03-1253

STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 03-1253-CR
(Brown County Case No. 01-CF-624)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL A. DELAIN,

Defendant-Appellant-Petitioner.

Appeal From The Final Judgment And Order Entered In The Circuit Court For Brown County, The Honorable Richard J. Dietz, Circuit Judge, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions, Rules and Statutes

Other Authorities

ISSUE PRESENTED FOR REVIEW

Whether the evidence was sufficient to establish sexual exploitation by a therapist, in violation of Wis. Stat. §940.22(2), as alleged in Count 3, when the complainant participated in the session during which the alleged sexual contact occurred, not for purposes of therapy, but purely as a police agent attempting to corroborate her allegations of prior sexual misconduct by Dr. DeLain.

The circuit court concluded that the evidence was sufficient and therefore denied DeLain's post-conviction motion on this ground, and the Court of Appeals affirmed.

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BRIEF OF DEFENDANT-APPELLANT-PETITIONER

STATEMENT OF THE CASE

In early 2001, Michael DeLain was a successful psychologist whose 11-year Green Bay area practice focused on helping young people with emotional problems (R104:113-15). Jennifer Ford was a stubborn 16-year old having problems with rules and authority, most specifically her father, and with her adult boyfriend, David (R103:97, 100-03, 106; R104:4; R105:5-6). Following a blow-up with her father, and on the recommendation of one of DeLain's teenaged female patients, Ford sought counseling from him in April, 2001, to address her relationship problems with her father and David (R103:101-03, 106-08; R104:7-8, 123).

Ford met with DeLain three times for therapy sessions in early April (R103:114-120). After the fourth session on April 25, 2001, she told David, and then her family, that DeLain had sexually assaulted her

during the session that day and that she did not want to see him any more (R103:144-45; R104:9).[1] Ford and her parents went to the police that evening, and it was suggested that she return for another meeting with DeLain to secretly videotape him for the police (R103:147-48; R104:10-11, 15-16). She did so on May 2, 2001, and that session was both video and audio recorded (R103:162-65, 205-14; R104:15-18; R38:Exhs. 6-8).

Dr. DeLain subsequently was charged with two counts of sexual abuse by a therapist (Count 1 for April 25 and Count 3 for May 2), Wis. Stat. §940.22(2), one count of sexual intercourse with a child 16 or older on April 25, Wis. Stat. §948.09 (Count 2), and one count of obstructing, Wis. Stat. §946.41(1), based on his denial to police of foot-to-foot contact with Ford on May 2, 2001 (Count 4). (R6).

The case ultimately proceeded to a jury trial on March 5, 2002, the Hon. Richard J. Dietz, Circuit Judge, presiding (R103-R105).

At trial, Ford claimed that, during her April 25, 2001 session with DeLain, they talked primarily about David and problems in her sexual relationship with him (R103:125). She stated that her back was sunburned and DeLain rubbed her back and sides, and subsequently lifted her leg and ran his hand up her pant-leg. She continued talking about David and DeLain removed his hand. (R103:126-27, 131-33, 135-36). She claimed DeLain later again slid his hand up her pant-leg and rubbed her inner thigh, although she could not remember if either of them said anything, or how this contact ended. Although feeling uncomfortable, she then continued talking with DeLain about David. (R103:136-37).

Ford claimed that DeLain then asked her to sit on his lap and

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[1] . . . So I went and I woke my mom up and I just told her that I never wanted to see him again and she asked me why and I told her I wouldn't tell her. It was none of her business. I just didn't wanna see 'em again."

(R103:144).

said he always wanted to have sex with her. She claimed he started rubbing her crotch, lifted her shirt and kissed her stomach, and then put his hand inside her underwear, rubbed her crotch, put a finger into her vagina, and said he could make her come in less than five minutes. (R103:138-40). She said he then removed his hand, spread her legs, and started thrusting against her. She also claimed that, at some point, he pretended to perform oral sex but outside her pants. (R103:140-41). She also claimed that, when she later got up to leave, he asked what color her thong was, stuck his hand down the back of her pants, and grabbed her behind (R103:142).

Ford conceded that she was sexually intimate with David and that she might have mentioned that David was an adult (R103:160-61, 167). However, she claimed that DeLain never said he had to report David as a consequence (R103:160-61, 188-90).

Regarding the May 2, 2001, session/investigation, Ford claimed that DeLain "grabbed" her buttocks once as she walked past him (103:150, 156-57). However, she admitted that she might have told the police that DeLain had "pinched" rather than "grabbed" her (R103:192-93).

Detective Walter Brzoza testified that Ford told him that DeLain had "pinched," not "grabbed," her buttocks on May 2 (R104:36-37). He also testified that, during an interview on June 7, 2001, DeLain denied touching Ford sexually (R104:20, 46). DeLain stated his belief that, due to a physical problem, he could not have lifted Ford's foot with his own (R104:28, 46-48, 68).

Officer Angela Cali also discussed the May 2, 2001 investigation involving Ford, and testified that, after that session, Ford told her that DeLain "pinched my ass or was reaching for it . . ." (R104:79).

The video and audio tapes of May 2, 2001 were played for the jury (R104:73-75; R38:Exhs 6-8). They show good-natured banter and teasing between Ford and DeLain, and that Ford promptly raised the fact that she and David had had sex in the woods, that it was painful for her and that David became "all bucky" when she had him stop.

They further show DeLain attempting to convince her that she was being used by David and deserved better. Neither Ford nor DeLain made any express reference to the supposed sexual activity of the preceding session. The tape at one point reflects DeLain moving Ford's foot with his own.

Also, while the tape reflects that, at one point Ford walks past DeLain and announces "Don't touch my ass," it does not show any actual physical contact. It does reflect, however, that DeLain immediately responded that he did not, and that Ford did not dispute that denial.

Dr. Michael DeLain testified that he received his Ph.D. in clinical psychology in 1990 and had a full-time clinical practice focused primarily on helping children and adolescents (R104:108-15; R105:2-3). He explained the need to speak to kids in language they will both understand and accept, and that one of the therapeutic techniques he uses, and which he used with Ford, was originated by Frank Farrelly and is known as "provocative therapy" (R104:113-22; R105:75). He explained that technique as involving the counselor provoking the patient to defend himself against his own negative feelings and solve his own problems (R104:120-21).

DeLain explained Ford's diagnosis as oppositional/defiant disorder, meaning that she has problems with rules and authority, possibly with depression (R105:5-6). He described his meetings with Ford, how all the sessions included discussions of her one-way relationship with David and her poor self-esteem, and how DeLain sought to convince her that she deserved better. Regarding the April 25 session, he explained that, in response to Ford's boasting of having sex with David in a church, DeLain responded that David was not being good to her and she should stop debasing herself. (R104:124-44, 148-50).

At the end of that session, Ford disclosed that David was an adult. When DeLain responded that he would have to report David, Ford became very angry, stated that he could not take her love from her,

and threatened to claim that DeLain molested her. She then claimed that David in fact was only 16 and stormed out of the room. (R104:151-52). About a week later, DeLain verified that David in fact was over 18 (R105:89-90).

DeLain denied any sexual contact with Ford, and demonstrated that placing his arm in the pant-leg as she claimed would have been virtually impossible. (R104:145-48, 197-98). He did not touch her buttocks, and thought she was joking when she said not to during the May 2, 2001 session (R104:187-88).

DeLain also explained the counseling and rapport-building techniques he used as shown on the May 2 videotape, and how he became frustrated with Ford's failure to respond to therapy that day (R104:154-65, 172-86, 189-93).

DeLain also explained that he suffered from plantar fascitis, that it is painful, and that he did not intend to mislead Brzoza about whether he had contact with Ford's foot a month earlier. (R104:194-97).

DeLain did not learn that the May 2 session was videotaped until about a week later (R104:177-78; R105:106).

On cross-examination, the state sought to portray the facts in DeLain's account and his corroborating patient chart as having been fabricated after he learned that the May 2, 2001, session had been recorded (R105:11-12, 60; *see id.*:178).

Social Services employees verified that DeLain did contact them about Ford on May 3, 2001, but was unable to finish the conversation at that time, and that he called again on May 10, 2001, to report that Ford was a minor having sex with an adult named David (R104:83-86, 89-91). A number of witnesses also testified to DeLain's non-exploitive character (R105:91-128).

