

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 18, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 00-2055-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS D. GOGIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Reversed and cause remanded with directions.*

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

¶1 PER CURIAM. Thomas D. Gogin appeals from a judgment convicting him of second-degree sexual assault and false imprisonment and from

an order denying his postconviction motion for a new trial. Because we conclude that trial counsel was ineffective, we reverse and remand for a new trial.

¶2 The victim and Gogin knew each other through their mutual interest in horses and their participation in rodeo-type events. The victim alleged that she accepted Gogin's invitation to return to his farm after one of these events¹ and that Gogin forcibly restrained and sexually assaulted her. Gogin claimed that he and the victim had consensual sexual relations. The jury convicted Gogin, and he sought a new trial on the grounds of ineffective assistance of counsel. The circuit court denied the motion; Gogin appeals.

¶3 The appellate issues arise from the State's disclosure immediately after opening statements of previously unseen photographs of bruises on the victim's arms and allegations that Gogin's trial counsel was ineffective in several respects. Because we conclude that Gogin's trial counsel was ineffective, we need not decide whether the circuit court misused its discretion in denying Gogin a continuance to review and evaluate the late-disclosed photographs. *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (we need not decide issues not essential to the appeal).

¶4 We turn to Gogin's ineffective assistance of counsel claims. To establish an ineffective assistance claim, Gogin must show that his counsel's performance was deficient and that it prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, Gogin must show that his counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* The case is reviewed

¹ The event was held at the farm of the victim's sister.

from counsel's perspective at the time of trial, and Gogin has the burden to overcome a strong presumption that counsel acted reasonably within professional norms. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

¶5 Even if counsel performed deficiently, we will not reverse Gogin's judgment of conviction unless the deficiency prejudiced his defense. *Strickland*, 466 U.S. at 687. Gogin must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* "The 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." *Id.* at 694.

¶6 An ineffective assistance claim presents a mixed question of law and fact. *State ex rel. Flores v. State*, 183 Wis. 2d 587, 609, 516 N.W.2d 362 (1994). The circuit court is the ultimate arbiter of witness credibility, *Johnson v. Merta*, 95 Wis. 2d 141, 152, 289 N.W.2d 813 (1980), and we will not disturb that court's findings of fact concerning the circumstances of the case and counsel's conduct unless the findings are clearly erroneous, *State v. Knight*, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540 (1992). However, the final determinations of whether counsel's performance was deficient and prejudicial are questions of law that we decide without deference to the lower court. *Id.*

¶7 Gogin alleges that his trial counsel was ineffective because he: (1) failed to present a witness who would have testified to the behavior of Gogin and the victim at the event before the sexual assault; (2) did not impeach the victim with evidence of a lengthier telephone call with Gogin the day after the

assault; and (3) did not object to the introduction of the victim's prior consistent statements which had the effect of bolstering her credibility.

¶8 The first ineffectiveness claim relates to trial counsel's failure to present the testimony of Jodi Overbee at trial. Overbee would have testified that she observed Gogin and the victim at the rodeo event on the day of the assault and that there was a great deal of sexual tension between them.² Overbee observed the victim flirting with Gogin. Overbee also would have testified that the victim revealed the assault to Overbee the day after it occurred. Overbee and Overbee's sister commented to Gogin's investigator that the rodeos were more social activity than horse activity and that they were a "Peyton Place and ... there is a lot of sexual activity."

¶9 At the postconviction motion hearing, trial counsel testified that Gogin never mentioned Overbee to him before trial. He and Gogin went over potential witnesses, but Overbee's name did not come up. Counsel's investigator also did not know of Overbee prior to trial.

¶10 Postconviction, Gogin testified that he gave trial counsel the names of people who attended the event, including Overbee. Gogin testified that approximately one week after the victim told Overbee about the assault, Overbee told him of her conversation with the victim. Thereafter, Gogin included Overbee on his list of persons who might have information about the case. Gogin may have relayed Overbee's name to trial counsel during a telephone call. Gogin testified that he told trial counsel that Overbee should testify.

² Overbee's testimony was presented to the court through Gogin's investigator as an offer of proof at the postconviction motion hearing.

