COURT OF APPEALS
DECISION
DATED AND FILED

February 23, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP3268-CR **Cir. Ct. No. 2003CF28**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW POLSTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dodge County: DANIEL W. KLOSSNER, Judge. *Affirmed*.

Before Dykman, Vergeront and Deininger, JJ.

¶1 DEININGER, J. Matthew Polster appeals a judgment convicting him of second-degree sexual assault for having sexual intercourse with a fourteen-year-old girl. He also appeals an order that denied his motion for postconviction relief on the grounds of ineffective assistance of trial counsel. His sole claim on

appeal is that the circuit court erred in rejecting his claim that he received ineffective assistance because his attorney did not request the court to instruct jurors that "[t]he act of sexual intercourse must be either by the defendant or upon the defendant's instruction," and for failing to argue to the jury that it should acquit him because the State had not proven that a purported act of fellatio had occurred "upon [his] instruction."

¶2 Having reviewed the trial record, we conclude there is no reasonable probability that the omission of the cited sentence from the instructions, or the failure to make the argument noted, contributed to the jury's verdict. The State presented overwhelming evidence that Polster engaged in penis-to-vagina intercourse with the victim, and the only witness who testified as to the fellatio was convincingly impeached by his former statement to police. We thus conclude there is no reasonable probability that jurors found Polster guilty of second-degree sexual assault because they found reasonable doubt that Polster had engaged in penis-to-vagina intercourse with the victim, and, instead, concluded beyond a reasonable doubt that the purported act of fellatio had occurred. Accordingly, Polster cannot show that he suffered prejudice on account of his attorney's failure to present the now-proffered defense. We therefore affirm the appealed judgment and order.

BACKGROUND

¶3 The State charged Polster, who was nineteen at the time, with having sexual intercourse with a fourteen-year-old girl. In the analysis below, we describe in more detail the testimony and exhibits introduced at trial. For present purposes, however, it is sufficient to explain that the charge was premised on (1) the victim's account of having had penis-to-vagina intercourse with Polster;

(2) the statement of Polster's brother, who told police he had witnessed the act of intercourse the victim described; and (3) Polster's admission to police that he had "sex" with the victim and his statement that she could not be pregnant because he had used a condom. At trial, Polster's brother denied he had told police that he had witnessed Polster having penis-to-vagina intercourse with the victim, instead testifying that "she gave us [the two Polster brothers and a third individual] blow jobs," adding that "[w]e asked her if it would be okay, and she said yes."

¶4 WISCONSIN STAT. § 948.02(2) (2003-04)[1] provides that "[w]hoever has … sexual intercourse with a person who has not attained the age of 16 years is guilty of" second-degree sexual assault, a Class C felony. "Sexual intercourse" is statutorily defined as follows:

> "Sexual intercourse" means vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either *by the defendant or upon the defendant's instruction*. The emission of semen is not required.

WISCONSIN STAT. § 948.01(6) (emphasis added). We addressed the emphasized language in ***State v. Olson***, 2000 WI App 158, 238 Wis. 2d 74, 616 N.W.2d 144, a case in which an adult female defendant, who claimed she had been raped by two boys, was convicted of two counts of second-degree sexual assault for having intercourse with the boys. We concluded that, when sexual intercourse is initiated by an underage person, in order to convict the other party to the intercourse of violating § 948.02(2), "the intercourse must at least have occurred, in the language of § 948.01(6) … 'upon [the defendant's] instruction.'" ***Olson***, ¶12. We further

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

concluded that, on the facts present in ***Olson***, the trial court had erred by failing to so instruct jurors. ***Id***., ¶13.

¶5 Without an objection or a request for additional language from Polster's counsel, the trial court instructed jurors that "'[s]exual intercourse' means any intrusion, however slight, by any part of a person's body or of any object, into the genital or anal opening of another. Emission of semen is not required.… Fellatio, the oral stimulation of the penis, is sexual intercourse." *See* WIS JI—CRIMINAL 2101B.[2] Twice during his closing argument, the prosecutor told jurors that the State's position was that no act of fellatio had occurred, but at one point added that, "if you believe the … one statement that was made by [Polster's brother], he's still guilty." Defense counsel made no mention whatsoever of the brother's courtroom testimony regarding acts of oral sex, arguing instead that the testimony "is conflicting all over the place," especially with regard to whether those present on the evening in question had smoked marijuana. He also argued that the State could have, but did not, call other witnesses who could have provided "the whole truth."