The parties stipulated that DeLain's activities on the May 2 video constituted "psychotherapy." (R104:103-05; R105:154-55).

In rebuttal, Dr. James Armentrout testified that, although he was not familiar with provocative therapy and disagreed with certain discussions in Farrelly's book on the subject, certain statements by

DeLain on the videotape were professionally unacceptable or inappropriate (R105:133-142).

The prosecutor used this testimony, and appeals to the jury's "gut feelings" to argue at length in closing that DeLain's actions on the tape were aimed at his own titillation rather than appropriate therapy (R105:189-99, 238-39, 242-44)

On March 7, 2002, the jury returned verdicts acquitting DeLain of the sexual intercourse charge but convicting him on the remaining counts (R43; R105:255-56).

On May 14, 2002, the Court sentenced DeLain to 7 years on Count 1 (2 years incarceration and 5 years supervision), and 6 months concurrent incarceration on Count 4. The Court withheld sentence on Count 3, imposed a consecutive term of 4 years probation on that count, and entered judgment. (R50-R52; R106:33-36; App. 13-16).

DeLain's post-conviction motion sought an order vacating his conviction on the grounds, among others, that he was denied the effective assistance of his trial counsel, Steven M. Glynn. Specifically, trial counsel (1) failed to investigate and call Valerie DeLain and Kristi Kovacs, witnesses to statements consistent with DeLain's trial testimony and made by him prior to the motive to fabricate alleged by the state, and (2) failed to investigate and call Frank Farrelly, the originator of "provocative therapy," who could attest to the appropriateness of DeLain's therapy techniques as shown on the May 2, 2001 videotape. The absence of the same witnesses, and other errors, likewise formed the basis for a claim of reversal in the interests of justice. (R59-R60).

The motion also sought vacation of the conviction under Count 3 regarding the May 2, 2001 session and dismissal of that count on insufficiency grounds (R59:2-4).

Following briefing (R71; R77; R78), and three separate hearings (R107; R108; R114), the circuit court, Hon. Richard J. Dietz, presiding, denied DeLain's motion on April 15, 2003 (R86; R108:48-56; R107:96-102; App. 17-35).

By decision entered March 23, 2004, the Court of Appeals affirmed (App. 1-12). *State v. DeLain*, 2004 WI App 79, 679 N.W.2d 562.

In denying DeLain's sufficiency claim, the Court of Appeals chose not to address the issues as briefed by the parties. Although accepting that Ford merely "feigned her role as a patient at the last session," the Court of Appeals nonetheless held that DeLain's belief that she was a patient was sufficient for conviction. (App. 5-6). It deemed unnecessary evidence that Ford was in fact DeLain's patient or client at the time of the alleged assault:

> ¶10. Both parties have overlooked the fact that Wis. Stat. § 940.22(2) proscribes therapists from "intentionally" having sexual contact with a patient or client during any ongoing therapist-patient relationship. Intentionally is a term of art when used in criminal statutes, see Wis. Stat. § 939.23(1), and is defined as "mean[ing] that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." Wis. Stat. § 939.23(3). The definition further provides that "the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word `intentionally.'" Id. (emphasis added).
>
> ¶11. In Wis. Stat. § 940.22(2), the words "patient" and "ongoing therapist-patient ... relationship" follow the word "intentionally." Thus, in order for DeLain to have committed the crime, he must have known two facts: (1) that Jennifer F. was a "patient" and (2) that he and Jennifer F. had an "ongoing therapist-patient relationship." But to "know" these facts for purposes of the criminal code "requires only that the actor believes that the specified fact exists." Wis. Stat. § 939.23(2) (emphasis added).
>
> ¶12. Therefore, we reject DeLain's argument that it was not enough for the State to prove he believed Jennifer F. was a patient and that he believed the last session was

> part of the continued therapist-patient relationship. At trial, DeLain stipulated that he was performing psychotherapy at all his sessions with Jennifer. It is also undisputed that at these sessions, DeLain believed Jennifer was a patient and believed these sessions were part of an ongoing therapist-patient relationship. Thus, even though Jennifer feigned her role as a patient at the last session, because the undisputed evidence is that DeLain believed the specific fact existed, namely that Jennifer was a patient and this was part of the ongoing therapist-patient relationship, any acts that occurred during this session were during an ongoing therapist-patient relationship as those terms are used in the statute. Consequently, we are satisfied the evidence is sufficient to sustain the conviction for sexual exploitation of a patient by a therapist that occurred on May 2.

(App. 5-6).

ARGUMENT

BECAUSE THERE WAS NO THERAPIST-PATIENT RELATIONSHIP AT THE TIME OF THE ALLEGED OFFENSE, THE EVIDENCE WAS INSUFFICIENT FOR CONVICTION UNDER COUNT 3

The evidence establishes that the complainant had withdrawn from any therapist-patient relationship with DeLain prior to the session on May 2, 2001, and was no longer his "patient or client" at that time. Rather, having decided and announced that she never wanted to see him again (R103:144-45; R104:9), she participated in that session, not for purposes of therapy, but purely as a police agent attempting to corroborate her allegations of prior sexual misconduct by Dr. DeLain.

For conviction under Wis. Stat. §940.22(2), the state must prove an actual therapist/patient relationship; a "feigned" or "therapist/police agent" relationship is insufficient. The state accordingly failed to prove an essential element of the offense alleged in Court 3.

A. Applicable Legal Principles

The burden in a criminal case is on the state to prove every fact necessary for conviction of the crime charged beyond a reasonable doubt. *E.g.*, *Jackson v. Virginia*, 443 U.S. 307 (1979); *In re Winship*, 397 U.S. 358, 364 (1970). "The standard for reviewing the sufficiency of the evidence to support a conviction is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Rushing*, 197 Wis.2d 631, 541 N.W.2d 155, 159 (Ct. App. 1995) (citing *Jackson*, 443 U.S. at 319); *see State v. Hayes*, 2004 WI 80, ¶56, 681 N.W.2d 203.

Of course, the Court "cannot affirm a criminal conviction on the basis of a theory not presented to the jury." *Chiarella v. United States*, 445 U.S. 222, 236 (1980). The Court thus can uphold a conviction only if the evidence at trial was sufficient to convict on the theory actually presented to the jury. *State v. Wulff*, 207 Wis.2d 144, 557 N.W.2d 813, 817 (1997).

This Court reviews challenges to the sufficiency of the evidence necessary to support a verdict de novo. *State v. Wanta*, 224 Wis.2d 679, 592 N.W.2d 645, 650 (Ct. App. 1999) (citation omitted).

B. Conviction Under Wis. Stat. §940.22(2) Requires Proof of an Actual, Ongoing Therapist-Patient Relationship, Not Merely a Feigned Relationship.

Wis. Stat. §940.22(2), defining the offense of sexual exploitation by a therapist, provides:

> Any person who is or who holds himself or herself out to be a therapist and who intentionally has sexual contact with a patient or client during any ongoing therapist-patient or therapist-client relationship, regardless of whether it occurs during any treatment, consultation, interview or examination, is guilty of a Class C felony. Consent is not an issue in an action under this subsection.

An essential element of the offense of sexual exploitation by a therapist thus is that the alleged sexual contact takes place "during any ongoing therapist-patient or therapist-client relationship." *See State v. Ambrose*, 196 Wis.2d 768, 540 N.W.2d 208, 209 (Ct. App. 1995) (proof of "professional therapist-patient/client relationship" required; counseling within teacher-student relationship insufficient); Wis. J.I.–Crim. 1248. The jury in this case was so instructed (R105:159-61). The plain language of the statute further requires that the sexual contact be "with a patient or client ." Wis. Stat. §940.22(2).

As demonstrated both by the statutory requirement that the sexual contact be with a patient or client, a "relationship" is a two-way street; there must be both a therapist (or someone "who holds himself or herself out to be a therapist") and a patient or client. *See, e.g., Ande v. Rock*, 2002 WI App 136, ¶10, 256 Wis.2d 365, 647 N.W.2d 265 ("A physician-patient relationship is a trust relationship, created when professional services are provided by a physician and accepted by a patient" (citation omitted)), *cert. denied*, 537 U.S. 1107 (2003). If either does not exist, as when someone merely poses as a patient and does not in fact seek treatment, there can be no "ongoing therapist-patient . . . relationship" and thus no completed crime of sexual exploitation by a therapist.

