

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 17, 2008

David R. Schanker
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. 2007AP1346-CR

Cir. Ct. No. 2005CF520

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JERRY L. CARTER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for La Crosse County:
RAMONA A. GONZALEZ, Judge. *Reversed.*

Before Higginbotham, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. The State appeals from an order granting defendant Jerry Carter's motion for a new trial. The issue is whether the court correctly determined that Carter's trial counsel was ineffective. We conclude that his attorney was not ineffective, and therefore we reverse.

¶2 Carter was found guilty by a jury on one count of second-degree sexual assault of a child. He filed a postconviction motion alleging that his trial counsel was ineffective by failing to impeach the alleged victim with a prior inconsistent statement made to a counselor and by improperly conceding during argument that the State’s witnesses were “consistent” in their testimony.

¶3 To establish ineffective assistance of counsel a defendant must show that counsel’s performance was deficient and that such performance prejudiced his defense. We affirm the trial court’s findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the trial court. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985).

¶4 In granting Carter’s motion, the circuit court noted that the State had stipulated that counsel’s performance was deficient. The court then held that counsel’s performance undermined the court’s confidence in the outcome of the trial, and therefore prejudiced Carter.

¶5 The merits of the ineffective assistance argument relate to testimony by the victim. The victim testified that she was spending the night at a friend’s house, and in the morning, after the friend had left the residence, Carter had sexual contact with her in the kitchen. The victim testified that shortly after the contact occurred she left the residence, she saw her friend in an alleyway near the residence, and they went to a park to discuss the incident.

¶6 Carter’s postconviction argument is that his trial counsel should have impeached the victim’s trial account by using notes taken by a counselor two days after the incident, during an interview with the victim. Before trial, Carter’s trial counsel successfully moved on hearsay grounds to exclude any testimony by the

counselor about their sessions. Carter’s concern at that point was that the counselor was going to report statements by the victim describing the incident that were generally consistent with her expected trial testimony.

¶7 Carter’s postconviction motion included a copy of the counselor’s notes, in which the counselor described the victim as having said that after the sexual contact the victim “woke up” her friend and they called the victim’s mother. This conflicts with the victim’s testimony that the friend was already out of the residence and that they met in the alley.

¶8 On appeal, the State argues that neither it nor this court are bound by the State’s concession in circuit court that Carter’s trial counsel’s performance was deficient. The State also argued that it has not waived that issue, because the concession was on an issue of law. We agree. See *State v. Kruzycki*, 192 Wis. 2d 509, 517, 531 N.W.2d 429 (Ct. App. 1995) (concession on an issue of law does not bind an appellate court). Therefore, we begin by considering the State’s arguments on deficient performance.

¶9 The test for measuring deficient performance is an objective one. See *State v. Koller*, 2001 WI App 253, ¶ 8, 248 Wis. 2d 259, 635 N.W.2d 838; *State v. Kimbrough*, 2001 WI App 138, ¶¶ 31-35, 246 Wis. 2d 648, 630 N.W.2d 752 (function of a court assessing a claim of deficient performance is to determine whether counsel’s performance was objectively reasonable). Although the State asserts that defense counsel’s own assessment of his performance as deficient is entitled to limited weight, it cites no authority for that proposition. Since the test is objective, defense counsel’s own opinion is entitled to no deference. Therefore, we are permitted to conclude that an action or omission by counsel is not deficient

performance regardless of counsel's actual reason for the act or omission and regardless of counsel's opinion.

¶10 The State argues that the performance by Carter's counsel was not deficient because counsel could reasonably believe that opening the door to the counselor's notes by using them for impeachment would have led to the remainder of the counselor's testimony, as well as additional testimony by a police officer describing prior consistent statements by the victim, being allowed in. According to the State, this additional testimony would have been allowed under the rule of completeness, *see State v. Eugenio*, 219 Wis. 2d 391, 407-13, 579 N.W.2d 642 (1998), and as a prior consistent statement offered to rebut a charge of recent fabrication by the victim, *see* WIS. STAT. § 908.01(4)(a)2.

¶11 We agree that the evidence would have been admissible under these theories. If Carter's attorney had opened the door to the counselor's notes, after successfully moving to have the counselor's testimony excluded, it would have given the prosecutor an opportunity to present prior consistent statements of the victim that were harmful to the defense and not offset by the inconsistency in a single sentence. We agree with the State that the jury would have had no reason to think that the counselor was especially concerned about the exact events following the assault but instead was concerned about the assault itself and its effect on the victim. Thus, we agree with the State that the potential harm of opening the door more than offset the potential benefit to the defense. It was objectively reasonable not to attempt impeachment by use of the counselor's notes. Therefore, because a reasonable attorney could have made this decision, counsel's performance was not deficient. We do not discuss prejudice because we need not address both components of the analysis if defendant makes an inadequate showing on one. *Strickland v. Washington*, 466 U.S. 668, 697 (1984).

¶12 Although our decision in this opinion is based on the merits, we could also have reversed based on the inadequate respondent brief filed by Carter. *See State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (court may reject arguments inadequately briefed). Carter’s brief argues that the State waived the issue of deficient performance. But beyond that, on the merits of the ineffective assistance claim, the brief is inadequate. Carter incorrectly argues that our standard of review is discretionary on ineffective assistance of counsel and that we should defer to the circuit court. As to the specifics of the State’s ineffective assistance arguments, Carter’s brief largely sidesteps the issues raised.

By the Court.—Order reversed.

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

