

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 26, 2016

Diane M. Fremgen
Clerk of Court of Appeals

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.

Appeal No. 2014AP1008

Cir. Ct. No. 2006CF68

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN D. KNIGHT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Rusk County:
EUGENE D. HARRINGTON, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Kevin Knight appeals an order denying his WIS. STAT. § 974.06 (2013-14),¹ postconviction motion without a hearing. He argues:

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

(1) his trial counsel was ineffective for failing to introduce into evidence the victim's alleged prior false allegations of sexual assault and for failing to impeach her testimony; (2) he is entitled to a new trial based on newly discovered evidence concerning a police officer's posttrial "sexting" with a sixteen-year-old girl; and (3) this court should grant him a new trial in the interest of justice. We reject these arguments and affirm the order.

BACKGROUND

¶2 In 2008, a jury convicted Knight of two counts of sexual assault of a child under the age of sixteen, as a repeater. Although this court granted an extension for Knight to file a postconviction motion or notice of appeal, he did not challenge his convictions at that time. Instead, in 2014, three days after his trial counsel died, Knight filed a motion under WIS. STAT. § 974.06 alleging ineffective assistance of his trial counsel. He also alleged newly discovered evidence regarding one of the officers who investigated the allegations and testified against him.

¶3 The circuit court denied the motion without a hearing, concluding the motion did not raise facts which, if true, would rise to a constitutional dimension. The court noted Knight's trial counsel filed a pretrial motion to exclude evidence of the victim's prior sexual acts as part of a strategic decision to undermine the victim's credibility. Because trial counsel died before the motion could be heard, Knight was required to submit corroborating evidence regarding counsel's ineffectiveness. *See State v. Lukasik*, 115 Wis.2d 134, 140, 340 N.W.2d 62 (Ct. App. 1983). Knight presented no corroborating evidence. Regarding Knight's claim of newly discovered evidence, the court noted the

officer's misconduct occurred after Knight's conviction and did not meet the test for newly discovered evidence.

DISCUSSION

¶4 Whether a postconviction motion alleges sufficient facts to merit a hearing is a question of law that we review de novo. *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). If the motion is deficient, the circuit court may nonetheless grant a hearing in its discretion, which is reviewed under the deferential erroneous exercise of discretion standard. *Id.* at 310-11. To establish ineffective assistance of trial counsel, Knight must show both deficient performance and prejudice to his defense. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's strategic choices, made with full knowledge of the facts and law, are virtually unchallengeable. *Id.* at 690-91. To establish prejudice, Knight must show a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. *Id.* at 694. A reasonable probability is one that undermines our confidence in the outcome. *Id.*

¶5 Knight established neither deficient performance nor prejudice from his counsel's failure to introduce evidence of the victim's alleged prior false allegations of sexual assault because his motion establishes no prior false allegations. The victim's prior sexual history is inadmissible under the rape shield law, WIS. STAT. § 972.11(2)(b). While there is an exception for prior false allegations of sexual assault, Knight has not established that the victim's assertions of prior sexual activities were false. Knight contends the victim's diary entries regarding the loss of her virginity to another man constitutes a prior false accusation as to intercourse with another. The fact of sexual intercourse, not

whether it resulted in loss of her virginity, must be the basis for any claim of a false accusation. The inconsistencies between the victim's diary and statements she made when questioned by police do not establish any exception to the rape shield law.

¶6 Contrary to Knight's argument, his counsel did present impeachment evidence using inaccuracies and inconsistencies in the victim's statements, testimony using extrinsic character evidence regarding her untruthfulness, and the victim's motive for falsely accusing Knight. As the circuit court noted, counsel's strategy challenged the quantity and quality of the State's evidence with reference to the burden of proof and the lack of DNA evidence that could tie the victim to the areas where semen stains were found. Counsel's reasonable strategic decisions cannot be second-guessed on appeal. *Strickland*, 466 U.S. at 690-91.

¶7 The investigating officer's alleged posttrial misconduct does not meet the test for newly discovered evidence. Knight must show a reasonable probability that the jury would have a reasonable doubt of his guilt if the jurors had considered the newly discovered evidence. See *State v. Plude*, 2008 WI 58, ¶¶32-33, 310 Wis. 2d 28, 750 N.W.2d 42. This court independently reviews whether the new evidence might change the result of the prosecution. *Id.*, ¶33. While the officer's alleged posttrial misconduct might have some bearing on his credibility, his credibility was not an important factor in the State's case. There is no evidence that the officer perjured himself at trial or lied about anything during the investigation. He was not a key witness. The officer located a toothbrush that was a different color than the victim described in an area where the victim said she discarded it. The officer was also inside Knight's residence prior to interviewing the victim and having her draw a layout where the assaults occurred. The defense challenged the evidence the officer found, not his credibility. The officer's

subsequent misconduct has nothing to do with his role in the investigation of Knight's case. Because the facts recited in Knight's postconviction motion regarding the alleged prior false accusation and the investigating officer's subsequent misconduct provide no basis for relief, the circuit court properly denied the motion without a hearing.

¶8 Finally, Knight has not established a basis for a new trial in the interest of justice. He contends the real controversy was not fully tried because the jury was not informed of an allegation of the victim's sexual intercourse with another person in 2004, an allegation that we conclude would not be admissible under the rape shield law. He also argues the jury was not informed that the victim had given a statement to authorities a week before she accused Knight in which she made no mention of him, that she knew she would be asked to sketch a layout of the house, and the jury was repeatedly told that her sketch led investigators to where semen stains would be found on the carpet even though the stains were not found exactly where she indicated. Finally, he contends the jury should have been able to assess the officer's misconduct because he was in a position to contaminate the evidence and skew evidence in favor of the victim. These arguments merely repeat Knight's claims of ineffective assistance of counsel and newly discovered evidence that we reject.

By the Court.—Order affirmed.

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