That sexual exploitation by a therapist cannot be committed against someone merely posing as a patient or client is further demonstrated by the statute's express reference to actions, not only of someone who actually is a therapist, but also to anyone "who holds himself or herself out to be a therapist." Wis. Stat. §940.22(2). The Legislature thus knew the difference between what is actual and what is feigned and how to express when it intended to cover both. The Legislature's failure to include parallel language in the statute extending its coverage to actions against those who merely hold themselves out to be patients or clients thus must have been intentional.

The statutory purpose of protecting patients from being influenced by predatory therapists does not justify reading such

language into the statute. The risk of such influence is absent if the alleged victim is not in fact a patient or client of the defendant.[2] The purpose is even less served if the alleged victim is a police agent rather than a patient.

Also, the fact that §940.22(2) does not apply when the supposed victim merely poses as a patient does not immunize a therapist's sexual contact from criminal liability. Regardless whether the alleged victim is in fact a patient, any unconsented to sexual contact may be charged as fourth degree sexual assault under Wis. Stat. §940.225(3m). If the defendant in fact believed mistakenly that the person was a patient or client, moreover, a charge of attempted sexual exploitation by a therapist may be appropriate. *Cf. State v. Damms*, 9 Wis.2d 183, 100 N.W.2d 592 (1960) (defendant guilty of attempted murder where he attempted to shoot another with a gun he mistakenly believed to be loaded). Any rational purpose for the sexual exploitation statute accordingly is fully accomplished without the type of judicial legislation necessary to amend §940.22(2) to cover acts against non-patients.

While the statute is plain on its face, the Court of Appeals nonetheless asserts that an actual, ongoing therapist-patient relationship is not required for conviction. Rather, it held that a therapist's mistaken belief that the person is a patient and that there is an ongoing therapist-patient relationship is sufficient to render any sexual contact "sexual exploitation by a therapist" under §940.22(2). The Court of Appeals is

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[2] While some concern for continuing influence may exist following termination of a therapist-patient relationship, it does not follow that post-termination sexual contact between a therapist and a former patient is covered by §940.22(2). Rather, the Legislature apparently deemed such post-termination sexual contact to be adequately covered by civil liability. *Compare* Wis. Stat. §940.22(2) (requiring that the sexual contact be "during any ongoing therapist-patient or therapist-client relationship") *with* Wis. Stat. §895.70(2) (granting a civil cause of action for any person who suffers injury as a result of "sexual contact with a therapist who is rendering or has rendered [therapy] to that person"). The difference in language and resulting difference in application between these statutes must be presumed to have been intentional as Section 895.70(2) was created at the same time that the Legislature added the "ongoing therapist-patient . . . relationship" language to §940.22(2). *See* 1985 Wis. Act 275.

wrong.

The Court of Appeals' theory is that the therapist's belief in an ongoing therapist-patient relationship, although mistaken, satisfies the "knowledge" requirement for proof of intent under Wis. Stat. §939.23(3) and therefore renders proof of an actual, ongoing therapist-patient relationship unnecessary (App. 5-6). According to that court,

> even though Jennifer feigned her role as a patient at the last session, because the undisputed evidence is that DeLain believed the specific fact existed, namely that Jennifer was a patient and this was a part of the ongoing therapist-patient relationship, any acts that occurred during this session were during an ongoing therapist-patient as those terms are used in the statute.

(App. 5-6). The Court of Appeals' theory that "believing it makes it so," however, is supported by neither law nor common sense.

That court is correct that, to act intentionally, as required by §940.22(2), the defendant "'must have *knowledge* of those facts which are necessary to make his or her conduct criminal and which are set forth after the word "intentionally,"'" (App. 5 (emphasis in original), quoting Wis. Stat. §939.23(3)), and that "to 'know' these facts for purposes of the criminal code 'requires only that the actor *believes that the specified fact exists*" (*id.* (emphasis in original), quoting Wis. Stat. §939.23(2)).

A mistaken view of the facts, however, only affects the *mens rea* element of the offense. A person, for instance, may intend to kill someone they believe to be alive, even though the victim is already dead. Similarly, someone may intend to receive property he believes to be stolen, even though in fact it is not. However, the defendant's mistaken belief under those circumstances neither brings the prospective victim back to life nor transforms property which has not been stolen into stolen property. *People v. Dlugash*, 41 N.Y.2d 725, 395 N.Y.S.2d 419, 363 N.E.2d 1155 (1977) (shooting a corpse is not murder, but attempted murder if the defendant had an intent to kill and believed that the intended victim was alive); *State v. Kordas*, 191

Wis.2d 124, 528 N.W.2d 483, 485 (Ct. App. 1995) (mistaken belief property stolen supports *attempt* to receive stolen property, but not completed offense). Similarly, a therapist's mistaken belief that a government agent posing as a patient is in fact a patient does not make it so.

The Court of Appeals appears to confuse the elements for an *attempt* to commit a crime with those necessary for the completed offense. Pursuant to Wis. Stat. §939.32(3),

> [a]n attempt to commit a crime requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that the actor does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that the actor formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

Contrary to the Court of Appeals' apparent belief, the fact that the defendant mistakenly believes facts which, if true, would render his acts a violation of law does not relieve the state of its obligation to prove all elements necessary for the completed offense. The defendant's mere belief that certain facts exist does not make them true. Accordingly, the defendant's mistaken belief at most would support a conviction for attempt, assuming that jury was instructed on that option.

In *Kordas*, for instance, the Court of Appeals held that the defendant's mistaken belief that property was stolen would not support conviction for the completed offense of receiving stolen property, although it would support conviction for an *attempt* to commit that offense. 528 N.W.2d at 485. Similarly, this Court in *State v. Robins*, 2002 WI 65, ¶¶27-28, 253 Wis.2d 298, 646 N.W.2d 287, *cert. denied*, 537 U.S. 1003 (2002), held that the defendant's belief that the individual he solicited over the Internet for sex was only 13 years old, when in fact he was a 42-year-old Department of Justice agent, would not justify conviction for the completed act of child enticement under Wis. Stat. §948.07, although it would support conviction for attempt.

See also State v. Koenck, 2001 WI App 93, ¶28, 242 Wis.2d 693, 626 N.W.2d 359 ("We conclude that the fictitiousness of the girls constituted an extraneous factor beyond Koenck's control that prevented him from successfully enticing a child for the express purpose of sexual intercourse or contact").

The Court of Appeals' analysis accordingly is incorrect. The completed offense of sexual exploitation by a therapist requires an actual, ongoing therapist-patient relationship and sexual contact with an actual, not feigned, patient.

C. Because Ford Did Not Attend the May 2, 2001 Session as a Patient for Purposes of Treatment, but Only to Obtain Evidence for the Police, the Evidence Is Insufficient to Prove the Necessary Element That the Alleged Assault Occurred During an "Ongoing Therapist-patient or Therapist-client Relationship."

The evidence on Count 3, viewed in a light most favorably toward the prosecution, showed that, on April 25, 2001, Jennifer Ford reported to her parents that she had been sexually assaulted by Dr. DeLain and that she never wanted to see him again. They went to the police and apparently determined that additional evidence was necessary. They accordingly agreed that she should return for another session with DeLain. Rather than returning for therapy, however, she would only pretend to be there for therapy while her true purpose was to tape their conversation in the hopes that it would produce evidence supporting a prosecution. The officers viewed her as their agent rather than a patient, cautioning her not to entrap DeLain (R104:67, 69).

DeLain does not dispute either that he was a professional therapist or that the conversations during his sessions with Ford constituted "therapy." He so stipulated at trial. (R105:154-55). The evidence viewed most favorably to the state, however, indeed the undisputed evidence, establishes that any therapist-patient relationship between Ford and DeLain ended with her allegations to the police on April 25-26, 2001.

"A physician-patient relationship is a trust relationship, created when professional services are provided by a physician and accepted by a patient." *Ande v. Rock*, 2002 WI App 136, ¶10, 256 Wis.2d 365, 647 N.W.2d 265 (citation omitted). Such a relationship thus requires the consent of both parties. *E.g.*, *Bovara v. St. Francis Hospital*, 700 N.E.2d 143, 146 (Ill App. 1998) ("The physician-patient relationship is a consensual relationship in which the patient knowingly seeks the physician's assistance and in which the physician knowingly accepts the person as a patient ").

