

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 9, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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. 99-1588-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID W.C.,¹

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed.*

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

¶1 PER CURIAM. David W.C. appeals a judgment convicting him of sexually assaulting his niece and twice sexually assaulting his stepdaughter. He

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

also appeals an order denying his postconviction motion in which he alleged that he was denied effective assistance of trial counsel because his attorney failed to call three character witnesses and failed to corroborate his testimony by introducing his medical records. Because we conclude that David's trial attorney employed a reasonable strategy and that his performance did not prejudice the defense, we affirm the judgments and order.

¶2 David was initially charged with four counts of sexual assault. The complaint alleged that he fondled his niece, Amy K.E., on one occasion, and fondled his stepdaughter, Melinda M.R., on three occasions.² At trial, the State presented evidence that David took an overdose of medication shortly after being accused of fondling the children. He left a note stating in part: "I'm sorry for what I did ... I don't know why but I won't do anything like that again for I won't be here ... I can't stand what I've done anymore ... I'm truly sorry for what happened."

¶3 Amy testified that when she was twelve-years-old, David tickled her under her pajamas and touched her breast. She admitted that other statements attributed to her in the police report were not true. Melinda testified that David touched or kissed her breasts on three occasions when she was ten years old. She admitted that she lied to police when she told an officer that David had touched her while she was in the shower and had inappropriately touched her on many other occasions.

¶4 The State also presented "other acts" evidence that David fondled a third child, thirteen-year-old Melissa N., a friend of David's daughter. She

² The jury acquitted David on the third count of assaulting his stepdaughter.

testified that he touched her inappropriately on five or six other occasions. Amy and Melinda also testified that David frequently came into the bathroom while they were showering. All of the assaults alleged by the three girls took place in the bedroom.

¶5 David testified that eleven people, including five girls between the ages of eight and fourteen, lived in the one-bathroom house. He testified that he went into the bathroom while the girls were showering because he had a bladder problem and had to use the bathroom frequently. David admitted that he often tickled Amy but denied touching her breasts. He also testified that Melinda had hiccups one day, and he attempted to squeeze the air out of her lungs to stop them, but did not intentionally touch her breasts. He thought Amy falsely accused him because she wanted to return to California. Melinda falsely accused him because she wanted her mother and her biological father to get back together. Melissa falsely accused him because she was looking for attention. He explained the suicide note by testifying that he was merely apologizing for committing suicide, not for any other conduct. He denied that anyone had accused him of sexual misconduct before the suicide attempt.

¶6 At the postconviction hearing, David presented three witnesses who were available to testify at trial to his reputation for truthfulness and the girls' reputations for untruthfulness. His longtime friend testified that he believed David to be "totally honest" and knew David's stepdaughter, Melissa R., to be dishonest based on his observing her forty to fifty times. When counsel realized that the witness was talking about the wrong stepdaughter, the witness stated that he knew Melinda as well, and "wouldn't believe her one bit." He also testified that he "wouldn't believe a word [Amy] says," although he admitted he had never talked to her.

¶7 David's sister and her husband testified that David was honest and Melinda was "often caught in lies." David's sister testified that she confronted Melinda in the hallway after the verdicts were returned and concluded that Melinda's tears were "a facade." Her husband testified that Melinda was a "manipulative child" and that she had fabricated different stories. He testified that Melinda had told her mother that some boys at school were going to rape her, a story he assumed was false after conducting no investigation.

¶8 David's trial counsel testified that he did not believe it was necessary to call witnesses to challenge the victims' credibility because their own testimony showed that they had made false accusations to the police. He thought that David's friend was not a believable witness, as was confirmed by his willingness to attack the credibility of the wrong child. Counsel was unwilling to risk putting David's reputation for truthfulness at issue knowing that Amy's mother, David's sister, was "very angry and vindictive" and willing to testify against him.

¶9 David's trial counsel also testified that he knew of David's bladder and kidney problems at some point before or during the trial. He did not indicate that he ever considered introducing David's medical records to confirm that David had a reason for entering the bathroom while the girls were showering.

¶10 The trial court denied the postconviction motion, concluding that the three character witnesses' testimony was diminished by their obvious interest in the case and that the proffered evidence had little weight in the context of the trial as a whole. While the medical records confirmed urinary tract problems, the last recorded problems occurred years before the incidents in question and the records do not explain why David could not use the bathroom before the girls began their showers.

¶11 To establish ineffective assistance of trial counsel David 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 David must overcome the 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, David 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 David has not established that his counsel's decision not to call character witnesses constituted deficient performance. Counsel reasonably determined that David's longtime friend who had never talked to Amy and exhibited confusion about Melinda's identity would not make a convincing witness. David's sister and brother-in-law would have cast aspersions on Melinda's truthfulness, something that had already been established by Melinda's own testimony that she lied to the police regarding some of her allegations against David. Counsel reasonably chose to avoid the prospect of rebuttal evidence challenging David's truthfulness.

¶13 David has not established any prejudice from counsel's decision not to call the character witnesses. Amy, Melinda and Melissa gave similar accounts of David's fondling them. His denials that he intended to fondle the children when he tickled Amy and attempted to cure Melinda's hiccups is unpersuasive in light of Amy's, Melinda's and Melissa's testimony of repeated fondling. His

explanation for the inculpatory suicide note is nonsensical. We conclude that calling the three character witnesses would have had no effect on the verdicts.

¶14 Likewise, counsel's failure to introduce David's medical records had no effect on the outcome. The medical records showed treatment for urinary tract infections and kidney stones ending in May, 1992. The records would have provided only marginal corroboration of David's explanation for entering the bathroom while the girls were showering. None of the alleged crimes occurred in the bathroom. Melinda specifically withdrew her allegations that David touched her in the bathroom. David's entering the bathroom while the girls were in the shower was not critical to the State's case. Counsel's failure to present stale medical evidence supporting David's explanation on this tangential question does not undermine our confidence in the outcome.

By the Court.—Judgments and order affirmed.

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

