

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 2, 2010

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. 2009AP229-CR

Cir. Ct. No. 2001CF2565

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM C. JACKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: PAUL B. HIGGINBOTHAM and JAMES L. MARTIN, Judges. *Affirmed.*

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

¶1 PER CURIAM. William Jackson appeals a judgment convicting him of five counts of sexually assaulting sixteen-year-old Stephanie G. during a trip from Illinois to her home in Sparta, Wisconsin. He also appeals an order

denying his postconviction motion in which he alleged ineffective assistance of trial counsel. He contends his counsel was ineffective in two respects: (1) counsel failed to call Tiffany Gutierrez as a witness to establish that Stephanie initially denied any sexual contact with Jackson; and (2) counsel failed to effectively prepare Jackson to testify, resulting in Jackson using crude language during his testimony. We reject these arguments and affirm the judgment and order.

¶2 The complaint charged Jackson with seven counts of sexually assaulting Stephanie as he drove her home from Illinois and when they stopped at a motel. Stephanie's mother became suspicious when Stephanie arrived home with Jackson much later than expected and in different clothing. When she asked Stephanie if any inappropriate sexual contact occurred, Stephanie initially denied it. The next night, she told her mother of the sexual assaults. A physical examination revealed that Stephanie had bruising on her labia majora and on her cervix. When questioned by detectives, Jackson admitted he touched Stephanie's breasts and let her touch his penis while he was driving. He eventually stopped and got a motel room so he could "fool around" with Stephanie before taking her home. He admitted kissing her vagina area, touching her breast with his hand, touching her vagina with his hand and sticking his finger in her vagina. She also touched his bare penis. The jury acquitted Jackson of the two counts he denied to detectives, touching Stephanie's vagina in the car and having Stephanie perform oral sex on him in the motel.

¶3 To establish ineffective assistance of trial counsel, Jackson must show deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Jackson must overcome the presumption that counsel's challenged action might be considered sound trial strategy. *Id.* at 689. Strategic choices made after thorough investigation of law and facts relevant to plausible

options are virtually unchallengeable. *Id.* at 691. The reasonableness of counsel's actions may be determined or substantially influenced by Jackson's own statements or actions. *Id.* To establish prejudice, Jackson must establish a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. A reasonable probability is one that undermines our confidence in the outcome. *Id.* at 694.

¶4 Counsel's decision not to call Gutierrez to establish Stephanie's initial denial that a sexual assault occurred does not constitute deficient performance for two reasons. First, the trial court did not accept Jackson's assertion that he informed his trial counsel of Stephanie's statement before trial. Counsel denied having any knowledge of the statement. The trial court is the arbiter of the witnesses' credibility. *State v. Kimbrough*, 2001 WI App 138, ¶29, 246 Wis. 2d 648, 630 N.W.2d 752. Counsel cannot be faulted for failing to present evidence that Jackson did not share with his attorney. *Strickland*, 466 U.S. at 691. Second, counsel indicated he was reluctant to call Gutierrez as a witness because she had told police Jackson supplied Stephanie and her with alcohol on the afternoon of the sexual assaults. That decision constitutes a sound trial strategy that cannot be second-guessed on appeal. *Id.* at 690.

¶5 Jackson also failed to establish prejudice from his counsel's failure to call Gutierrez as a witness. Stephanie testified that she initially denied the sexual contact to her mother. Therefore, Gutierrez's testimony would have been cumulative.¹ In addition, challenging Stephanie's credibility would not be likely

¹ It is not clear that Gutierrez's testimony would have been admissible. Her knowledge of Stephanie's statements appear to be limited to Stephanie's mother's side of a telephone conversation with Stephanie that Gutierrez overheard.

to produce an acquittal on any of the five charges for which Jackson was convicted. The jury acquitted Jackson of the charges that depended solely on Stephanie's credibility. It convicted Jackson of the counts that he admitted to detectives. The results of the physical examination and Jackson's incriminatory statements led to the convictions regardless of Stephanie's credibility.

¶6 Jackson also failed to establish deficient performance or prejudice from his counsel's preparation of Jackson to testify. Although counsel admitted he did not go over an exact list of questions, on several occasions he "pushed Mr. Jackson on every weak point in the case" until he was confident that Jackson knew what was going on and was a "believable, likeable, credible guy who doesn't get real flustered." He gave Jackson general instructions like keeping his answers short, and if Jackson did not understand a question, to ask for clarification. Counsel's stated fear that spending too much time preparing can make a witness more nervous and make them a worse witness constitutes a reasonable trial strategy. In addition, the degree of preparation appears to have been successful in that it resulted in acquittal of the charges that Jackson did not admit to detectives.

¶7 Jackson identifies three statements made during his testimony that he contends prejudiced the jury. He alleged Stephanie was "hammered"; he answered questions with "hell, no"; and said Stephanie was "yelling that her whole mother don't love her, her dad don't want her." Nothing in our review of the record suggests that the jury was influenced by Jackson's language. Counsel's failure to rehearse Jackson's testimony to eliminate that type of language does not undermine our confidence in the outcome.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)5. (2007-08).