The relationship may be terminated, *inter alia*, by mutual consent of the parties, or by the unilateral action of the patient. *E.g.*, *Lyons v. Grether*, 239 S.E.2d 103, 106 (Va 1977). Termination may occur either expressly or when the patient takes actions inconsistent with the consent necessary to a continuing physician-patient relationship, such as by the initiation of legal action against the physician. *E.g.*, *Toxey v. State of New York*, 279 A.D.2d 927, 719 N.Y.S.2d 765, 766 (App. Div. 2001).

A "relationship" thus is a two-way street; there must be both a therapist and a patient, and both must consent to the continuing therapist-relationship. While DeLain no doubt was acting professionally as a therapist during the May 2 session, Ford was there, not as a patient, but solely as an agent of the police. Her actions in going to the police to initiate legal action against DeLain were wholly inconsistent with any intent to continue the therapist-patient relationship with DeLain, and thus demonstrated her unilateral withdrawal from the therapist-patient relationship. Indeed, she expressly told David and her mother a week before the May 2 session that she never wanted to see DeLain again (R103:144-45; R104:9). She was not present at the May 2 session for treatment, but only to obtain evidence for a possible criminal prosecution. (*See* R105:188). Having withdrawn her own consent to treatment, she no longer could be considered DeLain's patient at the time of the May 2, 2001 session.

Because the evidence accordingly was insufficient to establish

a necessary element of the offense charged in Count 3, the conviction and sentence under that count must be vacated and that count dismissed. *See, e.g., Wulff*, 557 N.W.2d at 818; *Ambrose, supra* (reversing conviction for sexual exploitation by therapist where teacher was not in professional therapist-patient relationship with student).

Even if the Court of Appeals had not erred in its analysis, moreover, the conviction cannot be upheld on its theory that the defendant's belief is enough. The jury instructions here required *both* intent or belief *and* an "ongoing," i.e., *actual*, therapist-patient relationship (R105:159-61). The jury was not instructed on the Court of Appeals' new theory, nor on a theory of attempt. The conviction accordingly cannot be sustained on such grounds. *E.g., Chiarella*, 445 U.S. at 236; *Wulff*, 557 N.W.2d at 817.

CONCLUSION

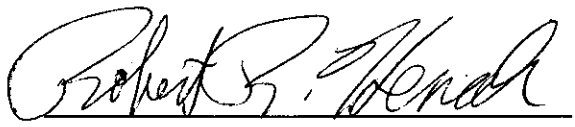
For these reasons, Dr. DeLain asks that the Court reverse his conviction under Count 3 and order that count dismissed.

Dated at Milwaukee, Wisconsin, July 6, 2004.

Respectfully submitted,

MICHAEL A. DELAIN,
Defendant-Appellant-Petitioner

HENAK LAW OFFICE, S.C.



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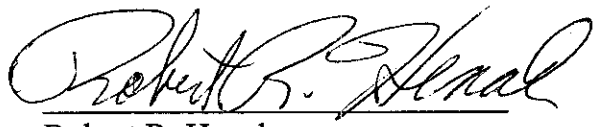
RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,930 words.



Robert R. Henak

SCT Brf cert.wpd

STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 03-1253-CR
(Brown County Case No. 01-CF-624)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL A. DELAIN,

Defendant-Appellant-Petitioner.

APPENDIX OF
DEFENDANT-APPELLANT-PETITIONER

COURT OF APPEALS
DECISION
DATED AND FILED

March 23, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1253-CR **Cir. Ct. No. 01CF000624**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL A. DELAIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: RICHARD J. DIETZ, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Michael DeLain appeals from a judgment of conviction after a jury trial for two counts of sexual exploitation of a patient by a therapist and one count of obstructing justice and from an order denying postconviction relief. He raises four arguments: (1) there is insufficient evidence to sustain one of the counts of sexual abuse by a therapist; (2) his trial counsel was

ineffective; (3) the prosecutor's "golden rule" argument in closing mandates a new trial; and (4) a new trial is warranted because the real controversy has not been fully tried or justice has miscarried. We affirm the judgment and the order.

BACKGROUND

¶2 DeLain was a psychologist in Green Bay whose eleven-year practice focused on helping young people with emotional problems. Jennifer F., a sixteen-year-old child, sought counseling from DeLain to address relationship problems with her father and her adult boyfriend. DeLain met with Jennifer four times in April 2001. After the fourth session, on April 25, Jennifer told her boyfriend and her family that DeLain sexually assaulted her and she no longer wanted to see him. Jennifer and her parents went to the police, who suggested that Jennifer return to another counseling session while she secretly wore a wire. On May 2, she did so and that session was both video and audio recorded.

¶3 The State charged DeLain with four crimes: two counts of sexual abuse by a therapist on April 25 and May 2, contrary to WIS. STAT. § 940.22(2);[1] one count of sexual intercourse with a child age sixteen or older on April 25, contrary to WIS. STAT. § 948.09; and one count of obstructing justice, contrary to WIS. STAT. § 946.41(1). At trial, Jennifer recounted the numerous sexual contacts DeLain had with her during the April 25 and May 2 sessions. DeLain's defense was that Jennifer fabricated the allegations because DeLain indicated he was required to report that she was having sexual relations with an adult to the authorities.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶4 The jury largely believed Jennifer F. and convicted DeLain of both counts of sexual abuse by a therapist as well as the obstruction of justice charge, but acquitted him of the sexual intercourse with a child sixteen or older charge. After sentencing, DeLain filed a motion for postconviction relief seeking an order vacating his convictions. He appeals the denial of that motion.

DISCUSSION

I. SUFFICIENCY OF THE EVIDENCE ON COUNT I

¶5 DeLain first argues there was insufficient evidence to prove he had sexual contact with Jennifer F. on May 2, contrary to WIS. STAT. § 940.22(2). Section 940.22(2) states:

> Any person who is or who holds himself or herself out to be a therapist and who intentionally has sexual contact with a patient or client *during any ongoing therapist-patient or therapist-client relationship*, regardless of whether it occurs during any treatment, consultation, interview or examination, is guilty of a Class C felony. Consent is not an issue in an action under this subsection. (Emphasis added.)

¶6 He claims that because Jennifer F. was at the May 2 counseling session at law enforcement's request, the statutorily required "ongoing therapist-patient ... relationship" no longer existed. *See* ***id.*** He contrasts a genuine relationship from that of a "feigned relationship," noting the latter is what was present on May 2. DeLain argues it is not enough that he merely believed this relationship continued because "a 'relationship' is a two-way street." Thus, he reasons, because Jennifer F. was present not as a patient but as an agent of the police, the State cannot prove there was an ongoing therapist-patient relationship.

¶7 DeLain also supports his argument by referencing federal conspiracy law. DeLain observes a conspiracy requires an agreement between two or more people to commit an unlawful act. *See, e.g.*, ***United States v. Mahkimetas***, 991 F.2d 379, 383 (7th Cir. 1993). Thus, "there is no real agreement when one 'conspires' to break the law only with government agents or informants." ***Id.*** DeLain observes it is undisputed that Jennifer F. attended the May 2 counseling session as a police agent hoping to obtain incriminating evidence. Therefore, he argues the therapist-patient relationship no longer existed.

¶8 The State counters with three arguments. First, it argues the statute should be construed to extend the relationship as a matter of law until one of the parties explicitly advises the other that the relationship has ended. The State claims that to conclude otherwise would impede the statute's purpose of punishing therapists who do not abstain from sexual contact with patients. Second, because the statute provides that "[c]onsent is not an issue in an action under this subsection," and because the statute does not require the sexual contact to occur during "treatment, consultation, interview or examination," the State argues the statute is effectively a strict-liability crime. Third, the State argues DeLain's reliance on federal conspiracy law is misplaced because Wisconsin allows for a "unilateral conspiracy," that is, a conspiracy where two people agree to commit an unlawful act but one of those persons, cooperating with law enforcement officers, feigns agreement. *See* ***State v. Sample***, 215 Wis. 2d 487, 500, 573 N.W.2d 187 (1998).

¶9 Thus, the State claims a conspiracy analogy actually supports its position. In any event, the State argues the evidence is sufficient to sustain the conviction on any of these grounds. We agree with the State that there is sufficient evidence to sustain the conviction, but do so for a different reason.

