

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

November 2, 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. 99-0997-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**KEVIN S.B.,<sup>1</sup>**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Marinette County: CHARLES D. HEATH, Judge. *Affirmed.*

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

¶1 PER CURIAM. Kevin S.B. appeals a judgment convicting him of sexually assaulting his six-year-old daughter. He also appeals an order denying

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<sup>1</sup> This court has modified the caption of the case in order to protect the confidentiality of the minor victim.

his postconviction motions in which he alleged ineffective assistance of counsel. At the close of the State's case, the court dismissed the second count of sexual assault charged in the information. Kevin argues that he was denied effective assistance of counsel by his attorney's failure to seek a mistrial on the ground of retroactive misjoinder and for his failure to request a jury instruction regarding the dismissed count. Because we conclude that Kevin's trial attorney employed a reasonable trial strategy, we affirm the judgment and orders.

¶2 To establish ineffective assistance of counsel, Kevin must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Judicial scrutiny of counsel's performance is highly deferential, and Kevin must overcome the strong presumption that his 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.

¶3 Kevin's trial counsel employed a reasonable strategy when he chose not to request a mistrial after the court dismissed the second count.<sup>2</sup> Counsel explained that he believed the evidence as to the second count was vital to the

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<sup>2</sup> Although it is not necessary to our analysis of counsel's effectiveness, we note that there is no basis for dismissal on retroactive misjoinder grounds. Retroactive misjoinder occurs when joinder of multiple counts is initially proper, but through later developments has been rendered improper. *See State v. McGuire*, 204 Wis.2d 372, 379, 556 N.W.2d 111, 114 (Ct. App. 1996). Here, the alleged victim denied that the incident charged in the second count took place. The only evidence that any improper act occurred came from the victim's mother who testified that Kevin, her ex-husband, was watching television with their daughter and had his hands under the blanket that covered both of them. This evidence is not of such an inflammatory nature that it would tend to incite the jury to convict Kevin on the remaining count. There is no danger of the jury inappropriately using "other crimes" evidence when there was no evidence that another crime occurred. The only "spillover" effect was damaging to the State because it undermined the victim's mother's credibility in a manner that suggests that the mother manipulated the child into making false accusations.

defense on the first count because it showed the possibility that the mother manipulated the victim into making a false accusation. He also reasonably chose not to request a jury instruction limiting the jury's use of the evidence presented on the second count because he intended to exploit the impression it left with the jury that the victim and her mother fabricated both accusations. In his closing argument, counsel focused on the mother's conduct throughout the case, her hostility toward her former husband, and the pressure she may have exerted against her daughter to make a false accusation. While counsel only briefly mentioned the dismissed count, the jury's knowledge that it was dismissed after the State presented no reliable evidence on that count supported counsel's attacks on the victim's mother as the instigator of false charges.

¶4 Kevin also suggests that his trial counsel was ineffective because he did not request a cautionary instruction regarding the use of other crimes evidence. Such an instruction would have suggested that there was proof of another crime. Because counsel reasonably preferred that the jury consider the dismissed count when determining the credibility of witnesses, the proposed cautionary instruction would have been inappropriate.

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

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

