

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

May 18, 2000

Cornelia G. Clark  
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* WIS. STAT. § 808.10 and RULE 809.62.

**No. 99-0278-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**RODELL THOMPSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from judgment and order of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

Before Eich, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Rodell Thompson appeals from a judgment convicting him of second-degree sexual assault of a child, and from an order denying him postconviction relief. The issues are whether Thompson received effective assistance from trial counsel, whether the jury heard sufficient evidence

to convict him, and whether we should grant him a new trial in the interest of justice. We affirm.

¶2 The complaint alleged that Thompson fondled the genital area of Kayla R., his girlfriend's thirteen year old sister. At trial, she testified that while visiting Thompson's residence, he rubbed what she described as her "private" and as her "naughty spot." The record indicates that she also pointed to where Thompson touched her. On cross-examination, Thompson's attorney questioned her regarding her ambiguous pretrial statements, which suggested that Thompson touched her but not in a sexual way. Later, in closing arguments, the prosecutor stated without objection that Kayla pointed to her pubic mound while testifying. The trial court instructed the jury that "sexual contact" in the charged offense meant an intentional touching of Kayla's pubic mound.

¶3 Thompson contended that trial counsel ineffectively failed to discover and present evidence that Kayla falsely accused him. After Thompson's guilty verdict and subsequent conviction he filed for postconviction relief, alleging ineffective assistance of counsel. He produced two witnesses who testified that Kayla had a reputation for lying. One also stated that Kayla's mother was very prejudiced against Thompson because he was black. Kayla's sister avoided a subpoena and was not available for the postconviction hearing. However, a defense investigator testified that the sister told him after the trial that Kayla was untruthful, and that their mother induced Kayla to fabricate her accusation, because of the mother's prejudice and dislike for Thompson.

¶4 Trial counsel testified that he interviewed Thompson, Kayla, her mother, and her sister. No one told him that Kayla was a chronic liar, and no one identified any motive for falsely accusing Thompson, including her mother's

prejudice. Counsel therefore saw no benefit in seeking out reputation evidence. He also decided not to call the sister as a witness because she was not present when the incident occurred, offered no particularly significant exculpatory information, was reluctant to testify, and “functions maybe at a lower level than most of us.” Counsel’s trial strategy was to confront Kayla with the ambiguous and somewhat contradictory statements she made before trial.

¶5 The court found counsel’s testimony credible, and his strategy and investigative efforts reasonable. The court further concluded that the “reputation witnesses located by appellate counsel had limited bases for their opinions. They were unimpressive witnesses of dubious veracity.” Additionally, the court found that trial counsel had no reason to investigate the possibility that Kayla’s mother induced her to lie.

¶6 To prove ineffective assistance of counsel, the defendant must show that counsel’s performance was deficient and that the errors or omissions prejudiced the defense. *State v. Pitsch*, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). Deficient performance falls outside the range of professional competent representation and is measured by an objective standard of reasonably competent professional judgment. *Id.* at 636-37. Whether counsel’s behavior was deficient is a question of law. *Id.* at 634.

¶7 Thompson received effective assistance from trial counsel. Effective performance by trial counsel requires a reasonable investigation or a reasonable decision that a particular investigation is unnecessary. *Strickland v. Washington*, 466 U.S. 668, 691 (1984). Trial counsel heard nothing from Kayla, or her sister, or especially from Thompson, suggesting a motive to falsely accuse him. He also heard nothing to suggest that reputational evidence would bolster the defense.

“When a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless..., counsel’s failure to pursue those investigations may not later be challenged as unreasonable.” *Id.* Here, counsel reasonably choose to focus on Kayla’s previous statements indicating that she may have confused innocent touching with sexual contact. A reasonably competent attorney might choose that strategy under the circumstances, especially when Thompson admitted to police that he touched Kayla during the incident.

¶8 Counsel also reasonably chose not to call Kayla’s sister. Based on a statement to his investigator, postconviction counsel contended that the sister would have provided substantial benefit to Thompson’s defense. However, what the sister told the investigator was not what trial counsel testified to hearing from her. The trial court found counsel’s testimony credible, and that resolves the issue. Counsel cannot be charged with ineffectiveness for failing to call a witness who offered little help and substantial potential damage.

¶9 The jury heard sufficient evidence to convict Thompson. Evidence is sufficient unless no reasonable jury could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Here, the jury heard testimony that Thompson rubbed Kayla for several seconds on a spot variously identified as her “naughty spot,” or “private.” Kayla pointed to the body area touched, and the prosecutor later stated on the record that she pointed to her pubic mound. Thompson did not dispute the accuracy of that statement. This direct evidence of the location and nature of the contact allowed a reasonable jury to convict.

¶10 Thompson is not entitled to a new trial in the interest of justice. We may order a new trial, in our discretion, if the real controversy has not been tried

or it appears probable that justice has miscarried. WIS. STAT. § 752.35 (1997-98)<sup>1</sup>. Because Thompson received a fair trial with effective assistance from trial counsel, justice did not miscarry. The real controversy, whether Thompson had sexual contact with Kayla, was fully tried. The request for a new trial is denied.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

