

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 2, 2006

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP1819-CR

Cir. Ct. No. 2002CF18

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN S. SPICER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed.*

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

¶1 PER CURIAM. John Spicer appeals a judgment convicting him of kidnapping, armed robbery, three counts of first-degree sexual assault with a dangerous weapon, assault by a prisoner, taking and driving a vehicle without consent, and escape, all as a habitual criminal except the escape conviction. He

also appeals an order denying his motion for postconviction relief. He argues that he received ineffective assistance of trial counsel. We reject all of Spicer's arguments and affirm.

¶2 Spicer argues that he received ineffective assistance of trial counsel. To substantiate a claim of ineffective assistance of trial counsel, a defendant must prove that counsel performed deficiently and that he or she was prejudiced by counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." *Id.* at 690. To prove prejudice, "[t]he 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. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. The defendant's burden is to show that counsel's errors "actually had an adverse effect on the defense." *Id.*

¶3 Spicer first argues that his attorney provided ineffective assistance because she objected to testimony by the victim's sister, which was admissible as an excited utterance. There was some time lapse between the crime and the victim's comments to her sister, so there was a plausible basis for making the objection. Because there was a plausible basis for making the objection, there was no deficient performance.

¶4 Spicer next argues that his attorney should not have attempted to elicit testimony from the victim about whether she had ever previously accused anyone of sexual assault. He also argues that his attorney should not have attempted to ask questions about the victim's conduct and dress at work, her

alcohol consumption, her anxiety and the medications she was taking. We disagree. If anything, these questions suggested to the jury that there might be something in the victim's background that would be beneficial to the defense, but that the defense was being prohibited from asking about it. Since this inference would have been to Spicer's benefit, he has not shown prejudice.

¶5 Spicer next argues that his attorney's failure to view all of the photographic evidence prior to trial constituted ineffective assistance of counsel. Spicer has not shown how this prejudiced him. Therefore, we reject this claim.

¶6 Spicer next contends that counsel's misunderstanding of fingerprint evidence prior to trial constituted ineffective assistance of counsel. Counsel believed that the victim's fingerprints were found on the knife when, in fact, the victim's fingerprints were found in the bathroom where the sexual assault occurred. The error did not lead to the introduction of damaging evidence or other harm to Spicer. Spicer's defense was that the victim consented to sexual relations, so the mistake about the fingerprint evidence did not undermine his defense. Again, Spicer has not shown prejudice.

¶7 Finally, Spicer argues that counsel's failure to provide him before trial with the five hundred page transcript of his taped telephone conversations, made when he was in jail, constituted ineffective assistance of counsel. During his trial testimony, Spicer asserted that the victim told him that if she came out of the bathroom he would be "in real trouble." The prosecutor then pointed to the jail transcripts where Spicer told his girlfriend during a conversation that if Spicer did not like someone, they would have "trouble." The implication was that Spicer regularly used the word "trouble," not the victim, and that he was fabricating what the victim had said. We agree with the State that it was not foreseeable that the

prosecutor would pick out this word from the entire transcript. Nor do we think that Spicer would have avoided the cross-examination if he had access to the transcript. We conclude there is no possibility that this minor point on cross-examination affected the trial.

¶8 Even if we agreed with Spicer that all of his claims involve instances of deficient performance, we would conclude Spicer was not prejudiced within the meaning of *Strickland*. Spicer did not deny the sexual contact and the circumstances of it. The victim told her sister about the attack immediately afterward and her sister testified that the victim was visibly shaken. A knife was found with the victim's clothing near where the assault occurred, consistent with the victim's statement that she had been threatened with a knife. Spicer took the victim's car and fled from prison after the assault. In light of this evidence, we conclude that the cumulative effect of any deficient performance does not undermine our confidence in the result.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