¶11 The circuit court did not make any findings about whether Gogin told counsel or whether counsel otherwise knew about Overbee. Rather, the court focussed on Overbee's potential testimony and determined that it would not have resulted in a different outcome.³ In so doing, the circuit court addressed the prejudice prong of the *Strickland* standard.

¶12 We review a determination of prejudice de novo because it presents a question of law. *Knight*, 168 Wis. 2d at 514 n.2. We conclude that Overbee's testimony, in conjunction with the other errors of trial counsel discussed below, creates a reasonable probability of a different outcome at trial. Overbee's testimony would not have been cumulative to the testimony of Jim Pritchard, Gogin's friend, who also attended the rodeo event. Pritchard testified that he saw the victim and Gogin with their arms around each other's waists. Pritchard testified that "there was more contact [between them] than I have ever seen before." This is not cumulative to Overbee's testimony regarding the flirtation she observed and the atmosphere of the rodeo events. Overbee's testimony could have lent inferential support to Gogin's version of events, i.e., that the victim fabricated the sexual assault and that he and the victim were on good terms and had consensual sexual relations. Gogin was prejudiced by the omission of this testimony.

¶13 Gogin next argues that counsel was ineffective for not procuring records of a telephone call between Gogin and the victim the day after the assault. The victim testified that Gogin called her twice the next morning. She ignored the

³ Essentially, the circuit court assumed without deciding that counsel knew or should have known that Overbee might have information relevant to the defense.

first call (which she believed to be from Gogin) and answered the second call. The victim testified:

Seconds later the ring came again, I picked up the phone and it was him and he said why didn't you answer my first call. And I said because I don't want to talk. And he just said how are you. And I – I said I don't – I don't want to talk and I needed to go.... I hung up.

¶14 In contrast, Gogin testified that he called the victim and they talked about her plans for the day, upcoming rodeo events and who would be attending them, and that they would see each other at an upcoming rodeo practice.

¶15 At the postconviction motion hearing, trial counsel testified that he was aware of the telephone call prior to trial but did not think to obtain telephone records to determine the length of the call. Counsel agreed that if he had obtained the telephone records he could have argued about the significance of the length of the call. Counsel admitted that this was an oversight.

¶16 The circuit court found that the telephone records would have been of some use to the defense. However, in the overall context of the trial, the records were a minor point. The court did not believe that a jury would have been swayed by the fact that the victim initially described the telephone call as short while the records showed that it lasted 8.4 minutes. The court observed that “[p]eople’s use of the term short conversation is quite ambiguous.”

¶17 Whether Gogin was prejudiced by trial counsel’s failure to obtain the telephone records presents a question of law. *Id.* We disagree with the circuit court that evidence of the length of the telephone call between Gogin and the victim the day after the assault was a “minor point.” The parties were the sole reporters of what happened. Hence, credibility was particularly crucial to this

case. The jury could have drawn inferences from the length of the telephone call and, more importantly, the victim could have been cross-examined and possibly impeached with this evidence in light of her testimony that she hung up on Gogin after a short conversation.

¶18 Finally, Gogin argues that trial counsel was ineffective because he did not object to the introduction of the victim's prior consistent statements to bolster her credibility. The State presented the victim's statements to her husband and sister about the assault. The State also presented a hot-line counselor and a physician who testified that the victim told them she had been sexually assaulted. Gogin did not object to most of these statements.⁴ The prosecutor's closing argument highlighted these statements as enhancing the victim's credibility.

¶19 Under WIS. STAT. § 908.01(4)(a)2 (1999-2000), a trial witness's prior statements are not hearsay if they are "[c]onsistent with the declarant's testimony and [are] offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive"

¶20 Gogin's theory of defense was that he and the victim had consensual sexual relations, and that the victim fabricated the sexual assault to protect her marriage. The defense intended to focus on inconsistencies among the victim's prior statements, preliminary examination testimony and trial testimony to undermine her credibility.

¶21 At the postconviction motion hearing, trial counsel recognized that he should have objected on hearsay grounds to the victim's statements to others.

⁴ Gogin did object to the husband's hearsay testimony.

