

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 7, 2002

Cornelia G. Clark
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. 02-0039-CR
STATE OF WISCONSIN**

Cir. Ct. No. 98-CF-488

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JARRETT M. ADAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: JACQUELINE R. ERWIN, Judge. *Affirmed.*

Before Vergeront, P.J., Dykman and Roggensack, JJ.

¶1 PER CURIAM. Jarrett Adams appeals from a judgment of conviction and an order denying his postconviction motion. The issues are whether his trial counsel was ineffective, whether justice miscarried, and whether the evidence was sufficient. We affirm.

¶2 Adams and two other men were charged with several counts of sexual assault for events that were alleged to have occurred with a single victim in a college dormitory room. Their first trial ended when the circuit court granted their motion for a mistrial in response to the State's amendment of the charges after the close of evidence. After the second trial, of just Adams and Dimitri Henley, Adams was convicted for direct commission or conspiracy of five counts of second-degree sexual assault, by use or threat of force or violence, under WIS. STAT. § 940.225(2)(a) (1999-2000).¹

¶3 Adams's first argument on appeal is that his trial counsel was ineffective in several ways. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We affirm the trial court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice is a question 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 Adams first argues that his counsel was ineffective by failing to call any medical personnel to testify about statements the victim made at the hospital on the day following the incident. These statements were inconsistent in certain respects with her trial testimony. At the postconviction hearing, Adams's trial counsel testified that he and counsel for co-defendant Henley had agreed not to call witnesses in order to highlight the weakness of the State's case. Adams

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

argues on appeal that his counsel's testimony is not credible because it is inconsistent with postconviction testimony by Henley's counsel. Adams asserts that Henley's counsel "never mentioned" an agreement with Adams's counsel regarding witnesses, and that Henley's attorney testified that "the only discussion" they had was whether the defendants would personally testify.

¶5 We do not find any such testimony by Henley's attorney at the location in the record cited by Adams. Instead, we find Henley's attorney testifying that his discussion with other counsel "included" a discussion about whether the defendants would testify. Then there was the following exchange:

Q. And part of that discussion beyond whether or not the clients would be called also included whether or not other witnesses were going to be called.

A. Sure.

Q. And just like with the defendants, there was certain information shared about the fact that you weren't planning, absent something unforeseen or surprising, weren't planning on calling any witnesses outside of the defendants either?

A. Yes.

Adams argues only that such an agreement did not occur, and not that it would have been unreasonable. Accordingly, we conclude that Adams's counsel, in consultation with other defense counsel, made a reasonable strategic decision not to call witnesses.

¶6 In addition, Adams's counsel testified that he did not call one of the medical personnel, a physician, because it would have led to testimony that the victim initially reported that anal intercourse occurred. The victim did not testify to anal intercourse at either the first or second trial. Counsel said that he wanted to avoid any mention of anal intercourse because it would have "lent a new sphere to

the whole thing,” and would “just indicate brutality.” This was also a reasonable strategic decision.

¶7 Adams also argues that his counsel was ineffective by not cross-examining the victim with her prior inconsistent statements from the preliminary hearing and the first trial. His counsel testified as follows during his cross-examination at the postconviction hearing:

Q. And if you try and impeach a victim with every inconsistency they have ever made, you can lose the jury?

A. You’re going to appear to be grasping.

....

Q. And it’s your assessment, is it not, that the types of inconsistencies you were examined by counsel about would have been minimal inconsistencies? Let me state another way, that they were inconcise [sic] on the periphery of the nature of the sexual assault?

A. I thought that even if I could convince the jury they were inconsistent, it would have yielded no advantage at all and, in fact, would have probably turned the jury off. Again I would just be grasping.

Later counsel testified:

I don’t think the prior inconsistent statements were very important. I remember that. It’s been my experience in the trials I have had that when time passes-- Actually, it’s discussion with other people is what it is. But, anyway, that’s my opinion. But witnesses always recall with more clarity at trials than they do at Preliminary Hearings or prior trials. It is – It’s very difficult to convince a jury that they’re lying or they have been coached or they’re just making things up.

We conclude that counsel’s choice was a reasonable one.

¶8 Adams next argues that his counsel was ineffective by failing to call as a witness a person who was present in the dormitory and would have testified

contrary to the victim's testimony on certain points. As we discussed above, defense counsel agreed they were not going to call witnesses, and this was a reasonable decision.

¶9 Adams argues that his trial counsel was ineffective by failing to object to the wording of the jury instruction on conspiracy. The trial court modified the pattern jury instruction with additional language. Adams argues that some of the language did not correctly state the law of conspiracy. In particular he argues that counsel should have objected to the instruction that stated: "One who tacitly consents to the object of a conspiracy and goes along with the other conspirators is guilty even though he intends to take no active part in the crime but stands by while they put the conspiracy into effect." Adams argues that the given instruction allowed the jury to believe that a co-conspirator need take no affirmative action, by speech or action, to participate in a conspiracy, and therefore may have found him guilty simply for being present while an assault occurred.

¶10 We are satisfied that the jury instruction adequately stated applicable law. Criminal liability for conspiracy is based on the agreement between the parties, as discussed in *Bautista v. State*, 53 Wis. 2d 218, 224-25, 191 N.W.2d 725 (1971). We conclude that the jury instruction in this case informed the jury that the essential act of a conspiracy is an agreement between multiple parties to direct their conduct toward realization of an intended criminal objective. Accordingly, counsel was not ineffective by failing to object.

¶11 Adams argues that his trial counsel was ineffective by failing to request an instruction on a lesser-included offense of third-degree sexual assault. The difference between the charges is that the lesser one does not include the

element of use or threat of force or violence. *See* WIS. STAT. § 940.225. His counsel testified that it was clear Adams did not want to be convicted of anything, and was adamant about his innocence. Counsel also testified that it was a tactical decision not to request a lesser-included instruction, in part because it would have been inconsistent with their defense that the intercourse was consensual. These were reasonable grounds for counsel not to request the instruction.

¶12 Adams filed a motion in circuit court for a new trial. The motion asserted that it was based on WIS. STAT. § 806.07(1)(h), and the ground was that justice had miscarried because a police officer did not turn over written notes of statements made by Adams and a co-defendant. The officer first produced those notes during the last trial of the co-defendant, after Adams's trials. Adams raises this issue on appeal, but his brief is ambiguous as to whether he is asking us to review the circuit court's decision on this motion, or to exercise our own independent discretionary power under WIS. STAT. § 752.35. We will treat it as the latter. The legal standard for exercising our discretion is well-established. *See Vollmer v. Luety*, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990).

¶13 Adams does not argue that the notes contained any new exculpatory information that was not already presented in the officer's formal report. Rather, his argument appears to be that the officer's late disclosure of the notes, and her earlier testimony that she no longer had the written notes, could have been used for a general attack on her credibility. He argues that because this attack might have discredited her testimony about the results of the criminal investigation, justice has miscarried. We disagree. We do not see a substantial probability of a different result on retrial. It is unlikely that the information about the notes would cause a jury to discredit the officer's testimony about the investigation.

¶14 Finally, Adams argues that the evidence at trial was insufficient. We affirm the verdict unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that no reasonable trier of fact could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Although Adams focuses on a number of weaknesses in the victim's story and inconsistencies between her testimony and other witnesses, that focus is inconsistent with our role of viewing the evidence most favorably to the State. That role requires us to focus on the strengths of her testimony, not its weaknesses. The victim's testimony, if believed, was sufficient to support the charges the jury was instructed on.

By the Court.—Judgment and order affirmed.

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

