate treatment with that of physicians who had examined Shawn regarding a foreskin anomaly, a hernia and a hydrocele requiring surgery and follow-up appointments. At age thirteen, during the trial, Shawn was unable to testify that Miller ever touched him. He testified only that Miller "ask[ed] me to go up to him and pull

down my pants…. That's about it." Thus, evidence of the assault would come in only through the hearsay testimony of Vicki, Groh and Lindemann. Counsel presumed that Vicki's testimony would be admissible as an excited utterance and did not seek to exclude it.[6]

¶17 The jury heard no testimony from Shawn that Miller ever touched him. Instead, it heard Groh testify as to what Shawn's mother said Shawn said. The jury also heard Groh and Lindemann testify to statements they said Shawn made to them about Miller, but only after being left alone with the detective, and only after numerous descriptions by Shawn of innocuous behavior by Miller. Counsel did not challenge the admissibility of Groh's or Lindemann's hearsay testimony, and the trial court determined that their performance was prejudicially ineffective for failing to do so.

¶18 The State mounts two arguments why trial counsel's failure to move to exclude Shawn's statements to Groh and Lindemann was not deficient performance. First, defense counsel reasonably concluded that governing case law on the excited utterance exception made the motion's success unlikely. Second, counsel wanted the jury to hear the hearsay testimony to show that Shawn incriminated Miller only after being subjected to Groh's and Lindemann's suggestive interviewing techniques.

¶19 The statements Groh and Lindemann offered clearly were hearsay. *See* WIS. STAT. § 908.01(3). A hearsay statement is admissible, however, if it falls

[6] The trial court agreed with defense counsel's assessment that Shawn's statements to his mother were admissible under WIS. STAT. § 908.03(2), the excited utterance exception to the hearsay rule. Miller does not challenge this ruling on appeal.

within a firmly rooted hearsay exception. *See* ***State v. Jackson***, 187 Wis. 2d 431, 436-37, 523 N.W.2d 126 (Ct. App. 1994). Where the exception is not firmly rooted, the statement must be examined for particularized guarantees of trustworthiness. *See* ***id.*** at 437. In child sexual assault cases, child hearsay may be admitted only if the particularized guarantees of trustworthiness existed at the time the statement was made. *See* ***Idaho v. Wright***, 497 U.S. 805, 821-22 (1990) (holding that to be admissible under the Confrontation Clause, child hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its *inherent* trustworthiness, not by reference to corroborating evidence).

¶20 Trial counsel testified at the ***Machner*** hearing that their research led them to conclude that Shawn's first statement to Vicki was "probably coming in" as an excited utterance. They recognized that excluding the Groh and Lindemann testimony would mean the jury would hear fewer repetitions of Shawn's initial statements, but also thought it could demonstrate that suggestive interview techniques had been used with Shawn. Counsel did not in any way advance a reliability challenge.

¶21 On appeal, the State argues at length that a "sizeable body of case law" supports the proposition that, like Shawn's statements to Vicki, those to Groh and Lindemann also qualify as excited utterances under WIS. STAT. § 908.03(2). The excited utterance exception is a firmly rooted exception to the hearsay rule. ***State v. Ballos***, 230 Wis. 2d 495, 510, 602 N.W.2d 117 (Ct. App. 1999).

¶22 Despite several earlier opportunities, the State raises the "excited utterance" argument for the first time on appeal. Miller specifically contended in his postconviction motion that the statements were inadmissible hearsay. In a second brief in support of his motion, Miller anticipated that the State would argue

that "all of the hearsay statements are admissible under ***State v. Sorenson***, 143 Wis. 2d 226, 421 N.W.2d 77 (1988)." The State concedes that it overlooked or otherwise failed to respond to these prompts. Instead, its response to the postconviction motion asserted only that trial counsel "made a reasonable assessment that the allegation brought by Shawn … was going to come in." The trial court, too, observed that "the State nowhere argues why the hearsay testimony of Pam Groh and Ernie Lindemann was legally admissible."

¶23 The State attempts to excuse its failure to address the admissibility of the hearsay because of the large record and numerous allegations of ineffective assistance, the four-year time lapse between trial and the ***Machner*** hearing, and Miller's two attorneys to the State's one. We are unpersuaded. Miller filed his motion for postconviction relief on December 18, 2003. The State filed its response on September 17, 2004. Nine months is a reasonable amount of time to conduct an appropriate record review and to analyze the hearsay statutes, especially where the State believes, in its own words, that a "sizeable body of law" supports its position. We reject out of hand the two-lawyers-to-one component of the argument. The excited utterance argument is waived.

