

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 10, 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.

No. 97-2368-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY D. TURNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Portage County: JOHN V. FINN, Judge. *Affirmed.*

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

PER CURIAM. Anthony Turner appeals a judgment convicting him of second-degree sexual assault, and second-degree sexual assault of a child. He also appeals an order denying his motion for postconviction relief. He contends that he received ineffective assistance from trial counsel. We conclude that the trial court properly denied that claim, and affirm.

The fifteen-year-old victim, April B., testified at Turner's bench trial that she left a party with Turner at about 2:30 or 3:00 a.m. After driving around for awhile, Turner took her to his apartment and sexually assaulted her. He then returned her to the address of the party. Other witnesses, physical evidence and Turner's inculpatory statements to police corroborated April's story.

Turner presented two witnesses in his defense. One testified to April's reputation for lying. The other testified that April and Turner were gone from the party for only a short time. The trial court found Turner guilty and entered judgment convicting him on both counts. Turner filed a postconviction motion alleging counsel was ineffective because he failed to call two material witnesses. One, William Green, was Turner's roommate and told an investigator after the trial that he was home the night of the assault, and was sure Turner did not bring April to their apartment. The other potential witness, Julie VanderZanden, was present at the party, and would have testified that April and Turner left the party at 3:15 to 3:20 a.m. However, VanderZanden could not testify as to when April and Turner returned.

Counsel also testified at the postconviction hearing. He stated that he interviewed Green but did not call him as a witness because Green said he was not home the night of the assault, and had no information on Turner's actions. Counsel also testified that he did not call VanderZanden because her testimony was cumulative and she was in Florida when the trial occurred and was thus unavailable. The trial court found that counsel acted reasonably, and denied postconviction relief.

To prove ineffective assistance of trial counsel, the defendant must show that counsel's performance was deficient and that counsel's errors or

omissions prejudiced the defense. *See State v. Pitsch*, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). Deficient performance falls outside the range of professionally competent representation and fails to meet an objective standard of reasonableness. *See id.* at 636-37, 369 N.W.2d at 716. Prejudice results when there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have differed. *See id.* at 642, 369 N.W.2d 719. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 637, 369 N.W.2d 716 (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984)).

Counsel reasonably chose not to call Green as a witness. Counsel testified that Green offered no relevant information when interviewed. The trial court believed that testimony, and we therefore deem it truthful as well. *See Turner v. State*, 76 Wis.2d 1, 18, 250 N.W.2d 706, 715 (1977) (the trial court's credibility determinations are not subject to review). That resolves the issue. Counsel had no reason to call a witness unwilling or unable to offer relevant testimony.

Counsel also reasonably chose not to use VanderZanden as a witness. Her testimony was not only cumulative, but not significantly helpful to Turner. Whether Turner and April left the party at or before 3:00 a.m. as April testified, or a short time later, was not a crucial point. The critical time factor was whether they were gone long enough for Turner to assault April at his apartment. VanderZanden had no testimony to offer on that question. The trial court expressly found that her proffered testimony would not have changed the outcome of the trial.

For the first time in this appeal, Turner cites other instances where trial counsel was allegedly ineffective. Because he did not raise these claims in the trial court he has waived them. *See State v. Schultz*, 148 Wis.2d 370, 379 n.3, 435 N.W.2d 305, 309 (Ct. App. 1988), *aff'd*, 152 Wis.2d 408, 448 N.W.2d 424 (1989). Turner also appears to raise a claim for a new trial because the prosecutor engaged in misconduct. Turner failed to raise this claim in the trial court, and thus he has forfeited the right to claim the error on appeal. *See State v. Holt*, 128 Wis.2d 110, 137, 382 N.W.2d 679, 692 (Ct. App. 1985).

By the Court.—Judgment and order affirmed.

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