¶6 Following his conviction and sentencing, Polster moved for postconviction relief, asserting as grounds that his trial counsel had been

[2] WISCONSIN JI—CRIMINAL 2101B provides several definitions for use with WIS JI—CRIMINAL 2104, which describes the elements of second-degree sexual assault under WIS. STAT. § 948.02(2). Among the alternatives set forth in WIS JI—CRIMINAL 2101B, in addition to those given by the court as quoted in the text, is the following explanatory sentence: "The act of sexual intercourse must be either by the defendant or upon the defendant's instruction." In its accompanying explanatory notes, the Criminal Jury Instructions Committee states that "[t]his phrase appears in the definition of 'sexual intercourse' in § 948.01(6)," and, further, that the committee concluded the language "adequately addresses the … requirement" in ***State v. Olson***, 2000 WI App 158, ¶10, 238 Wis. 2d 74, 616 N.W.2d 144, that "the defendant has to either affirmatively perform one of the actions on the victim, or instruct or direct the victim to perform one of them on him- or herself."

ineffective. During argument on the motion, postconviction counsel, citing ***Olson***, explained to the court that the premise for postconviction relief was that trial counsel should have requested the court to instruct jurors on the "by the defendant or upon the defendant's instruction" requirement, and, further, that counsel should have argued to jurors that the only sexual act that occurred between Polster and the victim was fellatio, which the State had not shown to have occurred at Polster's "instruction." Although subpoenaed to attend the postconviction hearing, Polster's trial counsel did not appear. The circuit court denied relief, concluding that, regardless of trial counsel's reasons for failing to pursue the defense proffered by postconviction counsel, there would not have been a different trial outcome had he done so.[3]

¶7 Polster appeals his conviction and the denial of postconviction relief, raising only the claim that trial counsel was ineffective for failing to pursue the defense described above.

ANALYSIS

¶8 To prevail on a claim of ineffective assistance of counsel, a defendant must establish both that his trial counsel's performance was deficient and that this performance prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether trial counsel's performance was deficient and whether that behavior prejudiced the defense are questions of law, which we decide de novo. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711

[3] The court stated, "I don't think that a ***Machner*** hearing needs to be held in this particular case because even if [trial counsel] were to testify about why he did it or didn't do it, I don't think there'd be a significant change in the outcome of this case."

(1985). In analyzing an ineffective assistance claim, this court may choose to address either the "deficient performance" component or the "prejudice" component first. *See* ***Strickland***, 466 U.S. at 697. If we determine that the defendant has made an inadequate showing on either component, we need not address the other. *See* ***id***.

¶9 Before a court may reverse a conviction on the grounds that an attorney provided ineffective representation, trial counsel must be examined in a postconviction evidentiary hearing regarding the reasons, if any, for the actions or omissions in his representation cited by the defendant. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). The relief Polster seeks in this appeal is that we remand for a ***Machner*** hearing, "where the testimony of trial counsel could be preserved." The circuit court, however, has the discretion to deny a postconviction motion alleging ineffective assistance of counsel without a hearing "if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief." ***Nelson v. State,*** 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972). Because the record "conclusively demonstrates" that Polster suffered no prejudice from the omissions he cites, we conclude the trial court did not err in denying Polster's motion without hearing testimony from his trial counsel.

¶10 To prove prejudice, Polster must show that trial counsel's errors had an actual, adverse effect on the defense. *See* ***Strickland,*** 466 U.S. at 693. He must establish 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. Specifically, Polster must prove that counsel's failure to pursue the defense outlined by postconviction counsel, and to request jury instruction

language in support of it, deprived him of a "fair trial, a trial whose result is reliable." ***Id***. at 687. We, like the trial court, are not persuaded that the results of Polster's trial would have been different if his trial counsel had pursued the defense postconviction counsel outlined.