¶10 Both parties have overlooked the fact that WIS. STAT. § 940.22(2) proscribes therapists from "intentionally" having sexual contact with a patient or client during any ongoing therapist-patient relationship. Intentionally is a term of art when used in criminal statutes, *see* WIS. STAT. § 939.23(1), and is defined as "mean[ing] that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." WIS. STAT. § 939.23(3). The definition further provides that "the actor must have *knowledge* of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally.'" *Id.* (emphasis added).

¶11 In WIS. STAT. § 940.22(2), the words "patient" and "ongoing therapist-patient ... relationship" follow the word "intentionally." Thus, in order for DeLain to have committed the crime, he must have known two facts: (1) that Jennifer F. was a "patient" and (2) that he and Jennifer F. had an "ongoing therapist-patient relationship." But to "know" these facts for purposes of the criminal code "requires only that the actor *believes that the specified fact exists*." WIS. STAT. § 939.23(2) (emphasis added).

¶12 Therefore, we reject DeLain's argument that it was not enough for the State to prove he believed Jennifer F. was a patient and that he believed the last session was part of the continued therapist-patient relationship. At trial, DeLain stipulated that he was performing psychotherapy at all his sessions with Jennifer. It is also undisputed that at these sessions, DeLain believed Jennifer was a patient and believed these sessions were part of an ongoing therapist-patient relationship. Thus, even though Jennifer feigned her role as a patient at the last session, because the undisputed evidence is that DeLain believed the specific fact existed, namely that Jennifer was a patient and this was part of the ongoing

therapist-patient relationship, any acts that occurred during this session were during an ongoing therapist-patient relationship as those terms are used in the statute. Consequently, we are satisfied the evidence is sufficient to sustain the conviction for sexual exploitation of a patient by a therapist.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

¶13 DeLain next claims he was denied effective assistance of counsel. "To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel's actions or inaction constituted deficient performance and that the deficiency caused him prejudice." ***State v. Brunette***, 220 Wis. 2d 431, 445, 583 N.W.2d 174 (Ct. App. 1998). "Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness." ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. To prove 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 (citation omitted.)

¶14 We are highly deferential to counsel's performance and "must avoid the 'distorting effects of hindsight.'" ***Id.***, ¶19 (citation omitted.) We are also guided by the principle that counsel's performance "need not be perfect, indeed not even very good, to be constitutionally adequate." ***Id.***

¶15 A claim of ineffective assistance of counsel presents a mixed question of law and fact. ***Id.***, ¶21. We uphold the circuit court's findings of fact unless they are clearly erroneous. ***Id.*** Findings of fact include "the circumstances of the case and the counsel's conduct and strategy." ***Id.*** Whether counsel's performance is constitutionally ineffective is a question of law we review de novo.

Id. DeLain has not contested any material findings of fact. Thus, we turn to whether his counsel was constitutionally ineffective.

¶16 DeLain claims his counsel was constitutionally deficient on two grounds: first, counsel failed to properly investigate and present evidence of exculpatory prior consistent statements DeLain made to co-workers; second, counsel failed to investigate and present expert evidence regarding the appropriateness of DeLain's therapy techniques.

¶17 As to the first ground, DeLain claims his counsel's failure to investigate witnesses who could corroborate his defense—that Jennifer F. fabricated the allegation because DeLain was going to report her to social services for having sex with an adult—was unreasonable. DeLain points out that his therapy notes for April 25, 2001, indicated he consulted with Dr. Valerie DeLain (DeLain's ex-wife who is a clinical psychologist) and Kristi Kovacs (a drug and alcohol counselor DeLain worked with previously). At the ***Machner*** hearing,[2] Valerie testified this consultation involved DeLain telling her how Jennifer F. threatened to accuse him of molesting her if he reported her sexual relationship with her adult boyfriend to authorities. Kovacs also testified to a similar conversation she had with DeLain. DeLain's counsel, however, did not present this evidence at trial because he never interviewed either of these witnesses regarding the consultation. Without producing these prior consistent statements at trial, DeLain claims his counsel performed deficiently.

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

¶18 DeLain's counsel testified that DeLain never revealed to him what he told Valerie or Kovacs, let alone that they could confirm Jennifer F.'s threats. In fact, the only thing DeLain told his counsel was that he told his co-workers and Kovacs he had a weird, strange, or odd session with Jennifer. He never told counsel there were witnesses who could confirm, through his prior statements, Jennifer's threats. DeLain's counsel interviewed all of DeLain's co-workers, which included Valerie, for a total of nearly eight hours. At no point did DeLain's counsel receive any intimation that these people had any relevant information regarding the allegations. In hindsight, it could be argued DeLain's counsel may have explored this area more, but when all his client told him was that he had a strange or odd session, it is not unreasonable for counsel to assume there would be little else to explore. Counsel nevertheless investigated further, only to find little helpful information. Under these circumstances, DeLain's trial counsel did not perform deficiently.

¶19 DeLain also claims his trial counsel was ineffective because he failed to present expert evidence regarding the appropriateness of DeLain's therapy approach. DeLain utilizes "provocative therapy" in counseling youths.[3] DeLain observes his counsel knew the jury could view DeLain's provocative therapy techniques as inappropriate. To combat the jury's adverse emotional reaction, DeLain argues it was incumbent on his counsel to produce independent expert testimony to support the appropriateness of his therapy techniques. We disagree.

[3] It was undisputed at the postconviction proceedings that in provocative therapy, the therapist uses humor both to sensitize and desensitize the client to problematic cognitive, affective, and behavioral patterns. This is the key to provocative therapy—humor, jocular, whimsical, caring, supportive humor.

¶20 DeLain's counsel indicated his trial strategy was to avoid expert testimony as much as possible. Counsel indicated he was concerned how jurors would react to DeLain's therapy techniques and did not want them to pass judgment on his techniques or decide the case on whether DeLain was a good psychologist. In fact, to prevent the State from offering expert testimony in its case-in-chief, DeLain's counsel stipulated that DeLain was engaged in "psychotherapy" during the relevant time periods. This was a reasonable trial strategy. We will not "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.' A strategic decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." ***State v. Elm***, 201 Wis. 2d 452, 564-65, 549 N.W.2d 471 (Ct. App. 1996) (citations omitted).

¶21 But DeLain claims his counsel knew he was going to testify, and that part of his testimony would relate to the appropriateness of his techniques, thereby opening the door to the whole provocative therapy issue for the State to explore in rebuttal. Therefore, DeLain argues his counsel should have had an expert ready to refute the State's rebuttal expert.

¶22 Prior to trial, DeLain's counsel consulted with two forensic psychologists. Both were troubled by what they saw of DeLain's techniques on the videotape but were of the opinion that DeLain was nonetheless performing psychotherapy and was trying to help Jennifer F. One of these witnesses developed a scheduling conflict and was unavailable to testify at trial, but the other was ready and able to testify. DeLain's counsel indicated he did not use this witness because he felt he did an effective job of impeaching the State's rebuttal expert witness. On cross-examination, DeLain's counsel showed the State's

expert had not taken any courses, received any training, or read any literature on provocative therapy. In light of this cross-examination, we conclude DeLain's counsel acted reasonably as part of his trial strategy by not calling an expert to refute the State's rebuttal expert. DeLain was not denied effective assistance of counsel.

III. "GOLDEN RULE" COMMENT

¶23 DeLain next claims the prosecutor's use of a "golden rule" argument during his closing argument requires reversal. Generally, a golden rule argument involves asking the jurors to place themselves in the position of someone claiming injury or damage and asking the jurors to determine what they would want as compensation. *See* ***Featherly v. Continental Ins. Co.***, 73 Wis. 2d 273, 284, 243 N.W.2d 806 (1976). In a criminal case, a golden rule argument asks the jurors to place themselves in the victim's shoes. *See* ***Rodriguez v. Slattery***, 54 Wis. 2d 165, 170, 194 N.W.2d 817 (1972). These statements are not allowed because they appeal to the jurors' sympathy for persons who have been injured or victimized by a crime.

