

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 6, 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. 2007AP1849-CR

Cir. Ct. No. 2005CF491

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JORDAN L. GAJEWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marathon County: PATRICK M. BRADY, Judge. *Reversed and cause remanded.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Jordan Gajewski appeals a judgment convicting him of third-degree sexual assault, and an order denying his postconviction motion in which he alleged ineffective assistance of trial counsel. Because we conclude

Gajewski's trial counsel was ineffective, we reverse the judgment and order and remand the matter for a new trial.¹

BACKGROUND

¶2 Rebecca L.B. testified that after attending a party, she spent the night at a friend's house. Gajewski, who attended the same high school, also spent the night at that house. Rebecca recognized Gajewski from school but did not know him well. During the night, Rebecca woke up to find Gajewski kissing her and removing her clothing. He then had intercourse with her. She testified that she told Gajewski to stop. He eventually stopped and went back to sleep. As these events occurred, two other people were sleeping in the same room and two other friends of Rebecca were in the house. Rebecca's attempts to prevent the assault did not awaken the other people in the room and she did not yell for help from her friends sleeping nearby.

¶3 On cross-examination, counsel asked Rebecca whether she had a conversation with Gajewski at school several days after the alleged assault. Rebecca responded that she did not remember whether she spoke with Gajewski following the assault. Counsel asked, "If you had been raped a few days earlier by [Gajewski], you wouldn't want to talk to him at all; would you?" Rebecca responded, "Right."

¹ The postconviction motion also alleged newly discovered evidence that Rebecca L.B. admitted to having falsely accused Gajewski. Because we conclude the case must be retried due to ineffective assistance of counsel, we need not address that issue or Gajewski's request for reversal in the interest of justice.

¶4 Gajewski did not testify. The only defense witness, Kori King, testified he was sleeping three feet from Rebecca and heard nothing. He said the next morning Rebecca did not appear upset.

¶5 At the postconviction hearing, Gajewski testified he gave his trial counsel a cursory description of an encounter with Rebecca that took place at school several days after the alleged assault. During that conversation, Rebecca invited Gajewski to a concert. He responded that he was attending the prom with another girl the night of the concert. Rebecca then grabbed his hand, wrote her telephone number on it and told Gajewski to call her later. When Gajewski told her he was not interested in her, she stormed off. Gajewski testified he told his trial counsel that Rebecca had given him her phone number and they had discussed their plans. Gajewski's friend, Casey Connor, testified at the postconviction hearing and confirmed seeing the end of the encounter, although he did not hear what was said.

¶6 Rebecca testified at the postconviction hearing that she was not interested in Gajewski and had never asked him to go out with her. But when asked whether she had given Gajewski her cell phone number to call her following the prom, she answered, "I don't recall."

¶7 Gajewski's trial counsel testified at the postconviction hearing that Gajewski had told him about the school encounter with Rebecca after the alleged assault, and counsel did not inquire further about it. Counsel acknowledged that a jury would probably have found Rebecca's behavior inconsistent with having been assaulted and he agreed that he should have cross-examined Rebecca about it at trial. He acknowledged that he had not offered any evidence of motive for

Rebecca to fabricate the assault, and that Gajewski's rejection of Rebecca would have provided such a motive.

DISCUSSION

¶8 To establish ineffective assistance of counsel, Gajewski must show both that counsel's performance was deficient and that it was deficient in a manner that prejudiced the defense. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance is judged on an objective standard of reasonableness. *Id.* at 688. To establish prejudice, Gajewski must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is one that undermines this court's confidence in the outcome. *Id.*

¶9 Gajewski's trial counsel was ineffective in several ways. First, counsel should have asked for more information from Gajewski that would have revealed details of his after-school encounter with Rebecca. This additional information could have been used to cross-examine Rebecca as to motive for fabricating or exaggerating the assault. Counsel could also have offered Connor's testimony to prove that some encounter occurred after the assault. Second, on the information counsel had about the encounter, he could have and should have cross-examined Rebecca on whether she gave Gajewski her phone number. If Rebecca had responded that she did not recall giving Gajewski her phone number, as she did at the postconviction hearing, the jury could reasonably doubt the victim would not recall this unusual behavior. The jury could reasonably doubt the assault occurred if the alleged victim gave the assailant her phone number after the assault.

¶10 Trial counsel should also have developed evidence regarding Rebecca's motive for falsely accusing Gajewski. While the trial court correctly noted that counsel did not possess all of this information, we fault counsel, not his client, for failing to develop it. A complainant's motive for falsely accusing a person of sexual assault is an obvious concern that should be investigated. Gajewski told his counsel about an encounter with Rebecca after the alleged assault and three days before she reported it. A reasonable attorney would have inquired further about that encounter to determine whether it provided a motive for false accusation. Counsel's failure to investigate facts that were readily available to him and his failure to employ those facts at trial to undermine Rebecca's credibility falls below an objective standard of reasonableness. *See State v. Jeannie M.P.*, 2005 WI App 183, ¶25, 286 Wis. 2d 721, 703 N.W.2d 694. When a case hinges on witness credibility, trial counsel has a duty to investigate and present impeaching evidence when counsel was or should have been aware of its existence. *Id.*, ¶11.

¶11 Counsel's strategic choices made after thorough investigation of the law and facts are virtually unchallengeable. *Strickland*, 466 U.S. at 690-91. However, strategic choices made after less than complete investigation and without full knowledge of the available facts cannot be described as a reasonable strategic decision. *See Wiggins v. Smith*, 539 U.S. 510, 528 (2003).

¶12 Because the State's case depended on Rebecca's credibility and her account of an assault in the presence of others might be considered improbable, this was a close case. Counsel's failure to investigate the school encounter, his failure to present evidence of Rebecca's behavior that appears inconsistent with the alleged assault, and his failure to investigate and present evidence explaining her motive for false accusation undermine our confidence in the outcome.

By the Court.—Judgment and order reversed and cause remanded.

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

