

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

May 24, 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. 99-1751-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**JOSEPH S. BARFOOT,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Joseph S. Barfoot has appealed from a judgment convicting him of first-degree sexual assault of a child and exposing his genitals to a child. He has also appealed from an order denying his motion for a new trial. We affirm the judgment and the order.

¶2 Barfoot was charged with the first-degree sexual assault of A.B. and S.L., and with exposing his genitals to S.L. Following a jury trial, he was acquitted of the charge involving A.B., but convicted of the other two charges. In a postconviction motion and on appeal, Barfoot contends that his trial counsel rendered ineffective assistance when he failed to present evidence regarding contradictions in S.L.'s testimony.

¶3 To establish a claim of ineffective assistance, an appellant must show that counsel's performance was deficient and that it prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, an appellant must show that his or her counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. *See id.*

¶4 "Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight. Rather, the case is reviewed from counsel's perspective at the time of trial, and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The appropriate measure of attorney performance is reasonableness, considering all the circumstances. *See State v. Brooks*, 124 Wis. 2d 349, 352, 369 N.W.2d 183 (Ct. App. 1985).

¶5 Even if counsel's performance was deficient, a judgment of conviction will not be reversed unless the appellant proves that the deficiency prejudiced his or her defense. *Johnson*, 153 Wis. 2d at 127. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair

trial, a trial whose result is reliable.” *Strickland*, 466 U.S. at 687. However, we need not address the prejudice prong of the test if deficient performance is not shown. *See Johnson*, 153 Wis. 2d at 128.

¶6 Whether there has been ineffective assistance of counsel constitutes a mixed question of law and fact. *See State ex rel. Flores v. State*, 183 Wis. 2d 587, 609, 516 N.W.2d 362 (1994). The trial court is the ultimate arbiter of witness credibility. *See State v. Wilson*, 179 Wis. 2d 660, 683, 508 N.W.2d 44 (Ct. App. 1993). Its findings of fact concerning the circumstances of the case and counsel’s conduct and strategy will not be overturned by this court unless they are clearly erroneous. *See State v. Knight*, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540 (1992). However, the final determinations of whether counsel’s performance was deficient and prejudicial are questions of law which this court decides without deference to the trial court. *See id.*

¶7 Barfoot contends that his trial attorney’s performance was deficient because counsel failed to bring inconsistencies in S.L.’s testimony and statements to the attention of the jury. Specifically, Barfoot contends that S.L. testified at trial that she was wearing pajamas at the time of the assault, while at the preliminary hearing and in her statement to social worker Linda Schroeder she stated that she was wearing a long T-shirt and underwear. He contends that S.L.’s trial testimony indicated that Barfoot was wearing a white bathrobe at the time of the assault, but she stated at the preliminary hearing that he was in his underwear.

¶8 Barfoot also contends that in her statement to Schroeder and at the preliminary hearing, S.L. stated that Barfoot asked her to touch his “private parts,” but at trial she denied that Barfoot asked her to touch his penis. He also relies on the fact that at trial, S.L. testified that Barfoot touched her over her pajamas. At

the preliminary hearing and in her statement to Schroeder, S.L. stated that Barfoot touched her genitalia after removing all her clothing. Barfoot contends that his trial counsel should have presented evidence of these discrepancies through cross-examination of S.L., questioning of Schroeder, or the introduction of Schroeder's written report or the preliminary hearing transcript. The trial court rejected Barfoot's arguments, concluding that counsel did not render deficient performance by failing to pursue these matters.

¶9 Addressing Barfoot's first argument, he is correct that Schroeder's written report indicates that S.L. was wearing a long T-shirt and underwear at the time of the assault.<sup>1</sup> At trial, S.L. stated that she was wearing her "pajamas." When asked by the prosecutor whether she had pants on, she replied, "Yeah shorts," responding affirmatively when the prosecutor asked her if they were pajama shorts.