¶24 In closing, the prosecutor criticized one of DeLain's defenses—that Jennifer F.'s allegations were more consistent with fabrications in light of her poor body image than with a true account of sexual assault—by stating:

> Finally, I'll end on what I consider to be the most ridiculous argument that I've heard in this case and it's also – it's sort of insulting, too, and that's the breast argument. Are you gonna accept the notion that because [Jennifer F.] doesn't relate in her testimony any breast touching she must be lying because she has a poor self-image about her breasts and, therefore, wouldn't say anything about breast touching. Does that make any sense to you at all. Is that anything more than just a – a – a desperate attempt to – to – to mislead you and to – to get you to think about anything but the evidence in this case. *How do you make that – how*

> *do you think that makes [Jennifer F.] feel sitting in the courtroom listening to that.* (Emphasis added.)

DeLain argues this was an improper golden rule argument that so infected the trial with unfairness such that the conviction results in a denial of due process. *See* ***State v. Lettice***, 205 Wis. 2d 347, 352, 556 N.W.2d 376 (Ct. App. 1996). Thus, he claims the trial court erred by failing to grant his motion to dismiss. We disagree.

¶25 The decision of whether to grant a motion for a mistrial lies within the trial court's discretion. ***State v. Ross***, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 659 N.W.2d 122. "The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial." ***Id.*** (citation omitted). "The denial of a motion for mistrial will be reversed only on a clear showing of an erroneous use of discretion by the trial court." ***Id.***

¶26 Following the State's brief remark, DeLain's counsel immediately objected and the prosecutor promptly withdrew the comment and apologized for making the statement. In fact, the State later urged the jury to weigh its decision solely on the evidence and to not be swayed by emotion. The circuit court later instructed the jury to "not be swayed by sympathy, prejudice or passion. You will be very careful and deliberate in weighing the evidence. I charge you to keep your duty steadfastly in mind and as upright citizens to render a just and true verdict." Because of the isolated nature of the remark, the State's immediate response, and because juries are presumed to follow the instructions, ***State v. Smith***, 170 Wis. 2d 701, 719, 490 N.W.2d 40 (Ct. App. 1992), we conclude the trial court did not erroneously exercise its discretion by denying the motion for a mistrial.

IV. DISCRETIONARY REVERSAL

¶27 Lastly, DeLain argues we should exercise our discretionary power of reversal to grant him a new trial because the real controversy was not fully tried or because justice has miscarried. *See* WIS. STAT. § 752.35. We exercise our power of discretionary reversal in exceptional cases. ***Vollmer v. Luety***, 156 Wis. 2d 1, 12-13, 456 N.W.2d 797 (1990). For this court to reverse on the theory that the matter has not been fully tried, we need not determine whether the trial's outcome would be different on retrial. ***Id.*** at 19. Instead, for there to be a miscarriage of justice, "an appellate court must first make a finding of substantial probability of a different result on retrial." ***Id.***

¶28 Under the circumstances of this case, we are not persuaded that the real controversy has not been fully tried or that there is a substantial probability there would be a different result on retrial.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 7 | BROWN COUNTY

State vs Michael A DeLain

Date of Birth: 11-03-1962

Judgment of Conviction

Sentence to Wisconsin State Prisons

Case No.: 01CF000624

The defendant was found guilty of the following crime(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
1	Sexual Exploitation by Therapist	940.22(2)	Not Guilty	Felony C	04-25-2001	Jury	03-07-2002

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Concurrent with/Consecutive to/Comments	Agency
1	05-14-2002	State Prisons	2 YR	defendant is not eligible for the Challenge Incarceration program.	DOC
1	05-14-2002	Extended Supervision	5 YR	No contact with victim or family. Not to engage in work as psycholtherapist. Sex offender treatment. Defendant cannot participate or engage in activities with children under 16 years old. Register as a Sex Offender. Costs waived.	DOC
1	05-14-2002	Restitution		$1106.56 to Mrs. Ford. $2532.32 Mr Ford, $474.50 to Jennifer, $4089.06 to Mr Ford's Insurance Co.	

Conditions of Sentence or Probation

Obligations: (Total amounts only)

Fine	Court Costs	Attorney Fees	Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA Anal. Surcharge
			8202.44				

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 7 | BROWN COUNTY

State vs Michael A DeLain

Date of Birth: 11-03-1962

Judgment of Conviction

Sentence to Wisconsin State Prisons

Case No.: 01CF000624

IT IS ADJUDGED that 0 days sentence credit are due pursuant to § 973.155 Wisconsin Statutes.

IT IS ORDERED that the Sheriff execute this sentence.

BY THE COURT:

Richard J. Dietz, Judge
John F Luetscher, District Attorney
Stephen M Glynn, Defense Attorney
Robert R Henak, Defense Attorney

Patricia Mandelyk
Court Official

5-14-02
Date

[redacted]

2(o) 01/00 Judgment of Conviction
20 02/92

This form shall not be modified. It may be suplemented with additional meterial. §§939.50, 939.51, 972.13, Chapter 973 Wisconsin Statutes

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 7 | BROWN COUNTY

State vs Michael A DeLain

Date of Birth: 11-03-1962

Judgment of Conviction

Sentence Withheld, Probation Ordered

Case No.: 01CF000624

The defendant was found guilty of the following crime(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
3	Sexual Exploitation by Therapist	940.22(2)	Not Guilty	Felony C	05-02-2001	Jury	03-07-2002

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Concurrent with/Consecutive to/Comments	Agency
3	05-14-2002	Withheld, Probation Ordered	4 YR	consecutive to ct. #1. Conditions same as in ct. #1.	DOC

Conditions of Sentence or Probation

IT IS ADJUDGED that 0 days sentence credit are due pursuant to § 973.155 Wisconsin Statutes.

IT IS ORDERED that the Sheriff execute this sentence.

Richard J. Dietz, Judge
John F Luetscher , District Attorney
Stephen M Glynn, Defense Attorney
Robert R Henak, Defense Attorney

BY THE COURT:

Patricia Nardozzi

Court Official

5-14-02

Date

[redacted]

TATE OF WISCONSIN | CIRCUIT COURT | BROWN COUNTY

tate vs Michael A DeLain

JUDGMENT OF CONVICTION AND SENTENCE TO THE COUNTY JAIL/FINE/FORFEITURE

ate of Birth: 11-03-1962

Case No.: 01CF000624

The defendant was found guilty of the following offense(s):

Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
Resisting or Obstructing an Officer	946.41(1)	Not Guilty	Misd. A	06-07-2001	Jury	03-07-2002

The defendant is guilty as convicted and sentenced as follows:

Sent. Date	Sentence	Length	Conc. with/Cons. to/Comments	Begin date	Begin time	Agency
05-14-2002	Local jail	6 MO	concurrent with ct. #1 and to be served at the Dodge Correctional Institute.			BCJ

is adjudged that 0 days sentence credit are due pursuant to § 973.155 Wisconsin Statutes.

Special Conditions:

It is ordered that the Sheriff shall execute this sentence.

Richard J. Dietz, Judge
John F Luetscher, District Attorney
Stephen M Glynn, Defense Attorney
Robert R Henak, Defense Attorney
County Sheriff

BY THE COURT:

Patricia Nauman

Circuit Court Judge/Clerk/Deputy Clerk

5-14-02

Date

[redacted]

App. 16

)4(o) 5/99 Judgment of Conviction

§§303.08(5), 972.13, 982.14, Chapter 973 Wisconsin Statutes
Page 1

STATE OF WISCONSIN : CIRCUIT COURT : BROWN COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

MICHAEL A. DELAIN,

Defendant.

Hon. Richard J. Dietz
Case No. 01-CF-624

ORDER

For the reasons stated on the record on February 10, 2003 and April 15, 2003, Dr. DeLain's motion for post-conviction relief is DENIED.

Dated this 15th day of April, 2003.

Hon. Richard J. Dietz
Circuit Court Judge

DUPLICATE

STATE OF WISCONSIN | CIRCUIT COURT BRANCH VII | BROWN COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

Case No. 01CF624

MICHAEL A. DELAIN,

Defendant.

TRANSCRIPT OF PROCEEDINGS

POST-CONVICTION RELIEF HEARING

February 10, 2003

Hon. Richard J. Dietz
Circuit Court Judge
Presiding

2:12 p.m.
at the Brown County Courthouse
Green Bay, WI

Kara L. Nagorny, RPR
Official Court Reporter

lost her identity as a patient and that the therapist/patient relationship ended, and there's simply no basis in this record or in the law for you to draw that conclusion. And really all of the evidence which really was not even challenged at trial was that in fact their relationship was ongoing, and in fact that much of that was by stipulation, that the doctor engaged in psychotherapy with Jennifer Ford in April and May of 2001.

