

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 16, 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. 02-0629
STATE OF WISCONSIN**

Cir. Ct. No. 97-CF-440

**IN COURT OF APPEALS
DISTRICT III**

**STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN L. C.,

DEFENDANT-APPELLANT.**

APPEAL from an order of the circuit court for Outagamie County:
JAMES T. BAYORGEON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Kevin L.C. appeals an order denying his postconviction motion under WIS. STAT. § 974.06.¹ Kevin's motion challenged a

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

1998 judgment convicting him of sexually assaulting twelve-year-old Melissa M.W. and his six-year-old stepdaughter, Kimberly A.R. The charge involving Melissa was initially filed in 1993. After he was bound over for trial, Kevin passed a polygraph test and the State dismissed the charge without prejudice. When Kimberly's allegations arose in 1997, the State reinstated the charge involving Melissa as well as charging sexual contact with Kimberly. The jury convicted Kevin on both counts and this court affirmed the judgments. Kevin then brought the present motion for postconviction relief alleging ineffective assistance of counsel, newly discovered evidence and other errors. The trial court denied the motion and Kevin appeals.

¶2 The State's evidence consisted primarily of testimony from four witnesses. Melissa testified that Kevin had sexual relations with her in 1992. Her childhood friend, Lindsey B., testified that she witnessed sexual contact between Kevin and Melissa. Melissa and Lindsey had drifted apart since that time and were no longer close friends. Kimberly's deposition testimony was played for the jury. She stated that Kevin touched her through her clothing when they "played doctor." A social worker, Mark Reich, testified regarding Kimberly's statements to him about the assault, patterns of behavior for sexual assault victims, and a statement by Kimberly's younger brother that he had witnessed Kevin sexually touching Kimberly through her clothes.

¶3 The defense consisted primarily of Kevin's denial that he assaulted either girl. His wife and Kimberly's mother as well as Kimberly's grandmother and aunt testified that Kimberly was motivated to falsely accuse Kevin so that she would not be required to move to Oklahoma with the family, but would have custody transferred to her biological father or grandmother. Kimberly's grandmother also testified that Kimberly told her that she lied when she first

reported Kevin's sexual touching at school. The jury found the State's witnesses more credible.

¶4 Kevin raises eleven issues on appeal, most of which involve ineffective assistance of counsel claims. To establish ineffective assistance of counsel, Kevin must show deficient performance and prejudice. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984). To establish deficient performance, he must identify acts or omissions of counsel that are not the result of reasonable professional judgment. Strategic choices made after thorough investigation of the law and facts are virtually unchallengeable. *Id.* at 690. To establish prejudice, Kevin must establish a reasonable probability that, but for counsel's unprofessional errors, the result of a trial would have been different. A reasonable probability is one that undermines this court's confidence in the outcome. *Id.* at 694.

¶5 Kevin first argues that his trial counsel was ineffective for failing to move to dismiss the charge regarding Melissa because the State acquired no new evidence after the 1993 dismissal. He has established neither deficient performance nor prejudice because there was no basis for seeking dismissal. The earlier charge was dismissed without prejudice, before jeopardy attached, and without a specific agreement between the parties. The statute of limitations had not expired. Kevin cites no authority to support his claim that voluntary dismissal without prejudice after probable cause is found precludes recharging unless additional evidence is presented. In addition, the State acquired additional evidence against Kevin, consisting of Kimberly's statement that she had witnessed sexual contact between Kevin and Melissa.

¶6 Kevin next argues that the trial court erroneously exercised its discretion and Kevin's trial counsel was ineffective for conducting a hearing on a motion in limine when Kevin was absent. The State brought the motion in limine to prohibit the defense from introducing an allegedly false prior accusation of sexual assault by Kimberly against her aunt. The trial court ruled that Kevin failed to establish that the previous accusation was unfounded. Kevin alleges that he could have offered his counsel additional information about the previous incident if he had been present. A defendant's presence is only required at the trial itself and at pretrial hearings where his presence is necessary to insure a fair procedure. *See Kentucky v. Stincer*, 482 U.S. 730, 745 (1987). No testimony was taken at the hearing. It consisted entirely of argument by counsel. Kevin's wife, who supported him against her daughter's accusations, was present at the hearing and had all of the information Kevin had, much of it first hand. In addition, Kevin spoke with his attorney by telephone before the hearing. Because Kevin's trial counsel had all of the information available to him at the hearing, the trial court properly proceeded and Kevin was not prejudiced by counsel's failure to ask for a continuance.

