

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 12, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

**Nos. 96-3185-CR
97-0322**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARLON SPEARS,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed.*

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

PER CURIAM. Marlon K. Spears appeals from a judgment of conviction and from an order denying his postconviction motion. The issue is whether his trial counsel was ineffective by failing to impeach the victim at trial by use of earlier, possibly inconsistent, testimony. We affirm.

Spears was charged with one count of sexual contact with a person under sixteen and one count of sexual intercourse with a person under sixteen, contrary to § 948.02(2), STATS. Both counts were alleged to have occurred with the same victim in the course of the same incident. The victim, Erin T., testified that Spears committed the charged acts on the porch of her residence. Spears testified that although he was on the porch with Erin at the time in question, no sexual activity occurred. Other witnesses also testified, but Erin and Spears were the only eyewitnesses presented. The jury acquitted Spears on the intercourse charge but convicted him on the contact charge.

The sexual contact charge was based on Erin's allegation that Spears fondled her breast before commencing intercourse. Spears argues that his trial counsel was ineffective for not impeaching Erin at trial with her possibly inconsistent testimony from the preliminary examination.

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 need not address both components of the analysis if defendant makes an inadequate showing on one. *Strickland*, 466 U.S. at 697. To demonstrate prejudice, the defendant must show that there is 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 sufficient to undermine confidence in the outcome. *Id.* 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, 714-15 (1985).

Specifically, Spears argues that at trial Erin testified that he touched her under her clothing, while at the preliminary hearing she testified that he did so over her clothing. He argues that by impeaching her with this inconsistency, trial counsel could have bolstered his defense that Erin's testimony about the incident was false. This impeachment would have been especially effective, he argues, because the contact charge was supported only by a few lines of her testimony, and because the jury apparently already had doubts about her credibility, as demonstrated by its acquittal on the intercourse charge.

We focus on the prejudice part of the analysis. We do not agree that this additional impeachment would have assisted Spears's defense enough to be a prejudicial omission. While it may be true that Spears's trial counsel did not challenge Erin's credibility specifically to this count, he did challenge her credibility in various other ways that tended to undermine her testimony as to *both* counts. Nor was Spears's defense based solely on attacking the victim's credibility, since he testified himself that neither event occurred.

We do not accept Spears's characterization of the contact charge as being supported by only a few lines of Erin's testimony. While her description of that contact took only a few lines of transcript, substantial portions of other trial testimony, by her and others, provided background or circumstantial evidence which, if viewed as argued by the State, provided support for both counts.

While Spears argues that the jury's split verdict supports his prejudice argument, it is difficult to be certain what significance to give to that split. It may show that the jury had doubts about Erin's credibility, but it also suggests that the jury did not believe Spears either, because if it did, it would have acquitted him on

both counts. We are not persuaded that the additional impeachment might have led the jury to acquit on both counts.

Spears also argues that his trial counsel was ineffective for failing to impeach Erin with her inability to remember specifics of how he touched her, and in his cross-examination of another witness. However, these issues were not addressed in Spears's postconviction motion or in his questioning of trial counsel, and therefore he has waived them. *See State v. Elm*, 201 Wis.2d 452, 463, 549 N.W.2d 471, 476 (Ct. App. 1996).

By the Court.—Judgment and order affirmed.

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