¶11 There can be no question that the act of penis-to-vagina intercourse described by the victim was performed "by the defendant." Thus, in order to find that Polster suffered prejudice from the omissions he cites, we would have to conclude that jurors found him guilty, not because they believed an act of penis-to-vagina occurred, but because they believed Polster's brother's in-court testimony that the victim performed fellatio on Polster. We have reviewed the trial transcript and the exhibits introduced at trial, including several tape-recorded telephone conversations between Polster and the victim that were played for the jury. We conclude there is no reasonable probability that jurors found Polster guilty based on an act of fellatio, cursorily testified to by a single witness, Polster's brother, in complete contradiction and repudiation of his earlier handwritten statement to police.[4]

¶12 The State specifically disavowed the brother's courtroom testimony as a basis for its charge against Polster and presented overwhelming evidence that an act of penis-to-vagina intercourse occurred between Polster and the victim.

[4] We note that Polster was apparently prepared to present testimony from a second witness, a friend of Polster's, that would have corroborated the brother's account of the victim's performing oral sex on the three of them (Polster, his brother and the friend). After Polster's brother had testified as a State witness, the State moved, citing the "rape shield law," *see* WIS. STAT. § 972.11, to preclude Polster from presenting any further testimony regarding sexual acts between the victim and any person other than Polster. The court granted the motion. Polster's friend did testify for the defense but was admonished by the court that he was not to say anything about sexual acts between the victim and any person other than Polster. Polster makes no claim that the trial court erred in this regard.

Based on the record before us, we cannot conclude that a reasonable juror would have harbored reasonable doubt that penis-to-vagina intercourse occurred, while concluding instead, beyond a reasonable doubt, that the victim had performed oral sex on Polster. Because we conclude that penis-to-vagina intercourse formed the only reasonable basis for the jury's verdict, we conclude Polster did not suffer prejudice from his attorney's failure to pursue a defense based on the premise that his client was the passive recipient of oral sex.[5]

¶13 We now describe in more detail the evidence presented at trial. The State first called a young man who had been at the Polster residence earlier in the evening in question who verified the victim's and Polster's presence there. He also testified that later in the evening he got a phone call from the victim, who was "in tears and kind of upset," and the victim told him she needed a ride home. The victim told this witness during the phone call that she and Polster "were messin' around, and … that they had sex that night."

¶14 The victim then took the stand and gave the following account of what happened on the evening in question. She gave her date of birth and said that she was fourteen at the time of the incident with Polster. She went to the Polster residence at the invitation of Polster and others to "hang out" with them. In addition to Polster and his younger brother, several other boys or young men were present, and the group smoked some marijuana from a pipe, both furnished by Polster. Polster instructed his younger brother to go to a gas station to purchase a

[5] The State also posits an alternative rationale for finding no prejudice—that even if jurors believed fellatio occurred, there was evidence from which they could reasonably infer that it was performed "at Polster's direction." Given the scant testimony regarding the purported act of fellatio, we cannot accept this alternative contention.

condom, which made the victim believe Polster "was going to try something," given that she was then the only girl present. The victim went to the bathroom and returned to the younger brother's upstairs bedroom, where Polster was now alone.

¶15 Polster was seated on a couch and the victim sat on the bed. Polster "tried to convince me [the victim] to have sex with him." Specifically, Polster told her that if she did not have sex with him, she would not have a ride home. The victim also said that the bedroom door was locked and that Polster's younger brother had knocked and wanted to come in but Polster "told him to leave because he was busy." At some point, Polster moved to the bed where the victim was sitting, kissed her and told her that he already had a condom on. The victim testified that Polster "begged" her and quoted him as saying "please, I really need this." She said that she was scared and intimidated, being a "small little girl." Polster then "laid [the victim] on the bed," removed her pants and underwear and inserted his penis into her vagina. The intercourse lasted "approximately five minutes," during which the victim said she felt "sharp pain" and begged Polster to stop.

¶16 After Polster left the room, the victim got dressed and called her parents for a ride home. She also called the young man who had already testified. Eventually, she met her father at a gas station, and upon returning home, showered and went to bed. She did not tell her mother about the incident until some five or six months later, "[b]ecause I didn't want to tell her that I had smoked marijuana."