That's all I've got to say on that.

THE COURT: Any response?

MR. HENAK: No, your Honor.

THE COURT: All right. We've been on the record for almost an hour and a half. I want to organize my thoughts and give the reporter a chance to stretch her fingers, so we'll take a few minutes recess.

(Short recess taken.)

THE COURT: We're back on the record on file 01CF624. I have had an opportunity to consider the arguments of the parties, review some of the case law that was cited. I conclude on the basis of this entire record that Michael DeLain has not met the burden of proof with respect to a requirement that the court order a new trial in the interests of justice. And we decided in this case and properly so that that issue could be

addressed before we reach the issues with respect to Mr. Glenn's representation in this case, but in many ways these things are all somewhat tied together.

We heard at length testimony of Frank Farrelly with regard to provocative therapy, a method of psychological treatment that he basically invented. He has expressed and I think it's uncontroverted in this record at least that Mr. Glenn was aware of Dr. Farrelly, attempted to contact him maybe one time and did not follow through on that contact.

It's clear that information about Frank Farrelly was given to Mr. Glenn at the time that this matter was pending for trial. I look at this as a somewhat different circumstance than a situation where that evidence may not have been available prior to trial and was later. It seems to me the issue in this case is not whether Frank Farrelly in and of himself should have been called by Mr. Glenn but whether there should have been some testimony from an expert in psychology concerning provocative therapy; and in that regard, Dr. Lange testified with respect to his use of provocative therapy in this case and in other cases; and the mere fact that that, there was a particular witness located in Madison who may have been able to testify and substantiate the procedure I don't believe

is in and of itself sufficient to find that the interests of justice mandates a new trial.

Whether or not to call any expert, whether it be Frank Farrelly or any other expert in the area of psychological treatment or counselling is a decision I think that trial counsel needs to make on the basis of what he is aware the testimony will be, and I just simply can't see where calling this particular witness in and of itself would give rise to the need for a new trial.

I think we need to get into the issue of whether or not Mr. Glenn's overall representation of Dr. DeLain was defective because he failed to call Mr. Farrelly or some other witness, and so I think that issue begs the question -- I'm sure there are any number of witnesses on both sides who would testify as to the appropriateness of what occurred on May 2, and the fact that more witnesses weren't called by the State or a witness to substantiate Dr. DeLain's testimony wasn't called I think could very well evolve into the issue of trial strategy, and I think we need to hear from Mr. Glenn in that regard.

There is another issue with respect to the testimony of two witnesses that also testified at the last hearing, Valerie DeLain and the other witness,

with regard to statements that may have been made by Dr. DeLain prior to May 2 and in fact on April 25 I believe is the date. The State argues that the Court shouldn't consider that because those statements are inadmissible under the rules of evidence, and I don't agree with the State's position on that. The case law -- and I've read Tome, and I understand what the Supreme Court was saying, but I also look at this in light of cases in Wisconsin that predate Tome and frankly that post-dates that Supreme Court decision, and I'm looking primarily at State v. Street.

Now, in both that case and the Mares case, it was the defendant who was objecting to certain testimony, and I think Mares is fairly clear and I don't think it's inconsistent with Tome although it was decided before Tome in that there are three reasons that rebuttal evidence or evidence of prior consistent statements can be utilized: Recent fabrication, improper influence, and motive.

The State makes a fairly strong argument that Dr. DeLain based upon the conduct that the jury found to have existed had a motive to make a, the statements that he made to those two people on April 25; but I have to look at what went on in the trial and put those statements in the context of what occurred. It was

clear at the trial that the State was trying to make an argument that the records of the clinic could very well have been altered sometime between April 25 and sometime after May 2, and the State went into great length with respect to that. Although there may have been a motive to make a false statement to others on April 25, nonetheless as I read Mares and also as I read State v. Street, I think that the Court must look at not only the motive that may have existed at that time but also the issue of whether or not the testimony would be introduced to rebut an argument of recent fabrication; and in both of the cases, it involved situations as an example in State v. Street where there was an allegation of an implied charge of recent fabrication or the rehearsal of videotape testimony and coaching. I think the same thing aligns here.

That having been said, I then look at the testimony and whether the mere fact that those two witnesses were not called would be such a plain defense error as to create a substantial probability of a different outcome, whether the interests of justice would require on that fact alone that the Court order a new trial and I cannot find that.

Again, there are potentially many reasons why that testimony would not have been proffered. I don't know

if it was strategic. It does appear that there is some evidence that Mr. Glenn was aware of that information prior to the trial in this matter, and the mere fact that that testimony may have corroborated the testimony of Dr. DeLain I don't think is in and of itself sufficient to establish whether there might not have been other good strategic reasons why that testimony would not be produced.

There was some evidence in this record concerning the potential financial problems of the clinic itself as an example, and I think that that needs to be addressed in the context of again ineffective assistance of counsel rather than merely standing alone at this time with regard to the requirement that the Court order a new trial.

There were other issues raised that have been addressed, the comments that were made with respect to closing arguments or rebuttal by Mr. Luetscher in this case, and there again, I look at those and try to look at the totality of the circumstances. And although I have to address those things in order and sequence, I am considering all of that in light of the overall trial in this matter and whether or not the interests of justice require that the Court order a new trial.

Mr. Luetscher concedes and did concede at the time

of the trial that his comment with regard to how the victim might feel was inappropriate, but he immediately backed off. He apologized. He made a statement on the record directing the jury to what he believed is the proper method by which they should decide the issues in this case, and I'm satisfied that the closing instruction that I gave was close enough in time to the rebuttal closing argument of Mr. Luetscher, that that was not so glaring a statement even if it may have been improper that it would require a new trial. The jury was properly instructed on the method by which they should consider the facts in this case.

With regard to the other statement, I'm satisfied then under all of the circumstances that constituted a fair comment on the closing argument of Mr. Glenn. That argument went on as it properly should have at length asking the jury to consider whether Dr. DeLain would have a motive, whether this whole thing made sense, and whether his history, his experience and things of that nature; and I reviewed some of the cases that were cited, and I think that the comments by prosecutors in those cases with regard to the Dillingers and people of that world are substantially different than the comment that in this case maybe the comment with respect to naming a particular president

could have been handled differently; but certainly I think the argument that there are other people in the public eye and who hold important positions who make, had made some more mistakes was not appropriate under all of the circumstances.

With respect to the issue of whether or not there was sufficient evidence in the record to establish a violation of Count 3, the sexual exploitation by a therapist, that's an interesting issue. I have read Ambrose. It isn't particularly helpful because that issue went more to whether or not Mr. Ambrose under the circumstances existing at that time was that in fact a therapist under the statute, and I don't think that that is an issue in this case. Clearly Dr. DeLain was a therapist.

I also believe that on May 2 a therapist/patient or therapist/client relationship existed even if I were to conclude that the victim in this case had decided she no longer wanted to seek therapy through Dr. DeLain. I don't think that that personal decision on her part is dispositive of the issue, and we're talking about as we are with many, if not most crimes, the concept of ethicacy on the part of the person who is charged with the crime. And Dr. DeLain in fact believed at the time that he had a therapist/client or

therapist/patient relationship with this young lady and in fact exercised that right or exercised that understanding rather through their session that occurred; and this is an issue the appellate courts in the state will ultimately have to determine, but I am satisfied that even in a circumstance such as this, and I distinguish it from the argument that was made with regard to conspiracy, because in that circumstance the conspiracy ends because somebody has basically voluntarily withdrawn from the conspiracy. This is another co-conspirator or criminal. That's a substantially different circumstance.

It's often been said that a person is entitled to a fair trial, not a perfect trial. If an error occurred here at all, in my view that would be tied to whether or not Mr. Glenn was ineffective in his representation of Dr. DeLain, and we have not reached that issue; but on the basis of this entire record, again, I conclude that a new trial is not required in the interests of justice at this time pending further proceedings with regard to the issue of ineffective assistance of counsel. And in that regard, I think it would be appropriate to try to schedule that.