¶24 The State also contends that counsel's failure to object to the testimony represented a reasonable strategic decision to have the jury hear that Shawn implicated Miller only after being suggestively interviewed by Groh and Lindemann. Counsel, in fact, testified that this was a consideration in not moving to exclude the evidence. We agree with the trial court that, on this choice of strategy, counsel failed to proceed in an ordinarily prudent manner.

¶25 The Centinario letter raised questions about the reliability of Shawn's statement and, indeed, the strength of the case. Defense counsel were

aware of the letter before trial, and found it "very significant." Counsel knew that Shawn would be unable to testify to the assault. They also knew that there was no other corroborating evidence of a crime, apart from hearsay statements. After ***Wright***, counsel should have known that Shawn's statements had to be inherently reliable; reliability could not be established through corroborating testimony. *See* ***Wright***, 497 U.S. at 822. Nevertheless, counsel did not reevaluate the child hearsay issue after receipt of the Centinario letter.

¶26 Doctor Marc J. Ackerman, a licensed clinical and forensic psychologist, testified at the ***Machner*** hearing as an expert on behalf of Miller. Dr. Ackerman testified that the Groh-Lindemann interview was contaminated in at least six ways, which tainted the entire case from that point forward. He opined that there were "so many factors that contaminate this process that it just doesn't work…. [I]t's useless, and the Centinario letter tells us that."

¶27 The trial court found Dr. Ackerman's testimony to be credible. It also found problematic the manner in which the Groh-Lindemann interview was conducted, "including the interruption to bring in [Shawn's] mother and the one-on-one questioning by the detective," and that counsel knew of the contaminated interview. The court further found that the testimony lacked guarantees of trustworthiness, there existed a basis for exclusion on reliability grounds, the evidence likely would have been excluded and, because its reliability was not tested, "the adversarial test process failed."

¶28 We agree. Had the defense brought a motion in limine challenging the statements' reliability, it would have been the State's burden to prove admissibility. *See* ***State v. Peters***, 166 Wis. 2d 168, 174, 479 N.W.2d 198 (Ct. App. 1991). Yet, as the trial court observed, nowhere did the State set forth how it

would have addressed a challenge to the hearsay issue. The admission of Shawn's statements through Groh and Lindemann was critical.

¶29 For instance, the trial court found "faulty" trial counsel's strategy to show how the 1992 investigation led to a "seed being planted in Justin's mind," leading him to concoct a story years later "to blame Dr. Miller for his ruined life." We agree with the trial court that using Groh and Lindemann to "forge a link" to Justin not only was unnecessary but unreasonable. As the court noted, this coupling tactic imprudently risked adding weight to the evidence in Shawn's case, which carried a twenty-year maximum penalty, to assist in Miller's defense on Justin's case, which carried a five-year maximum.

¶30 In addition, trial counsel knew that Shawn's testimony alone would have been insufficient for the case to get to the jury. One of Miller's attorneys conceded that, upon receipt of the Centinario letter, they should have asked for an adjournment and considered whether to challenge the admissibility of Shawn's various statements, "and we didn't do that." He also conceded that they knew they likely could have kept out at least Groh's testimony and that challenging hearsay statements made to social workers is "relatively common." Miller's other attorney testified that he believed that Shawn's testimony was manipulated, which mirrored Centinario's conclusion about a later interview of Shawn, but that he "never put two and two together" in terms of challenging the statements' reliability via a motion in limine. As a result, the jury heard no direct testimony from Shawn about any assault. It heard instead repeated hearsay accusations from Groh as to what she said Vicki said Shawn said, and from Groh and Lindemann as to what they said Shawn said. We therefore agree with the trial court that counsel's decision not to challenge Groh's and Lindemann's testimony and the strategy

adopted after that decision was "outside the wide spectrum of effective representation."

¶31 We conclude that counsel's deficient performance also was prejudicial, in part because of the weakness of the prosecution's case. *See* ***Strickland***, 466 U.S. at 695-96 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."). We agree with the trial court's observations:

> Credibility was the issue in the case. Pam Groh['s] and Ernie Lindemann's testimony were primary pieces for the prosecution. Without their testimony, the case would be immeasurably weakened.
>
> ….
>
> Where credibility is the sole issue, any corroboration of a victim's testimony is key…. There are clear reasons for keeping their testimony out of the trial, and Miller's trial counsel knew them…. The harm to the defense in having the jury hear Pam Groh and Ernie Lindemann testify from their reports outweighed the benefits perceived by trial counsel. The prosecution was able to focus [its] arguments on the support they gave to the case involving [Shawn]. The error is magnified because without these two witnesses the outcome rests only on the testimony of [Shawn's mother]. Without these witnesses, the State loses significant corroboration testimony.
>
> The Court finds that it is more probable than not that Miller was convicted of sexual assault of [Shawn] in part due to inadmissible evidence in violation of his Constitutional Rights.