¶17 On cross examination, the victim denied seeing Polster's father at the residence that evening. She acknowledged telling an investigating officer that, after smoking the marijuana, she didn't "remember all that much." She later said, however, that she remembered Polster "actually penetrating his penis into me, that

I remember, and the fact that he tried to talk me into having sex with him, those I remember perfectly." The victim also acknowledged that, prior to leaving home and going to Polster's, she had lied to her mother as to where she was going "because she did not want me to go over there." Finally, the victim testified that she cooperated with a police request to tape several conversations between herself and Polster, during which she maintained that he had told her he had worn a condom "at one time" on the evening in question and that when she said "so it was just sex, … he said, yeah, basically."

¶18 The state next called the investigating officer. He first described and presented a written statement of his interview with Polster regarding the incident. The officer testified that Polster told him "that he … did not force himself on [the victim], he just had sex with her." When the officer asked whether the victim "could have gotten pregnant," Polster told him "no, that he was wearing a condom." The officer also explained that he had requested the victim to engage Polster in taped telephone conversations, a technique he had been taught in training for investigating crimes of this nature. The officer related some of the conversation obtained on the tapes, and the tapes were later played for the jury. On cross-examination, the officer acknowledged the victim had told him she had smoked marijuana on the evening in question, that it had made her "dizzy," and he stated his own understanding that marijuana can affect one's memory.

¶19 The cassettes containing the taped phone conversations between Polster and the victim are in the record, but there is no transcript of them. We have listened to the tapes, and although we will not attempt to quote the conversations at length, we concur with the State's contention at trial that a reasonable inference from Polster's responses to the victim, and perhaps the only reasonable inference, is that he denied forcing himself upon her but acknowledged

that they had engaged in "sex," to which he claimed she had willingly submitted. For example, in one conversation, Polster told her that she didn't say no and he wouldn't have done it if she had said no. He also told her that he had witnesses, that his brother and perhaps two other individuals had watched them have sex. When the victim asked him if his version was that he "just had sex" with her, Polster replied "pretty much." When she asked him if he had actually worn a condom, he replied that he had "at one time." As for the purported witnesses to the incident, Polster told her the "dimshits" had been on the roof.

¶20 The next State witness was Polster's brother. He claimed that his father had been at home on the date in question, in the bedroom adjacent to his own, because he was sick that day. He identified the handwritten statement he had given to police, as well as a sketch of his bedroom that he had drawn for them. Most of the State's direct examination of the brother consisted of his denials that he had told police the things contained in his handwritten statement, many portions of which the prosecutor read to him. At one point during these denials, the brother said that "we had head" or a "blow job" from the victim. On cross-examination, the brother elaborated further that the victim had "sucked our private part," the recipients of the fellatio being himself, Polster and a third individual. In response to a question whether these acts were "voluntary, or anybody force her or trick her or anything," he replied: "No. We asked her if it would be okay, and she said yes."

¶21 As for the handwritten statement he gave police, the brother explained during cross-examination that he has a learning disability which gives him trouble "spelling and writing." He claimed the officer therefore "was writing what I was saying down, but I didn't say all of it" and that the officer added information that he did not know. On redirect, Polster's brother again claimed that

the officer had made up some of the information in his statement, that he had just copied down what the officer had written and told him to copy, including numerous misspelled words, and that he did so because the officer "told me to." The brother also acknowledged, however, that, when he wrote the statement, he "thought [he was] writing a statement for [his] brother, because [he was] concerned that [the victim] had said that [his] brother had forced sex on [her]."

¶22 The State then recalled the investigating officer to the stand. He described how he had obtained Polster's brother's statement during an interview conducted at the high school the brother was attending. He denied writing anything for the brother to copy and explained that he conducted the interview in a question-and-answer format, asking the brother to write out each question and his response "so there would be no question about this, presenting it in court today." The officer also described how Polster's brother drew a picture of his bedroom, its contents, and where he was situated at the time he witnessed the incident. The officer denied making any threats or promises to the brother, stated that he believed the brother had given the statement "of his own free will," and that the brother's information "corroborate[d] other parts of [his] investigation."