MR. HENAK: Your Honor, I did contact Mr. Glenn this morning. I do have the bad dates on his calendar,

STATE OF WISCONSIN | CIRCUIT COURT BRANCH NO. 7 | BROWN COUNTY

STATE OF WISCONSIN,

Plaintiff,

-vs-

MICHAEL A. DELAIN,

Defendant.

MOTION HEARING

FILE NO: 01CF-624

HON. RICHARD J. DIETZ
PRESIDING JUDGE

APPEARANCES:

Deputy District Attorney John Luetscher, Law Enforcement Center, Green Bay, WI 54305, appeared on behalf of the State of Wisconsin.

Attorney Robert Henak, 1223 N. Prospect Avenue, Milwaukee, WI 53202, appeared on behalf of Defendant, who appeared in person.

Date of Proceedings

April 15, 2003

Lori J. Makela
Official Reporter

Delain's testimony would just be cumulative in the eyes of the Sixth Circuit is -- is not only wrong but it's unreasonable. So the Court cannot I submit rely on -- on the State's argument there.

And with that I am done talking.

THE COURT: Thank you.

There been a number of exhibits that have been admitted in the record and I have not had an opportunity to look at them. I think that it's appropriate that I review those. So I'll take a few minutes to look at those exhibits and I'll come out with a decision.

MR. LUETSCHER: All right.

(Whereupon, a recess was taken.)

(Whereupon, proceedings reconvened.)

THE COURT: We are back on the record on File 01CF-624. Dr. DeLain and counsel are present. I've had an opportunity to review the various exhibits and consider the testimony in this case.

First, I would like to address the issue that was initially raised with regard to whether the interest of justice requires that the Court order a new trial.

Superimposed over the hearings in this case seems to be an argument that because Frank Farrelly invented or developed this concept of provocative therapy that in this case it was absolutely necessary that a fair trial cannot be

held unless he testified and I reject that argument.

Mr. Farrelly testified in the prior proceedings in this case and he is an expert. He might have a better understanding of provocative therapy than others. He may not. Others who have adopted the process of provocative therapy in -- in the area of psychotherapy may have a better understanding.

The -- the mere fact that he is a potential witness in my view does not require absolutely that he had to be called in this case. He may have been of some value. He may not. I think that to determine that his testimony alone would create a reasonable probability of a different outcome in this case were he to have testified is at best speculative.

With regard to the two witnesses that apparently could have testified with regard to statements made by Dr. DeLain immediately after the April psychotherapy session with Ms. Ford again I think that there are issues with respect to their testimony whether that testimony would have come into court in any event and the mere fact that those witnesses were available and had that information does not necessarily make the likelihood that the Jury would have heard that testimony under the circumstances in this case and, therefore, I -- I do not believe that simply in the interest of justice that -- that the fact that that information was not gleaned by Mr. Glynn nor attempted to be presented to

the Jury creates a circumstance where it is mandatory that this Court exercise its discretion and -- and order a new trial.

I think the real issue here is whether or not Mr. Glynn's efforts in this case; his professional efforts were inadequate and whether or not that created the -- the prejudice in this case which the Court must find in order to order a new trial.

Mr. Glynn testified at length in this hearing with regard to what he did by way of preparation and the -- the two specific issues that the Court needs to address is whether his professional efforts were deficient with respect to not contacting Dr. Farrelly, not at least determining whether he would be appropriate as -- as a witness and also with respect to Ms. DeLain; Ms. Kovacs.

His testimony was that he made one phone call to Mr. Farrelly. He testified today he was unaware whether he had a Ph.D. or not. He also testified as to what is his preference with respect to calling expert witnesses and it was clear from his testimony that -- that there is a weighing; a winnowing and sifting of the facts, the area of expertise and things of that nature.

The fact of the matter is that Mr. Glynn did have an expert. In fact had consulted with two experts. Was satisfied that their testimony may be useful in this case

and was prepared to call one of them at the trial of this matter.

It's not for this Court to second-guess his determination that he was satisfied with the expert testimony that he had and again it would be pure speculation for me to guess whether looking at Mr. Farrelly's relative qualifications; looking at his demeanor as a witness that he would have selected Mr. Farrelly over the psychologist that he had prepared and -- and was prepared to -- to call in this case, if he deemed that that was necessary and I think that's exactly the kind of second-guessing that the Court is supposed to avoid in a case such as this.

There was an expert. The whole concept of addressing the issues of the appropriateness of the psychotherapy had been adequately reviewed and adequately prepared. As I stated before, Mr. Farrelly simply wasn't a -- an absolutely necessary witness in this case and although an attempt was made by Mr. Glynn to -- to contact him when that was inappropriate knowing that he had a perfectly qualified expert who had been prepared, who had reviewed the materials and who was available to testify in my view was sufficient.

He testified also that he spent a couple of hours at Dr. Delain's office; that he talked to members of the staff. His testimony was that it was his recollection that nobody ever informed him of these statements that Dr. DeLain and --

and the other witnesses testified were made with respect to the April psychotherapy session.

He also went on to testify that even if he had been aware of that testimony, he would have reviewed and -- and may have reviewed the -- the rules of evidence with respect to prior consistent statements.

Now it's pretty clear I think that there's a difference of opinion between Mr. Glynn and Mr. Henak concerning the admissibility of -- of those statements. Mr. Glynn testified that he has considerable experience with that particular rule of evidence and that even if he had been aware of that, he would have gone through a -- a -- a questioning process and while I'm not required to rule on that -- that evidence at this time I certainly would find that his statement with regard to his review of -- of the rule of evidence and -- and his review of whether or not it might be admissible is both professional and ethical and that likely in the event that even if he had been aware of that evidence -- and I'm not -- I can't make a finding from this record absolutely that he was unaware of it -- but even if he were unaware of it and -- and he very well may have been, it -- it would be again speculation as to whether that evidence would have ever been presented to the Jury and clearly an attorney has a professional obligation to review evidence and abide by -- by the rules of evidence.

Mr. Glynn testified that it was his opinion; his professional opinion that unlikely that would have been admissible in any event and I can't disagree with that opinion; although I'm not making a specific ruling. Clearly there is a basis in the law for his analysis with regard to -- to that testimony.

There are two aspects to looking at the effectiveness of counsel in the case. One is whether or not counsel's conduct and -- and performance was deficient and then whether or not there is a reasonable probability that that might have changed the -- the outcome of the proceedings.

The Court does not have to reach the second prong of that test if I find that the testimony satisfies me that the attorney's conduct in the case; performance in the case was not deficient and I find on the basis of this entire record that overall the performance by Mr. Glynn clearly was not deficient.

Again I would have to speculate that even if Mr. Farrelly had been contacted and had been selected and named as an expert witness that he would have been called. Mr. Glynn was satisfied based upon his cross-examination of Dr. Armentrout that the impression that he wanted to leave with the Jury and was appropriate to be left with the Jury was taken care of. He decided not to call the expert that he in fact was prepared to call, if that became necessary, and

that could have very well been the same decision; strategic decision that he would have made with respect to Mr. Farrelly and again I -- I -- it's not my job to second-guess at this point and -- and to speculate but quite frankly I -- I don't think as I previously stated that Mr. Farrelly is the indispensable witness in this case that it has been argued.

Having found that Mr. Glynn's performance was not deficient; that his representation of Dr. DeLain was in fact effective and adequate or more than adequate I am going to deny the motion.

MR. HENAK: Your Honor, I do have in preparation for the hearing since the Court of Appeals has given us until tomorrow to decide the motion I have put together two separate draft orders coming out either way. So what I would do is submit the one that I preferred not to use to the Court.

THE COURT: Do you want to show that to --

MR. HENAK: -- Yes.

MR. LUETSCHER: It's fine.

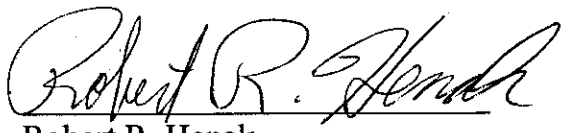
MR. HENAK: 'Kay.

THE COURT: It's a simple motion (SIC) and the record should reflect that I have dated and signed that motion.

Is there anything else we need take up on the record?

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 6th day of July, 2004, I caused 22 copies of the Brief and Appendix of Defendant-Appellant Michael A. DeLain to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.



Robert R. Henak

SCT Crt. Mailing.wpd