¶7 Kevin next argues that his counsel was ineffective for failing to preserve the record in his first appeal by including social services' investigative files regarding Kimberly's accusation against her aunt, and that his counsel should have presented alternative arguments for admissibility of Kimberly's alleged false accusation. The social services records are now a part of the record on appeal and, contrary to Kevin's argument, do not establish that the prior accusation was false. Kevin also faults his attorney for failing to argue that Kimberly's allegation against her aunt was admissible to show Kimberly's source of knowledge of sexual matters. *See State v. Dunlap*, 2002 WI 19, ¶4-6, 250 Wis. 2d 466, 640

N.W.2d 112. Kimberly's allegations involved touching through her clothing while "playing doctor." Her testimony did not display any unusual sexual knowledge. Kevin faults his trial counsel for not arguing that he should have been allowed to present evidence of other sexual assaults against Kimberly. Reich's testimony that Kimberly showed symptoms of a sexual assault victim, he argues, created a need to show that sexual assault may have been committed by someone other than Kevin. That argument fails because Reich's testimony referred to Kimberly's inconsistent statements and her fear of her stepfather and mother. Kimberly's allegations of sexual abuse by her twelve-year-old aunt would not produce the symptoms Reich described.

¶8 Kevin next argues that the trial court improperly admitted hearsay testimony at his preliminary hearing and that his counsel was ineffective for failing to object to that testimony. Rulings on the admissibility of evidence cannot be challenged in a WIS. STAT. § 974.06 motion. *See State v. Langston*, 53 Wis. 2d 228, 231-32, 191 N.W.2d 713 (1971). In addition, errors in the preliminary hearing cannot be raised after trial. *See State v. Wolverton*, 193 Wis. 2d 234, 254, 533 N.W.2d 167 (1995).

¶9 Kevin faults his trial counsel for stipulating to the admission of evidence that Kimberly exhibited behavior commonly associated with sexually abused children without first requesting an independent evaluation. Kevin has not identified any expert witness who would have contradicted Reich's testimony. Therefore, Kevin has not established any prejudice from his counsel's failure to object and failure to retain his own psychological expert.

¶10 Kevin also faults his counsel for agreeing to the admission of Kimberly's prior consistent statements. Prior consistent statements are admissible

to rebut an express or implied charge of recent fabrication or improper influence or motive. *See* WIS. STAT. § 908.01(4)(a)2. Defense counsel agreed to allow Kimberly's prior consistent statements to rebut a suggestion that Kimberly was improperly influenced by her father and stepmother into making this allegation. The suggestion that Kimberly's father and stepmother were behind the accusations was suggested in Kimberly's mother's reports to social workers that were admitted into evidence. Trial counsel later abandoned any attempt to prove improper influence by Kimberly's father and stepmother. However, he did present substantial evidence of improper motive, that Kimberly's accusations against Kevin were designed to effect a custody change so that she would not have to move to Oklahoma. Counsel's decision to forego evidence of improper influence in favor of the theory that Kimberly was trying to avoid moving to Oklahoma constitutes a reasonable trial strategy that cannot be second-guessed by this court. *See Strickland*, 466 U.S. at 690-91.

¶11 Kevin argues that his trial counsel was ineffective because he opened the door to Reich's hearsay testimony by asking Reich whether he was aware of anyone other than Kimberly who witnessed sexual contact between her and Kevin. We conclude that he did not "open the door" to Reich's testimony that Kimberly's brother said he witnessed sexual contact. Counsel's question was not answered and he withdrew the question. The prosecutor later asked the same question and elicited testimony that Kimberly's brother witnessed sexual touching.

