

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 15, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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. 98-3625-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TODD M. BEYERSDORF,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Todd M. Beyersdorf appeals from a judgment of conviction of three counts of first-degree sexual assault of a child and from an order denying his postconviction motion for a new trial based on ineffective assistance of counsel. Beyersdorf contends that trial counsel was ineffective for

not introducing a one-party consent recording of a conversation between Beyersdorf and the victim, for not introducing medical records or the treating physician's testimony that the victim did not exhibit physical evidence of sexual assault, and for not calling a social worker to testify about Beyersdorf's inquiry after being accused by the victim. We conclude that there was no prejudice in not presenting the recording and that it was reasonable strategy to not present medical evidence or call the social worker. We affirm the judgment and the order.

¶2 Amanda S., thirteen at the time of trial, testified that Beyersdorf had sexual intercourse with her continuously from the age of seven or eight. The charges arose out of sexual contact that occurred on Christmas Eve 1995. Amanda did not disclose the assault until a slumber party in the summer of 1996. By the time the assaults came to the attention of investigating officials, Beyersdorf had moved away from Amanda and had not had contact with her since April 1996. Amanda was asked by police to call Beyersdorf and suggest that she was pregnant. The phone conversation took place on September 6, 1996 and was recorded. When Amanda indicated that Beyersdorf was the potential father, he expressed dismay as to why Amanda would make such a suggestion.

¶3 Beyersdorf's trial counsel made a pretrial request to admit the tape recording under the prior inconsistent statement exception to the hearsay rule. The trial court ruled that the statement could only be used as a prior consistent statement to rehabilitate Beyersdorf if his credibility was attacked. Neither the tape recording nor the transcript of the conversation was admitted at trial.

¶4 Beyersdorf claims that trial counsel was ineffective for not arguing that the recording was not hearsay because it was not offered for the truth of the matter asserted but only to show Beyersdorf's shock and disbelief at Amanda's

accusations. *See* § 908.01(3), STATS. Beyersdorf also claims that trial counsel should have argued that the recording was admissible under the then-existing mental or emotional condition and residual exceptions to the hearsay rule. *See* § 908.03(3) and (24), STATS.

¶5 To establish ineffective assistance of counsel a two-part test must be satisfied: first, the defendant must show that his or her counsel's performance was deficient; second, the defendant must prove that the deficient performance prejudiced the defense. *See State v. Byrge*, 225 Wis.2d 702, 718, 594 N.W.2d 388, 394 (Ct. App. 1999). The questions of whether counsel's actions were deficient and whether such actions prejudiced the defense are questions of law which we review de novo. *See State v. Hubanks*, 173 Wis.2d 1, 25, 496 N.W.2d 96, 104-05 (Ct. App. 1992), *cert. denied*, 510 U.S. 830 (1993). When a defendant fails to prove either prong of the test, the reviewing court need not consider the remaining prong. *See id.* at 25, 496 N.W.2d at 104. Here, we begin and end with the prejudice prong.

¶6 To establish prejudice, the defendant must show that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's errors. *See State v. Pitsch*, 124 Wis.2d 628, 642, 369 N.W.2d 711, 719 (1985). This is not an outcome determinative standard. *See id.* at 642, 369 N.W.2d at 718. Rather, reasonable probability contemplates a probability sufficient to undermine confidence in the outcome. *See id.* at 642, 369 N.W.2d at 719.

¶7 The jury first heard about the telephone conversation during the cross-examination of Amanda. Amanda admitted that she told Beyersdorf she thought she was pregnant and that she implied he was the father. Amanda's

mother testified that she was present when the phone call was placed from the police station. The investigating police officer admitted that it was his idea to have Amanda tell Beyersdorf that she was pregnant. In his testimony, Beyersdorf indicated that he was initially shocked, then angered and then amazed by the accusations Amanda made during the telephone conversation. He testified that during the phone conversation he denied having sexually assaulted Amanda. He further explained that immediately after the call, he called a county social worker and reported what he believed to be ill-motivated accusations.

¶8 From the testimony outlined above, the jury learned that Amanda lied when she told Beyersdorf that she might be pregnant and that the phone call was orchestrated by the police, with Amanda's mother present. The jury learned that Beyersdorf was shocked by Amanda's accusations and asked the county social worker to investigate. While the transcript of the conversation includes Beyersdorf's comments, "I don't understand why you would say it is me," "This is just blowing my mind," "I didn't do shit," and "I haven't done anything," Beyersdorf made no specific denial of sexual activity with Amanda during the telephone conversation. Without hearing the tape, the jury was left with the impression that Beyersdorf had explicitly denied sexually assaulting Amanda. Hearing the tape would not have added to the evidence already before the jury and may have detracted from his testimony that he denied the assaults.

¶9 Additionally, the trial court found that listening to the recording would not have necessarily enhanced Beyersdorf's credibility and that the statements he made on the recording could have been construed as self-serving. Our confidence in the outcome is not undermined by counsel's failure to gain admission of the recording. Beyersdorf was not prejudiced by counsel's performance in this respect.

¶10 Beyersdorf faults trial counsel for not seeking the admission of Amanda's medical records or the testimony of her treating physician which would have established that Amanda's vagina and cervix were "unremarkable." Beyersdorf asserts that counsel's brief reference to the absence of medical evidence substantiating repeated sexual assaults was insufficient. Trial counsel explained that the medical report also included statements that the treating physician believed the assaults had occurred. It was also trial counsel's belief that the doctor would opine, upon cross-examination, that simply because there was no physical trauma, it did not mean the assaults had not occurred. In light of those concerns, counsel opted for the stronger tack of drawing attention to the lack of medical evidence in closing arguments. Trial counsel advanced a reasonable strategy reason for not presenting the medical evidence and was therefore not deficient. We are not to second-guess trial counsel's selection of trial tactics or the exercise of professional judgment after weighing the alternatives. See *State v. Felton*, 110 Wis.2d 485, 502, 329 N.W.2d 161, 169 (1983).

¶11 Beyersdorf argues that trial counsel should have called Linda Chapman as a witness, the county social worker he spoke with right after Amanda's telephone call on September 6, 1996. He suggests that Chapman's verification of Beyersdorf's call would have again demonstrated his shock and disbelief over Amanda's accusations. Again, trial counsel advanced a reasoned strategy for not calling Chapman. In addition to potential hearsay objections which might be raised by Chapman repeating what Beyersdorf claimed were Amanda's statements, Chapman was a witness sympathetic to Amanda. The risk that even greater victim sympathy would seep into the record was too high compared to the fact that Beyersdorf's testimony that he made the call to the social worker was unrefuted. Trial counsel was not deficient.

By the Court.—Judgment and order affirmed.

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

