

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 22, 2010

David R. Schanker
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 Nos. 2009AP63-CR
2009AP618-CR**

Cir. Ct. No. 2004CF88

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PETER F. KUKLA,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Affirmed.*

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Peter F. Kukla appeals a judgment of conviction and an order denying his motion for postconviction relief. Kukla argues that he received ineffective assistance of trial counsel because counsel did not call a

particular witness at trial. Kukla also argues that he received ineffective assistance of postconviction counsel because postconviction counsel did not challenge trial counsel's effectiveness for failing to call this witness. We conclude that Kukla did not receive ineffective assistance of trial counsel and, consequently, postconviction counsel was not ineffective for failing to challenge trial counsel's effectiveness. We affirm the judgment and order of the circuit court.

¶2 Kukla was charged with one count of second-degree sexual assault of a person with a known mental illness or deficiency. WIS. STAT. § 940.225(2)(c) (2003-04). The victim testified at Kukla's trial and said that Kukla had assaulted him at the apartment of another man. Kukla did not testify. Kukla's defense was that the assault did not occur. During closing argument, Kukla's counsel challenged the victim's credibility by pointing out to the jury the inconsistencies in the victim's story over time. The jury found Kukla guilty as charged.

¶3 Before sentencing, Kukla, represented by new counsel, moved for a new trial on the grounds of newly discovered evidence and ineffective assistance of trial counsel. The court held a hearing and denied the motion. The court then sentenced Kukla to a total of eleven years, with forty months of initial confinement. Kukla, represented by another attorney, who is also his appellate counsel, filed a motion for postconviction relief, alleging ineffective assistance of trial and postconviction counsel. The court held another hearing.

¶4 At the hearing, Kukla argued that trial counsel was ineffective for failing to call Joanne Nimmer as a witness at trial. Kukla asserted that he had been told that the victim had recanted to Nimmer by saying he "had lied about the whole incident." Trial counsel testified that he was aware of the alleged recantation, but that he decided not to contact Nimmer for two reasons. The first

was that Nimmer was aware of an allegation that Kukla had “forced sexual intercourse” on another man, who lived in the apartment where Kukla assaulted the victim. Trial counsel further testified that this other man also appeared to be “mentally impaired,” and “if this was brought in as other acts evidence, it … hurt our case because it was a similar situation as what [Kukla] was being charged with.”

¶5 The second reason trial counsel did not contact Nimmer was because Kukla had told counsel that there had been “sexual activity” between him and the victim. Counsel testified that, even if the victim had told Nimmer that he had lied about the whole incident, counsel knew that the victim “hadn’t lied about the fact that sexual activity had occurred between himself and the defendant.” Counsel stated that, even if the victim had said that “it didn’t happen,” counsel knew that was not true, and counsel “did not want to present evidence that [he] knew was false.”

¶6 The circuit court identified the issue presented by Kukla’s motion as whether it was reasonable for trial counsel to have made a decision not to further investigate Nimmer’s evidence. The court considered that, by this time, trial counsel had seen the victim testify at the preliminary hearing, and knew that there were “plenty of other attacks on [the victim’s] credibility.” The court found that trial counsel was aware of all of the inconsistencies in the victim’s testimony, and that Nimmer’s testimony would have been just another inconsistency. The court further noted that the victim’s purported recantation was not that the sexual activity had not happened, but rather that the victim had “made up the whole thing,” which could be interpreted as recanting lack of consent. The court found that the victim probably did not understand that his consent was not an issue in the crime. The court concluded that trial counsel’s decision not to pursue this issue

was a matter of reasonable trial strategy, and was neither deficient performance nor prejudicial. The court denied the motion as to both trial and postconviction counsel.

¶7 Kukla renews his argument here that trial counsel was ineffective for failing to investigate Nimmer's purported testimony, and that postconviction counsel was ineffective for failing to establish trial counsel's ineffectiveness. To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State ex rel. Flores v. State*, 183 Wis. 2d 587, 619-20, 516 N.W.2d 362 (1994). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. *Strickland*, 466 U.S. at 697. If this court concludes that the defendant has failed to prove one prong, we need not address the other prong. *Id.* To demonstrate prejudice, 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. *Id.* at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.* “In determining whether there was any act or omission which would constitute deficient performance, the standard is one of reasonable professional judgment or reasonable professional conduct.” *Flores*, 183 Wis. 2d at 620.

¶8 We review the denial of an ineffective assistance claim as a mixed question of fact and law. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). We will not reverse the circuit court's factual findings unless they are clearly erroneous. *Id.* However, we review the two-pronged determination of trial counsel's performance, as a question of law, independently. *Id.* at 128.

¶9 There is a strong presumption that counsel rendered adequate assistance. *Strickland*, 466 U.S. at 690. Professionally competent assistance encompasses a “wide range” of behaviors and “[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Id.* at 689. To demonstrate prejudice, 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. *Id.* at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.* We will not “second-guess a trial attorney’s ‘considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.’ A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel.” *State v. Elm*, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) (citations omitted).

¶10 We conclude that Kukla did not establish that he received ineffective assistance of trial counsel. Counsel knew that Nimmer was aware of an allegation that Kukla had had sexual relations with another mentally deficient man, the man in whose apartment the assault here took place. It was reasonable, therefore, for counsel to be concerned that this potentially damaging evidence might have been revealed if Nimmer had testified.¹

¹ Because we conclude that trial counsel acted reasonably on this basis, we do not address the State’s argument that trial counsel was concerned that he would be presenting false testimony had he called Nimmer as a witness.

¶11 Further, as the circuit court found, counsel's trial strategy was to pursue the inconsistencies in the victim's various statements, and counsel had examples of these inconsistencies. Nimmer's testimony would have been just another example of an inconsistent statement made by the victim, but it also could have opened the door to the introduction of the evidence that Kukla had sexual relations with the other man. Under all of these circumstances, balancing the potential harm Nimmer's testimony may have done against its minimal usefulness, we agree with the circuit court that it was a reasonable strategy for trial counsel not to pursue this issue. Trial counsel did not perform deficiently.

¶12 Kukla also alleges that he received ineffective assistance of postconviction counsel. Counsel is not ineffective for failing to make meritless arguments. *See State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). Because we have concluded that Kukla did not receive ineffective assistance of trial counsel, we must necessarily conclude that postconviction counsel was not ineffective for failing to allege ineffective assistance of trial counsel. For all of these reasons, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

