**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

June 16, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 97-1394-CR**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**THOMAS M. RAAB,**

**DEFENDANT-APPELLANT,**

**ALLEN EMIL HOTCHKISS,**

**DEFENDANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON and MICHAEL J. BARRON, Judges. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Thomas M. Raab appeals from a judgment entered after a jury convicted him of one count of second-degree sexual assault of a child, while armed, two counts of second-degree sexual assault of a child, one count of child enticement as party to a crime, and one count of delivery of a controlled substance to a minor, contrary to §§ 948.02(2), 939.63, 948.07, 939.05, 161.14(4)(t), and 161.46(2), STATS., 1993-94. He also appeals from an order denying his postconviction motion alleging ineffective assistance of trial counsel. Raab claims that: (1) the trial court erred in denying his postconviction motion without conducting a ***Machner*** hearing;[1] (2) his trial counsel provided ineffective assistance; and (3) the evidence was insufficient to support the convictions. Because the trial court did not err in deciding the postconviction motion without a hearing, because Raab's trial counsel provided effective assistance, and because the evidence is sufficient to support the verdicts, we affirm.

## I. BACKGROUND

In October 1994, fourteen-year-old Janelle S. ran away from home to live with twenty-five-year-old Robert Burkhardt, who she considered to be her boyfriend. Burkhardt introduced Janelle to his friends, including Raab, David Orcholski and Al Hotchkiss. The police located Janelle in April 1995, and returned her to the home of her parents.

Janelle asserted that during the time she was away from home, she had sexual contact with the four men referenced above as well as three women. On the basis of her statements, the men were charged with a variety of crimes.

[1] *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Relevant to this case, Raab was charged with the crimes that the jury convicted on and two other crimes on which the jury returned not guilty verdicts.

Raab denied that he had sexually assaulted Janelle when he testified in his own defense. Janelle, Burkhardt and Hotchkiss testified for the State. The jury convicted. Raab filed a postconviction motion alleging ineffective assistance of trial counsel. The trial court denied the motion without a hearing. Raab now appeals.

## II. DISCUSSION

*A. Machner Hearing and Ineffective Assistance Claims.*

Raab contends that the trial court erred in denying his ineffective assistance claims without holding a hearing and that counsel was ineffective for: (1) failing to request a specific unanimity instruction; (2) failing to raise the issue of selective prosecution; and (3) failing to introduce evidence of Raab's impotence at trial. We reject Raab's claims.

Our standard of review of the trial court's decision to deny Raab's motion without a hearing is as follows. If Raab alleged facts in his motion, which, if true, would entitle him to relief, the trial court must hold an evidentiary hearing. *See* ***State v. Bentley***, 201 Wis.2d 303, 309, 548 N.W.2d 50, 53 (1996) (citing ***Nelson v. State***, 54 Wis.2d 489, 497-98, 195 N.W.2d 629, 633-34 (1972)). If, however, Raab failed to allege sufficient facts to raise a question of fact, or made only conclusory allegations, or if the record conclusively demonstrates that he is not entitled to relief, the trial court may, in its discretion, deny the motion without holding a hearing. *See* ***Bentley***, 201 Wis.2d at 309-10, 548 N.W.2d at 53 (citing ***Nelson***, 54 Wis.2d at 497-98, 195 N.W.2d at 633-34). Further, "[w]hether a

motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo." ***Bentley***, 201 Wis.2d at 310, 548 N.W.2d at 53.

Because Raab's claim arises in the context of an ineffective assistance claim, we also set forth those standards. In order to establish that he did not receive effective assistance of counsel, Raab must prove two things: (1) that his lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** Even if Raab can show that his counsel's performance was deficient, he is not entitled to relief unless he can also prove prejudice; that is, he must demonstrate that his counsel's errors "were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." ***Id***. Stated another way, to satisfy the prejudice-prong, a 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996) (citation omitted).

In assessing Raab's claim, we need not address both the deficient performance and prejudice components if he cannot make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. *See* ***Sanchez,*** 201 Wis.2d at 236, 548 N.W.2d at 76. Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently. *See* ***id.*** at 236-37, 548 N.W.2d at 76.