¶32 The defense's primary theory was that the State could not prove its case. Yet counsel failed to object to Groh's and Lindemann's testimony despite knowing that Shawn could not testify that Miller inappropriately touched him and that there was no physical evidence. Without Shawn's testimony, the only evidence as to what happened in Miller's office came in through the testimony of

Vicki, Groh and Lindemann. We agree that defense counsel rendered deficient assistance in failing to attempt to keep this damaging evidence from the jury. We also conclude that it is reasonably probable that their failure to do so infected the reliability of the proceedings and tipped the scales in favor of conviction. Both prongs are satisfied.[7]

Failure to Call Lacey As an Impeachment Witness

¶33 This issue involves Justin, who, over five years after denying any sexual contact by Miller, came forward with accusations that Miller had molested him for several years. At the time of trial, Justin was twenty-four years of age. The defense theory was that Justin was lying about being abused by Miller, motivated by financial gain and a desire to justify his own failures.

¶34 During and after the time he was seeing Miller, Justin also saw other treatment professionals, among them therapist Kathleen Lacey. Trial counsel received Lacey's treatment records pertaining to Justin and used some of them as a basis of Justin's cross-examination. One record entry indicated that Justin reported that he had been "sexually abused prior to tx [treatment], age 12 – c [circa] age 18." The trial court found that the note referred to abuse prior to treatment with Miller.

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[7] We recognize that Miller did not challenge trial counsel's conclusion that Shawn's statements to Vicki would be admissible under the excited utterance exception to the hearsay rule. Thus, we have considered whether counsel's failure to challenge the Groh and Lindemann testimony did not prejudice Miller because it simply represented "more of the same." We conclude that prejudice did result. Groh and Lindemann involved Vicki in a portion of their interview with Shawn. Thus, Vicki was not entirely divorced from the tainted interview process. Moreover, Vicki herself had expressed reservations to Centenario as to whether Miller had assaulted Shawn. The end result is that the jury may well have credited Vicki's excited utterance testimony based on the Groh and Lindemann testimony.

¶35 During cross-examination, this exchange occurred:

> Q. Do you recall telling [Lacey] that you had been sexually abused prior to treatment --
>
> A. No, I don't, sir.
>
> Q. -- treatment with her?
>
> A. Oh, yes, sir.

¶36 Trial counsel did not call Lacey as a witness to explore whether the notation meant that Justin was sexually abused before his six-year treatment with Miller, thereby impeaching Justin's denial that he told Lacey of abuse before Miller. Lacey testified at a deposition taken in conjunction with Justin's civil trial that this is what Justin told her. Trial counsel conceded they might have scored "a big point" with Lacey's testimony, but "we just plain missed this one totally. Somehow it slipped through the cracks." Counsel also acknowledged that "all [Lacey] would have had to do was testify from her records" and the defense would have scored a "big point." These concessions reveal that counsel's failure to call Lacey was not a piece of the trial strategy.

¶37 The trial court found that Lacey should have been called as an impeachment witness. The court found that her credibility was high because Justin had sought her out for treatment, she was not an expert retained by Miller, and she herself felt that the matter was serious such that she was working with the prosecution. The court also found that by failing to call Lacey, counsel missed the opportunity to impeach Justin's credibility to show that he might be lying about the critical issue of the case, whether a sexual assault occurred. The result was that, having asked the question about sexual abuse occurring prior to treatment, Justin's unchallenged denial stood as a fact. The court then found that the error was "outside the requisite norm for defense counsel."

¶38 In its reply brief, the State submits that the trial court's findings regarding whose treatment the notation referred to are erroneous because they are based on a misreading of Lacey's records. The State argues that the trial court "may have believed" that a certain record entry predated another. The State also argues that the trial court's "mistake" also may have occurred because Lacey misdated another entry. Our role is to search the record for evidence to support the findings of fact the trial court made, not for facts to support a finding it did not make or could have made. ***Johnson v. Merta***, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980).