¶23 Polster's brother's handwritten statement, with the spelling and punctuation as it appears in the document, is as follows:

> ["Statement of Rights" and "Waiver of Rights" signed by Polster's brother, indicating he was "Age 18"]
>
> My name is Jason Polster Police came to scool and tockt to me about Matt and [victim] having sex I my room at home in March
>
> I was whaching my brother matt and [victim] from my window and matt did not rape [victim]
>
> The pleice asked me how I know this

Matt told me that he was going to have sex with [victim]. Matt tolded her after werds he get her a ride home It was dark time and matt asked me to get a condom for him matt gave money a $1[.]00 and I bougt one In the bathroom in the gas stason

*Police asked how I got the condom, I got it from a mishen and rode my bike to and fome the store

*Police asked how I know for sher matt did not Beat [victim] up are hert here

matt lock the door and [victim] and matt were in my room

I pout a lader on to the side of the hose and kimed on the roff Nick Schatezel climed to but went dowe so he did not fall off I staed on the roff and watched , From the out side

The Police asked me how I can see I to the room and wach them.

I was wach a bout 10 feet away and the light was on in the room.

Police asked If the window was up or down It was up. The skren was on and I herd them matt did not yell ate here.

The Police asked me abute the skren. It was opin for air It is part off the storm window I wach from the skren and herd [victim] yell ones one time It was lowd hah

When they got dune I qusk ran up stars and after they were done and matt told here that she can use the Phone to call here mom and matt said good bye to here and she went down by the Gas stason to get a ride home

Matt never got here a ride home

When I went in my room it smelled like sex. Matt tock my blankets and whast them.

The Ploice asked me why matt washed all the blankes

matt told me that [victim] stunk matt said here twat stinks

The ploice asked me what a twat was It is here vigina

Ploice asked me they asked me how was on top and matt was on top [victim] was on bottom

> I seen matt bare butt from the side and [victim's] face She was looking tored the dresers
>
> Shers were on and matt was holding [victim's] hips when haveing sex
>
> I never Seen matt put the condom on but ladter I saw the used condom with comey in it in my garpige can In my bedroom
>
> Police asked If I try to stop matt. No I Never tryed to stop matt.
>
> [signature, date]

¶24 Attached to the brother's statement is a hand-drawn sketch, with the following caption at the top: "This is my Drawing of my Bedroom on what look like in mach by Jason Polster." The drawing shows a "cowch," behind which is a "windo," and to the left a "bed," to the right, two "dresers." An arrow is drawn to the "windo" from the following writing: "I whch matt and [victim] with it matts sort pold done and [victim's] pans off having sex in my bed 'I was waching from hear'." The sketch was sent to the jury room, along with a picture of the Polster residence, showing a large wrap-around porch with a gently sloping roof and several second-story windows. Polster's brother's handwritten statement was not sent to the jury room, but, as noted, significant portions of it were read to the jury during the State's questioning of the brother, and other portions of the statement and sketch were described by the officer to whom they were given.

¶25 The State rested and the defense first called Polster's father, who testified that he had been off work on the date in question because he was sick and he recalled seeing the victim and the others at his home that evening. He said that he "kicked [those kids] out of the house twice because of the noise." He also testified that he had not smelled marijuana that night, acknowledging, however, that "the room did have a lot of cigarette smoke in it." He also described the porch

roof as "fairly steep," and said that the only ladder on the premises was an "eight-foot stepladder" with which it would have been difficult to mount the porch roof without injuring oneself. He also said he was home all evening and produced a time card from his place of work indicating his absence for the day in question.

¶26 The only other witness called by the defense was Nick Schaetzel, to whom Polster's brother had referred in both his statement to police and his courtroom testimony. Schaetzel testified to being at the Polster residence on the night in question and to seeing the victim, Polster, and his brother there. He said that they had not smoked marijuana and that Polster's father had come into the brother's room and told them to "keep it down." He denied witnessing Polster engage in penis-to-vagina intercourse with the victim or that he had climbed a ladder or seen anyone climb a ladder to the porch roof.[6]

¶27 As its sole rebuttal witnesses, the State called another young man who testified he was at the Polster residence on the evening in question. He said that he saw the victim and Polster there and that, after Polster's parents had left the home, the group had smoked marijuana in Polster's room.