1. Unanimity Instruction.

Raab first claims his trial counsel was ineffective for failing to request a unanimity instruction. His postconviction motion asserted that because this case involved allegations of multiple acts of intercourse, he was entitled to a specific unanimity instruction such as the one given in ***State v. Chambers***, 173 Wis.2d 237, 496 N.W.2d 191 (Ct. App. 1992).[2] He claimed that the pattern unanimity instruction given to the jury in the instant case was insufficient to ensure a unanimous verdict.[3]

The trial court disagreed that trial counsel provided ineffective assistance for failing to request a specific unanimity instruction. Distinguishing

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[2] The instruction given in ***State v. Chambers***, 173 Wis.2d 237, 496 N.W.2d 191 (Ct. App. 1992), provided:

> Now, this is a criminal and not a civil case. The distinction is that in a criminal case, before a jury may return a verdict which can legally be received, such verdict must be reached unanimously.
>
> And the defendants are charged with six counts of first degree sexual assault. However, evidence has been introduced of more than six acts, any one of which may constitute first degree sexual assault.
>
> Before you may return a verdict of guilty on any count as to any defendant, all twelve jurors must be satisfied beyond a reasonable doubt that the defendant committed the same act and that the act constituted the crime charged in the Information.

***Id.*** at 258, 496 N.W.2d at 199.

[3] The pattern unanimity jury instruction provides:

> This is a criminal, not a civil, case; therefore, before the jury may return a verdict which may legally be received, such verdict must be reached unanimously. In a criminal case, all 12 jurors must agree in order to arrive at a verdict.

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***Chambers***, which involved multiple sexual assaults over a period of three hours, from the instant case, which involved multiple sexual assaults "committed over a lengthy period of time and where the specific acts and dates were blurred by the passage of time and by the repetitive activity which occurred at various places" the trial court determined that a specific unanimity instruction was not required. For the reasons that follow, we affirm the trial court's determination.

Although the testimony does reflect that the State's witnesses alleged that multiple sexual assaults occurred over a six-month period, the record demonstrates that Janelle was able to describe in some detail only three acts of sexual intercourse with Raab, each act forming the basis for one of the three sexual assault convictions.

The first sexual assault involved the additional "while armed" element and was charged only against Raab. The amended information specified that this assault occurred in a garage that Raab rented located at 2555 South 9th Street. Janelle described with specificity an incident that occurred in the garage. She testified that when she told Raab she did not want to have sex with him, he pulled a gun out of his jacket and pointed it at her vagina. Janelle testified that she had sex with him after that because she was afraid. This was the only occasion described in the evidence when Raab sexually assaulted Janelle while armed.

The next sexual assault with which Raab was charged (denominated as count three in the amended information) occurred at Hotchkiss's residence, 2555 South 9th Street. Janelle testified that although she had penis-to-vagina intercourse with Raab a number of times at his house, in the garage, and at Hotchkiss's house, she could not recall the specific number of times. As the basis for the charged assault, however, Janelle offered specific testimony describing an

act of fellatio which occurred at Hotchkiss's house. This was the only specific act of sexual intercourse at 2555 South 9th Street described by Janelle.

The final sexual assault charged (count four of the amended information) occurred at Raab's house, 1663 North Marshall Street. Janelle testified that this was the first time she had sexual intercourse with Raab. She testified in detail how Raab arranged the meeting, told her to take off her shirt and, as she was lying on his bed, put her legs on his chest and had intercourse with her.

Based on the foregoing, the record demonstrates that the three counts of sexual assault of a child were each tied to a specific location and, for each count, there was only one specific act of sexual intercourse described by Janelle. Although the record reflects that there was also general testimony that Raab had penis-to-vagina intercourse with Janelle on a number of occasions at the three different locations, no specific details regarding these general assaults were provided.

Further, the jury verdict specifically directed the jurors to the three specific assaults charged in the amended information. The verdict, together with Janelle's detailed testimony describing three acts of sexual intercourse with Raab, forced the jury to focus on the three specific acts. This was sufficient to satisfy the unanimity requirement. *See* ***State v. Marcum***, 166 Wis.2d 908, 919, 480 N.W.2d 545, 551 (Ct. App. 1992) (unanimity requirement is met when information or verdict forms force the jury to focus on a specific act or alternative forms of a specific act). Therefore, a ***Chambers*** jury instruction advising the jury that they must unanimously agree "that the defendant committed the same act" was not necessary. *See* ***Chambers***, 173 Wis.2d at 258, 496 N.W.2d at 199.