Counsel admitted that this was not a tactical decision; he simply overlooked the need to object. However, counsel made a tactical decision not to object to (1) the testimony of the husband in the hope of eliciting inconsistencies and (2) the testimony of the physician whom the victim consulted because the physician would testify that she did not observe any bruises on the victim's arms. On the other hand, letting the hot-line counselor testify without objection was not a tactical decision.

¶22 The State argues that trial counsel's failure to object to the prior consistent statements furthered the defense strategy of impeaching the victim with inconsistencies in her version of events. We disagree. First, at the postconviction motion hearing, trial counsel testified that his failure to object to several of the prior consistent statements was not an informed, strategic decision; it was an oversight or arose from a misunderstanding of the rules of evidence relating to prior consistent statements. Second, counsel testified that it was his strategy to point to inconsistencies in prior statements. We fail to see how objecting to inadmissible hearsay in the form of prior consistent statements would have undermined this strategy.

¶23 We are not persuaded by the State's argument that the victim did not really make "statements" to others about what happened because those witnesses did not recount the substance of her statements to them. While the witnesses did not recount details of the crime as provided by the victim, they confirmed the victim's sexual assault allegations by testifying that she made the same allegations to them.

¶24 We are also not swayed by the State's contention that the prior consistent statements were admissible to rehabilitate or bolster the victim's

credibility under *State v. Gershon*, 114 Wis. 2d 8, 337 N.W.2d 460 (Ct. App. 1983). In *Gershon*, the circuit court gave a cautionary instruction about the purpose of the statements and advised the jury that the statements were offered to support the victim's credibility, not as substantive evidence of the facts of the alleged criminal conduct. *Id.* at 13. This instruction cured any prejudice from the State's introduction into evidence of five versions of the event versus the one version offered by the defendant. *Id.* Here, Gogin did not request an instruction. This is not a *Gershon* case.⁵

¶25 The State also argues that the rule of completeness as expressed in *State v. Sharp*, 180 Wis. 2d 640, 511 N.W.2d 316 (Ct. App. 1993), renders the prior consistent statements admissible.

The rule [of completeness] is designed to make the presentation of evidence fair and effective in order to ascertain the truth. "The critical consideration is whether the part of the statement offered into evidence creates an unfair and misleading impression without the remaining statements." The trial court must first determine if the partial evidence admitted has in fact created a distorted view of the evidence as a whole. If it has, the court must determine what additional portions of the evidence are necessary to cure the distortion.

State v. Anderson, 230 Wis. 2d 121, 135-36, 600 N.W.2d 913 (Ct. App. 1999) (quoted sources and citations omitted). The statements at issue in this case do not fall within this rule. They were not partial statements and provided the same information to the jury, i.e., that the victim claimed Gogin sexually assaulted her.

⁵ Although there may be a conflict between *State v. Gershon*, 114 Wis. 2d 8, 337 N.W.2d 460 (Ct. App. 1983), and *State v. Peters*, 166 Wis. 2d 168, 479 N.W.2d 198 (Ct. App. 1991), we need not address it to resolve this appellate issue.

They were not necessary to avoid an unfair and misleading impression about the evidence.

¶26 A defendant is prejudiced by the deficient performance of counsel when “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.” *Strickland*, 466 U.S. at 694. Taking counsel’s errors together gives us great concern about the reliability of the verdict. A central feature of this case was the need for the jury to decide which version of events—Gogin’s or the victim’s—was more credible. Because our confidence in the verdict is shaken by (1) the failure to present a witness with evidence about the behavior of Gogin and the victim before the sexual assault, (2) counsel’s failure to obtain telephone records which would have impeached the victim’s testimony that she declined to speak with Gogin the day after the assault, and (3) counsel’s failure to object to prior consistent statements which may have been inadmissible,⁶ we reverse and remand for a new trial.⁷

By the Court.—Judgment and order reversed and cause remanded with directions.

⁶ At Gogin’s new trial, the circuit court is not precluded from entertaining arguments about the admissibility of these prior consistent statements. All we have held is that trial counsel was ineffective for not objecting to these statements.

⁷ Having held that trial counsel was ineffective for the reasons cited, we need not address Gogin’s claim that counsel was also ineffective for failing to obtain a videotape of the rodeo event which was made by the victim’s sister and which might have shown Gogin and the victim together. *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (we need not decide issues not essential to the appeal).

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