We conclude that counsel's withdrawn question did not open the door to this line of cross-examination.²

¶12 Kevin next argues that he established newly discovered evidence consisting of "exculpatory witness statements," and that his trial counsel was ineffective for failing to present those statements. The evidence consists of several witnesses' statements that Melissa has a character for untruthfulness and that she and Lindsey discussed the case in 1993 and gave the impression that they were trying to "get their stories straight." These witnesses' statements were given to a private investigator in 1993 but were not turned over to Kevin's 1997 counsel. Kevin's counsel was not deficient for failing to discover these statements. He requested the file from Kevin's previous attorney and received some documents. He had no reason to know that additional documents existed. The trial court correctly ruled that counsel adequately represented Kevin when his performance was measured against prevailing professional norms. *See Strickland*, 466 U.S. at 689.

¶13 Kevin has not established that the statements constitute "newly discovered evidence." To be newly discovered, the evidence must have come to his knowledge after trial, without negligence on his part. It must be material and not cumulative, and the result of the trial must probably have been different if the evidence had been presented. *See State v. Boyce*, 75 Wis.2d 452, 457, 249 N.W.2d 758 (1977). Kevin overstates the significance of these statements when

² Kevin does not argue that the trial court erred by allowing hearsay testimony at the trial. In addition, the trial court's ruling that the State opened the door prevented the State from establishing any hearsay exceptions. Therefore, we will not address whether Reich's testimony included impermissible hearsay.

he describes them as “exonerating witness statements.” The witness who overheard Melissa and Lindsay discussing their testimony went on to say that Lindsay told Melissa “I’m not going to lie.” Other witnesses’ statements would not be admissible as they merely show the witnesses’ assessment of the evidence. At trial, Kimberly’s reputation for untruthfulness was appropriately examined through her mother’s, grandmother’s and aunt’s testimony. The statements were cumulative and would not have affected the verdicts.

¶14 Kevin next argues that his trial counsel was ineffective for allowing the jury to hear that he had been twice convicted of a crime when, in fact, he had one prior conviction. The second offense was reduced to a civil forfeiture and therefore did not constitute an additional criminal conviction. The reasonableness of counsel’s actions may be determined or substantially influenced by Kevin’s own statements and actions. See *Strickland*, 466 U.S. at 691. Kevin himself provided the information that he had two prior convictions. He had testified to that effect at a CHIPS hearing. He cannot fault counsel for presenting erroneous information that he personally provided. This situation is not comparable to that in *State v. Pitsch*, 124 Wis. 2d 628, 640, 369 N.W.2d 711 (1985), in which the State was allowed to present details about nine prior convictions after the witness gave the wrong answer as to the number of convictions. Here, the jury heard no details about the nature of the offenses, and the difference between one and two prior convictions is not one that undermines this court’s confidence in the jury’s verdict.

¶15 Kevin next faults his counsel for failing to introduce evidence that Kevin volunteered to take a polygraph. Counsel testified that, in his experience, once the jury is told that a polygraph was administered, the jury will want to know the results. He concluded that it was preferable for the jury not to hear that Kevin

volunteered to take a polygraph based on the risk that the jury would speculate about its results. That decision falls within the wide range of reasonable professional assistance and does not constitute deficient performance. *See Strickland*, 466 U.S. at 689.

¶16 Kevin next faults his trial counsel for failing to challenge Kimberly's videotaped deposition on the ground that the record failed to show that Kimberly understood the meaning of the oath. Kimberly was almost twelve years old by the time this testimony was given. The record does not suggest that she did not understand the meaning of an oath.

¶17 Finally, Kevin argues without elaboration that he is entitled to a new trial under the theory of "manifest injustice" or "plain error." This court does not have authority in an appeal from an order under WIS. STAT. § 974.06 to reverse a conviction in the interest of justice. *See State v. Allen*, 159 Wis. 2d 53, 55, 464 N.W.2d 426 (Ct. App. 1990). Kevin has not established any "obvious" or "grave" evidentiary errors that would implicate the plain error rule. *See State v. Vinson*, 183 Wis. 2d 297, 303, 515 N.W.2d 314 (Ct. App. 1994).

By the Court.—Order affirmed.

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