Because the record conclusively demonstrates that Raab is not entitled to relief, the trial court did not err in denying the motion without a hearing and counsel was not ineffective for failing to request a special unanimity instruction.

2. Selective Prosecution.

Raab next alleges that his trial counsel was ineffective for failing to raise the issue of selective prosecution. His postconviction motion alleged that, even though a number of men and women were implicated by Janelle's statements, the State chose only to prosecute the men, and this violated Raab's equal protection rights. The trial court summarily rejected this contention. We reject Raab's claim.

A person raising a claim of selective prosecution must prove that the prosecution had a discriminatory effect and then prove that the prosecution was motivated by a discriminatory purpose, *see* ***Wayte v. United States***, 470 U.S. 598, 608 (1985), and involved people who are similarly situated. *See* ***State v. McCollum***, 159 Wis.2d 184, 196, 464 N.W.2d 44, 48 (Ct. App. 1990).

Raab's motion fails to allege specific facts setting forth the required discriminatory purpose or that trial counsel had reason to believe that the State chose to forego prosecution of the women because of some discriminatory purpose. The record suggests any number of plausible reasons for the nonprosecution of the women, including the women's testimony denying the assaults, and the testimony that if the women were involved, it was a one-time event that occurred only because Raab coerced them.

Raab's postconviction motion fails to allege specific facts to show that a reasonable trial counsel would have concluded that grounds existed for raising a claim of selective prosecution. Therefore, the trial court did not err in denying this allegation without a hearing, and this cannot form the basis for an ineffective assistance claim.

3. Impotence.

Finally, Raab claims his trial counsel was ineffective for failing to introduce evidence that Raab was impotent at the time the sexual assaults allegedly occurred. His postconviction motion alleged that a psychiatrist, Dr. Steven Ulrich, was willing to testify at trial that Raab suffered from diabetic impotence, and that psychologist John Pflaum would have also testified as to Raab's impotence. Raab attached letters from both Ulrich and Pflaum. The trial court ruled that these allegations were merely conclusory and did not demonstrate that Raab was impotent at the time of the assaults. We agree.

Raab's motion fails to allege specific facts that, if true, would entitle him to relief. He does not allege that he was, in fact, impotent, and that he informed his attorney of this fact. His motion does not allege that he informed his attorney that he was being treated for this condition and that there was medical evidence confirming this condition. Absent these facts, Raab was not entitled to a hearing and the trial court did not err in summarily denying the claim.

*B. Insufficiency of Evidence.*

Raab also claims that the evidence is insufficient to support his convictions. We disagree.

In reviewing a challenge to the sufficiency of the evidence, we will not reverse a conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990).

Raab's insufficiency claim is based on his claim that the State's three witnesses were not credible because each had a motive to lie. He suggests that Janelle was not credible because she was a runaway and she did not want Burkhardt, who she considered to be her boyfriend, to get into trouble. He points to her testimony that during this six-month period, she considered herself the "best hustler," "best liar, stealer and cheater." He suggests that State witness Burkhardt was motivated to lie because he had worked out a favorable sentencing recommendation agreement with the State. He points to a part of the record that demonstrated that Burkhardt lied about making a phone call to Raab, as proven by a tape introduced at trial. Raab further asserts that Burkhardt admitted to using drugs on a daily basis, which affected his ability to recall details. Finally, Raab asserts that Hotchkiss was motivated to lie because he also made an agreement with the State.

Applying the ***Poellinger*** standard, we cannot agree with Raab's claim. It is true that these witnesses had arguable motives which might have led them to falsely accuse Raab of sexual assault. The credibility of these witnesses, however, was explored during direct and cross-examinations. The jury was able to observe the demeanor of the witnesses, and consider Janelle's statements about being a "liar" and "cheater." The jury heard the tape that refuted Burkhardt's statement that he did not phone Raab. It is the function of the jury to decide issues

of credibility, to weigh the evidence and resolve conflicts in the testimony. *See* ***State v. Gomez***, 179 Wis.2d 400, 404, 507 N.W.2d 378, 380 (Ct. App. 1993). We see no reason to disturb the jury's credibility determination in the instant case. The testimony proffered by the State is sufficient evidence to support the convictions. We reject Raab's claim.

*By the Court.*—Judgment and order affirmed.

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