¶39 Based on the record before us, the trial court's findings are not clearly erroneous. The records are clearly dated. We cannot say with certainty, as the State urges, that the trial court read them out of order or that Lacey misdated a record entry.[8] Moreover, counsel already had established that Justin had lied to Lacey about his grades and his drug use. Counsel recognized that, in keeping with the defense theory, "the most important thing … to show the jury was that Justin … was lying about sexual assault." One of Miller's attorneys testified that Lacey was "available[,] … [s]ubpoenaed[,] … [a]nd absolutely unimpeachable." The other acknowledged that Lacey's testimony could have been significant and, more importantly, that they "just plain missed this one totally." We realize we are not to "second-guess a trial attorney's 'considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.'" ***State v. Elm***, 201 Wis. 2d 452, 464, 549 N.W.2d 471 (Ct. App.

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[8] Moreover, even if the State's reading of Lacey's records is a plausible interpretation, it does not render Miller's reading implausible. At a minimum, this was a matter which should have been made known to the jury.

1996) (citation omitted). But by counsel's own admission, this tactic was not considered.

¶40 In addition, Miller's other attorney testified at the ***Machner*** hearing that, in his mind, calling experts or other treatment providers would be cumulative "and we didn't want to tick the jury off." The argument makes sense in a vacuum. But under the facts of this case, Lacey was not just another expert or treatment provider. Rather, she would have offered evidence, viewed in one light, suggesting that the abuse occurred before Justin treated with Miller. Such testimony would have been new, not cumulative. Cumulative evidence is "[a]dditional evidence that supports a fact established by the existing evidence (esp. that which does not need further support)." BLACK'S LAW DICTIONARY 596 (8th ed. 2004); *see* ***State v. Johnson***, 231 Wis. 2d 58, 68, 604 N.W.2d 902 (Ct. App. 1999).

¶41 Expediency does not justify the failure to differentiate the import of Lacey's potential testimony from that of a roster of other experts and treatment providers. The State seeks to excuse trial counsel for overlooking the import of the notation in Lacey's records because of its ambiguity, the "volume of discovery defense counsel had to wade through," and the fact that Justin did not report other sexual abuse to anyone else. Rather than justifying counsel's inaction, the ambiguity and the lack of other reports of abuse underscore why Lacey should have been called. We conclude that, in failing to do so, trial counsel's performance fell below an objective standard of reasonableness, rendering it legally deficient.

¶42 We also agree with the trial court's conclusion that the failure to call Lacey to impeach Justin's testimony was prejudicial. The State posited in its

response to Miller's postconviction motion that the Lacey notation "is not as clear[-]cut as the defense would like this court to believe," but side-stepped any argument that impeaching Justin's credibility would not have affected the outcome of the trial. Of course, counsel could not have known at Miller's trial how Lacey would later testify at her civil deposition. But armed with the notation in Lacey's records, counsel had a prime opportunity to find out what she meant by it. This deficient handling of the matter prevented the introduction of testimony which, the trial court said, would have had an "immeasurable" impact on the jury. We hold that defense counsel's performance was deficient and prejudiced Miller's defense.

Other Areas of Alleged Ineffective Representation

¶43 Miller raises other areas in which he claims his trial counsel provided prejudicially deficient representation. He contends that counsel failed to impeach Justin by calling other experts and outcry witnesses and that Miller should not have been used in the dual capacity of fact and expert witness. These assertions were aired at the ***Machner*** hearing and rejected by the trial court. Because we agree with Judge Mawdsley that trial counsel rendered ineffective assistance in the two areas before us on appeal and are remanding for a new trial, we do not reach these additional grounds.

CONCLUSION

¶44 Many aspects of counsel's representation were commendable and Miller does not—nor could he—contend that counsel were ineffective in all regards. A critique of counsel's trial performance must be approached with great deference so as to "avoid the 'distorting effects of hindsight.'" ***Thiel***, 264 Wis. 2d 571, ¶19 (citation omitted). Miller was convicted; some of counsel's trial

strategies obviously failed. Our task, however, is to separate failed strategy from that which falls below an objective standard of reasonableness.

¶45 While overall trial counsel performed well, their errors, though few in number, were weighty in effect. Trial counsel's single act of ineffective representation on each charge spilled over and colored the evidence against Miller on the other charge. Like the trial court, we conclude that the cumulative effect of these deficient acts undermines our confidence in the outcome of the trial. *See* ***id.***, ¶60. We therefore affirm and remand for the new trial ordered by the trial court.

By the Court.—Order affirmed and cause remanded.

Not recommended for publication in the official reports.