COURT OF APPEALS DECISION DATED AND FILED

June 29, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 98-3674

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

IN THE INTEREST OF ADAM C.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ADAM C.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed.*

FINE, J. Adam C., a juvenile, was adjudicated delinquent after a jury found him guilty of one count of second-degree sexual assault and one count of first-degree sexual assault of a child. *See* §§ 940.225(2)(a) & 948.02(1), STATS. He claims that his trial lawyer did not give him effective assistance of counsel. The trial court held a hearing under ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d

905 (Ct. App. 1979), and denied his motion for a new trial. Adam appeals. We affirm.

I.

Adam was convicted of forcing Richard B. to fellate him while they were both in a group home. Adam was some two months shy of fifteen at the time, and Richard was twelve. Adam claims that his trial lawyer was ineffective because the lawyer did not introduce evidence, through either the cross-examination of Richard or otherwise, supporting Adam's contention that Richard accused him because Adam had rebuffed Richard's earlier request that Adam fellate *him*. At both the trial and at the subsequent ***Machner*** hearing, however, Adam's trial lawyer told the trial court that Adam had said that he had reported Richard's alleged advances to the group home but that he, the lawyer, could not verify Adam's assertions. He thus did not pursue the matter. Adam also complains that his trial lawyer did not adequately "prepare witnesses for the defense prior to trial." (Uppercasing omitted.)

II.

Every person accused of a crime has a Sixth Amendment right to the effective assistance of counsel, ***Strickland v. Washington***, 466 U.S. 668, 686 (1984), and a coterminous right under Article I, § 7 of the Wisconsin Constitution, ***State v. Sanchez***, 201 Wis.2d 219, 226–236, 548 N.W.2d 69, 72–76 (1996). In order to establish a violation of this right, a defendant must prove two things: (1) that his or her lawyer's performance was deficient, and, if so, (2) that "the deficient performance prejudiced the defense." ***Strickland***, 466 U.S. at 687; *see also* ***Sanchez***, 201 Wis.2d at 236, 548 N.W.2d at 76.

A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. The defendant must also prove prejudice; that is, he or she must demonstrate that the trial lawyer's errors "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Ibid***. Put another way: "In order to show prejudice, '[t]he 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.'" ***Sanchez***, 201 Wis.2d at 236, 548 N.W.2d at 76 (bracketing in ***Sanchez***) (quoting ***Strickland***, 466 U.S. at 694). This "prejudice" component of ***Strickland*** "focusses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." ***Lockhart v. Fretwell***, 506 U.S. 364, 372 (1993).

In assessing a defendant's claim that his or her counsel was ineffective, a court need not address both the deficient-performance and prejudice components if the defendant does not make a sufficient showing on one. ***Strickland***, 466 U.S. at 697; ***Sanchez***, 201 Wis.2d at 236, 548 N.W.2d at 76. Moreover, a defendant who alleges that his lawyer was ineffective because the lawyer did not do something, must show with specificity what the lawyer should have done and how that would have either changed things or, at the very least, how that made the result either unreliable or fundamentally unfair. ***State v. Flynn***, 190 Wis.2d 31, 48, 527 N.W.2d 343, 349–350 (Ct. App. 1994).

The issues of performance and prejudice present mixed questions of fact and law. ***Sanchez***, 201 Wis.2d at 236, 548 N.W.2d at 76. Findings of historical fact will not be upset unless they are clearly erroneous. ***Ibid.***; RULE

805.17(2), STATS. Whether the lawyer's performance was deficient, and, if so, whether it was prejudicial, are legal issues that we review de novo. ***Sanchez***, 201 Wis.2d at 236-237, 548 N.W.2d at 76.

1. *Richard B.'s alleged motive to falsely accuse Adam*

Section 972.11(2), STATS., Wisconsin's rape-shield law, limits the admissibility of evidence concerning a victim of sexual assault. As material here, it provides:

> (a) In this subsection, "sexual conduct" means any conduct or behavior relating to sexual activities of the complaining witness, including but not limited to prior experience of sexual intercourse or sexual contact, use of contraceptives, living arrangement and life-style.
>
> (b) If the defendant is accused of a crime under s. 940.225, 948.02, 948.025, 948.05, 948.06 or 948.095, any evidence concerning the complaining witness's prior sexual conduct or opinions of the witness's prior sexual conduct and reputation as to prior sexual conduct shall not be admitted into evidence during the course of the hearing or trial, nor shall any reference to such conduct be made in the presence of the jury, except the following, subject to s. 971.31(11):
>
> 1. Evidence of the complaining witness's past conduct with the defendant.
>
> ....
>
> (c) Notwithstanding s. 901.06, the limitation on the admission of evidence of or reference to the prior sexual conduct of the complaining witness in par. (b) applies regardless of the purpose of the admission or reference unless the admission is expressly permitted under par. (b)1., 2. or 3.[1]

[1] Section 901.06, STATS., provides:

> **Limited admissibility.** When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the judge, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Under § 971.31(11), STATS., "evidence which is admissible under s. 972.11(2) must be determined by the court upon pretrial motion to be material to a fact at issue in the case and of sufficient probative value to outweigh its inflammatory and prejudicial nature before it may be introduced at trial."

On its surface, Adam's assertion that Richard propositioned him falls within the scope of § 972.11(2)(b)1, STATS., and is thus not excluded by the rape-shield law. Given the high hurdle erected by § 971.31(11), STATS., to the admission of this type of evidence, however, Adam's trial lawyer was not ineffective for failing to pursue that which he believed he could not prove, as the trial court cogently recognized. Significantly, Adam's postconviction and appellate lawyer has not offered any evidence corroborating Adam's charges against Richard. Adam's first claim of ineffective-assistance-of-counsel is without merit.

2. *The alleged failure by Adam C.'s lawyer to adequately prepare his witnesses.*

Adam also claims that, in some unspecified way, his trial lawyer did not adequately prepare his witnesses. Postconviction and appellate counsel does not, however, indicate what more elaborate preparation would have done: namely, what evidence would have been elicited and what arguments could have been made. Accordingly, this claim of ineffective-assistance-of-counsel is also without merit. *See* ***Flynn***, 190 Wis.2d at 48, 527 N.W.2d at 349–350.

By the Court.—Orders affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.