¶28 As we have previously noted, the prosecutor twice told jurors during his closing argument that the State's position was that no act of fellatio had occurred, but at one point added that, "if you believe the … one statement that was made by [Polster's brother], he's still guilty." Defense counsel made no mention whatsoever of the brother's courtroom testimony regarding acts of oral sex, arguing instead that the testimony "is conflicting all over the place," especially

[6] This is the witness whom the court instructed not to testify to any sexual acts between the victim and anyone other than Polster. See footnote 4.

with regard to whether those present on the evening in question had smoked marijuana. Defense counsel also asserted that the State could have, but did not, call other witnesses who could have provided "the whole truth." Jurors deliberated for less than forty minutes before arriving at a guilty verdict.

¶29 We recognize that it is most certainly the province of the jury, and not this court, to determine the credibility of the witnesses who testified at trial. *See* ***State v. Webster***, 196 Wis. 2d 308, 320, 538 N.W.2d 810 (Ct. App. 1995) (noting that the jury is "the sole arbiter of the credibility of witnesses and alone is charged with the duty of weighing the evidence"). One cannot read the transcript of the testimony from Polster's brother and the officer who obtained his handwritten statement and sketch, however, without concluding that the brother's in-court repudiation of his earlier statement strained credulity. Not only was the statement in his own handwriting and replete with misspellings, but his account to police corroborated key details of the victim's allegations, such as: Polster's promising the victim a ride home, the brother's procurement of a condom, Polster engaging the victim in penis-to-vagina intercourse at the time and location the victim described, and what the victim did afterward. In addition, Polster himself stated in the taped telephone conversations with the victim that witnesses, including his brother, had observed his and the victim's activity in the bedroom from the porch roof. Finally, jurors heard that Polster admitted to police that he "had sex" with the victim and that she could not be pregnant because he had used a condom. Jurors also heard Polster's own voice on tape essentially acknowledging these same facts.

¶30 Polster would have us conclude that, had the trial court instructed jurors that "[t]he act of sexual intercourse must be either by the defendant or upon the defendant's instruction," WIS JI—CRIMINAL 2101B, and had his attorney

argued to jurors that the only sexual activity between Polster and the victim was fellatio performed by the victim, but not upon his instruction, "there is a reasonable probability that … the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. We simply cannot reach such a conclusion on the record before us. Rather, we conclude that, given the evidence presented at trial, jurors would have found Polster guilty of second-degree sexual assault even if counsel would have presented the defense Polster now claims should have been presented. Accordingly, regardless of why trial counsel chose to forgo a "passive fellatio" defense, and regardless whether that decision could be deemed deficient performance, we conclude Polster suffered no prejudice. We are satisfied that Polster received precisely what the Sixth Amendment guarantees him, a "fair trial, a trial whose result is reliable." ***Id***. at 687.[7]

CONCLUSION

¶31 For the reasons discussed above, we conclude the circuit court did not err in denying Polster's motion for postconviction relief. We therefore affirm the order denying relief and the judgment of conviction.

By the Court.—Judgment and order affirmed.

[7] Although we have no need to address whether trial counsel's performance was deficient, we do not wish to suggest that it was. We do not know why Polster's counsel chose not to present the defense Polster now advances. Having reviewed the trial record, however, we observe that a reasonable defense attorney could well have concluded that pursuing the defense Polster advances on appeal would have been both futile, because Polster's brother's in-court testimony had been convincingly impeached, and counterproductive, because it would have meant conceding that an act of intercourse did take place between Polster and the victim. *See* ***State v. Koller***, 2001 WI App 253, ¶8, 248 Wis. 2d 259, 635 N.W.2d 838 (In determining whether counsel's performance was "objectively reasonable," a court "may rely on reasoning which trial counsel overlooked or even disavowed.").

Not recommended for publication in the official reports.