

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 21, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 99-0952-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRANCE L. RICHARDSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: WILLIAM C. GRIESBACH, Judge. *Affirmed.*

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

¶1 PER CURIAM. Terrance Richardson appeals a judgment convicting him of attempted first-degree intentional homicide, armed false imprisonment, armed burglary, first-degree sexual assault while armed and felon in possession of a firearm. He also appeals an order denying his postconviction

motion in which he requested a new trial on the false imprisonment, burglary and sexual assault charges based on ineffective assistance of counsel. He argues that his trial counsel should have called two out-of-state witnesses to testify regarding his previous relationship with the victim and that the trial court erred when it refused to compel those witnesses to testify at the postconviction hearing. Because we conclude that Richardson has established neither deficient performance nor prejudice and that the trial court correctly concluded that the out-of-state witnesses were not material, we affirm the judgment and order.

¶2 The victim testified that a man she later identified as Maurice Johnston knocked on her door. When she opened the door, he placed a gun to her head and ordered her to the floor. Two other men then entered the apartment. She recognized Terrance Richardson whom she had previously met. The men were members of a gang looking for the victim's boyfriend, Earl Miller. They searched the apartment for Miller, intending to kill him because of a drug debt. After they searched the apartment and failed to find Miller, the three men waited to ambush him.

¶3 Shortly after they arrived, Richardson ordered the victim to come into the bedroom with him and perform oral sex on him while they waited for an accomplice, Vincent Thornton, to return from a store with condoms. When the condoms arrived, he had vaginal sex with the victim. The victim testified that her two-year-old son was in the bedroom during the sex acts because she was afraid to leave him in the other room. She acquiesced in the sex acts because Richardson was armed and she was intimidated by the entire situation.

¶4 After the sexual assaults by Richardson, the victim's mother knocked on the apartment door. The victim was ordered at gunpoint to be quiet

and not answer the door. After her mother left, the victim was again ordered to the bedroom where Thornton sexually assaulted her. The victim was five-and-one-half-months pregnant with Miller's child at the time.

¶5 Miller eventually called the victim, and Richardson instructed her to tell Miller to bring her food to lure him to the scene. When Miller arrived, the victim opened the door and immediately took her child and hid in the bedroom. The three men came out of their hiding places and confronted Miller. He then jumped through a window as the intruders fired several shots at him, striking him in the leg. The intruders then left.

¶6 At trial Richardson acknowledged that he, Thornton and Johnston were in Green Bay to collect a drug debt from Miller and went to the victim's apartment for the purpose of surprising Miller. He admitted that he fired two shots at Miller as he fled, but denied attempting to kill him. He admitted sexual intercourse with the victim, but argued that she had consented not only to his entry into the dwelling, but also to the intercourse. He further contended that she was free to leave. He testified that he previously lived with the victim and had a sexual relationship with her, and that her consent was based on this prior relationship rather than intimidation.

¶7 The victim refuted Richardson's testimony, denying that she ever lived with Richardson or had consensual sex with him. She recalled having met Richardson at a club with Miller and was not sure whether he had ever been in her apartment. The victim's testimony was contradicted by Tyeiba Summers, who testified that she had visited the victim's apartment on three occasions and that Richardson was living there at one time. On cross-examination, Summers admitted that she was a friend of Richardson's mother, that she had visited him

after his arrest, and that she could not remember anyone else living at the residence, specifically the victim's child.

¶8 Richardson filed a postconviction motion alleging that his trial counsel was ineffective for failing to call two other witnesses, Lisa Mickle and William Summers, to corroborate his and Tyeiba Summers' testimony that he previously lived in the same apartment with the victim. The trial court conducted a bifurcated postconviction hearing designed to determine whether the two out-of-state witnesses' testimony would be necessary to determine the effectiveness of Richardson's trial counsel. Richardson's trial counsel testified that he made contact with Mickle through Richardson's mother and learned that she was reluctant to come from Chicago to testify. He was concerned that forcing her to testify might result in unfavorable testimony and that the risk was not justified because her testimony would be cumulative to that of Tyeiba Summers. Postconviction counsel stated that Mickle could testify that at some unspecified time, Mickle saw Richardson, the victim and the victim's mother playing cards at the apartment. He presented a letter from Mickle stating that Richardson shared an apartment with the victim. Unlike Tyeiba Summers, she knew that the victim had a son residing there.

¶9 Richardson's trial counsel testified that he did not seek the extradition of William Summers because the negatives of his testimony outweighed any possible benefits. William Summers was a gang member with an extensive criminal history and was currently facing homicide charges in Chicago. Postconviction counsel introduced a letter from William stating that Richardson lived with the victim and he knew this because he also lived there. Counsel conceded that there was no evidence of a prior sexual relationship between Richardson and the victim.

¶10 Based on this information, the trial court refused to compel Mickle and William Summers to appear at the postconviction hearing, concluding that they were not material witnesses. The court rejected the ineffective assistance of counsel claim, concluding that counsel employed a reasonable strategy and that Richardson was not prejudiced by his trial counsel's decision not to call Mickle and William Summers.

¶11 To establish ineffective assistance of counsel, Richardson must show that his counsel was deficient and that the deficient performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Judicial scrutiny of counsel's performance is highly deferential, and Richardson must overcome a strong presumption that counsel's performance might be considered sound trial strategy. *Id.* at 689. Strategic choices made after thorough investigation of the law and facts are virtually unchallengeable. *Id.* at 690. To establish prejudice, Richardson must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one that undermines this court's confidence in the outcome. *Id.* at 694.

¶12 Richardson has not overcome the presumption that his counsel's decision not to call Mickle and William Summers constituted a reasonable trial strategy. Counsel reasonably chose to rely on Tyeiba Summers' testimony and not risk presenting substantially cumulative testimony from a reluctant witness or one with an extensive criminal background.

¶13 Richardson has also failed to establish any prejudice from his counsel's decision. The witnesses would have testified that the victim previously shared an apartment with Richardson. We conclude that Richardson was not

prejudiced by his counsel's decision not to call additional witnesses to contradict the victim on this collateral point in an effort to persuade the jury to draw an irrational inference. From this additional piece of evidence, Richardson argues that the jury might have concluded that the victim consented to his entry into the apartment, her confinement and the intercourse. It is highly improbable that the jury would have drawn the inference that the victim lied when she testified she did not consent to these acts. No reasonable jury would believe that the victim, five-and-one-half-months pregnant with Miller's child, would voluntarily consent to having three men enter her home to ambush him; that she would fail to answer the door when her mother came to pick up her two-year-old son, further exposing him to danger; and that while they waited, she would consent to sex with Richardson and Thornton in the presence of her son, feeling no intimidation from the circumstances, the threats and the weapons.

¶14 Because William Summers's and Lisa Mickle's proffered testimony was not required to determine the postconviction motion, the trial court properly refused to order their presence at the postconviction hearing. Both § 976.01(3), STATS., (extradition of prisoners) and § 976.02(2), STATS., (extradition of witnesses) are limited to "material witnesses." Neither Mickle nor Summers witnessed the crimes. The offer of proof suggested only that they would have contradicted the victim on her familiarity with Richardson, a question collateral tangentially related to consent. Extraditing these witnesses was not necessary to establish whether Richardson's trial counsel effectively represented him.

By the Court.—Judgment and order affirmed.

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