¶10 We agree with the trial court that trial counsel was not deficient for failing to raise this issue. It is unclear whether there was a discrepancy in S.L.'s testimony or whether she simply used the word pajamas to describe her sleepwear, consisting of a T-shirt and underwear or shorts. Moreover, as noted by the trial court, even if a discrepancy existed, it was minor. S.L. was seven or eight years old at the time of the assault, and ten at the time of trial. Regardless of whether she was accurately recalling whether she was wearing a T-shirt with shorts or underwear or more traditional pajamas for her sleepwear, the difference was so minor that counsel cannot be deemed deficient for failing to raise it.

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<sup>1</sup> At the preliminary hearing, S.L. made no mention of what she was wearing at the time of the assault.

¶11 The second alleged discrepancy is also minor. At the preliminary hearing, S.L. was asked what Barfoot was wearing and said, "I think underwear." At trial she was asked what he was wearing and replied that he was wearing a robe. She was asked whether he had underwear on under his robe and said she did not know.

¶12 S.L.'s testimony at the preliminary hearing expressed some uncertainty as to whether Barfoot was wearing underwear, and thus did not clearly contradict her trial testimony that she did not know whether he was wearing it. Moreover, her statement that Barfoot was wearing a robe does not establish an inconsistency since he could have been wearing a robe with or without underwear. Under these circumstances, we agree with the trial court that any discrepancy was simply too minor to have been of assistance to the defense, and that counsel's failure to raise it thus did not constitute deficient performance.

¶13 The third discrepancy relied on by Barfoot was also not definitive. At the preliminary hearing, S.L. testified that Barfoot first asked her to rub his legs and then kept telling her to go up farther toward "his private parts." When asked at trial whether Barfoot asked her to rub "his private part, his penis," she answered "no." However, when asked whether she was sure, she said, "Not really," and acknowledged that the incident was a long time ago.

¶14 Most importantly, S.L.'s preliminary hearing testimony and her statement to Schroeder indicating that Barfoot wanted her to touch his penis were far more prejudicial to Barfoot than her actual trial testimony. Pointing out the discrepancies between the testimony and the statement would thus have highlighted testimony that was more damaging to Barfoot than S.L.'s trial

testimony. As noted by the trial court, it was not deficient performance for Barfoot's trial counsel to fail to do so.

¶15 The same reasoning defeats Barfoot's final claim. He points out that at the preliminary hearing and in her statement to Schroeder, S.L. stated that Barfoot took her clothes off and then rubbed lotion all over her body. At trial, she testified that he touched her in and underneath her pajamas and pajama shorts.

¶16 Once again, S.L.'s description of the contact at the preliminary hearing and in her statement to Schroeder was more prejudicial than her testimony at trial. As such, trial counsel was not deficient for failing to bring to the jury's attention the more damaging description.

¶17 In addition, at the postconviction hearing Barfoot's trial counsel testified concerning his trial strategy. He testified that his strategy was to convince the jury that A.B. was incredible, and that S.L. was simply inventing a story to mimic that of A.B., either out of sympathy for her friend or to get attention. His strategy was reasonable in light of evidence regarding A.B.'s untrustworthiness and motivation to fabricate charges, and because S.L. made her charges only after A.B. alleged that Barfoot had assaulted her. In addition, A.B. was the first person S.L. told about the assault by Barfoot.

¶18 Trial counsel indicated that S.L. subsequently proved to be a stronger witness than he had expected based upon the immaturity she had previously exhibited while testifying at the preliminary hearing. He testified that he thought it best to get her off the witness stand as quickly as possible and to focus more on other factors designed to show that A.B. was untrustworthy and that S.L. was simply mimicking her. Factors identified by counsel were S.L.'s vagueness as to dates, times and surrounding circumstances.

¶19 Counsel's strategy was reasonable and, in the case of A.B., successful. Moreover, it was reasonable to conclude that attempting to impeach S.L. based upon her prior statements and testimony would be ineffectual because her testimony was not definitive enough to be easily impeached by use of prior inconsistent statements. In addition, challenging her based upon inconsistencies would possibly render her more sympathetic in the jurors' eyes. Because counsel pursued a reasonable strategy and because the alleged inconsistencies in S.L.'s testimony and statements were of little or no importance to that overall strategy, counsel's conduct did not constitute deficient performance. *See State v. Felton*, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983).

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

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).

