

**WISCONSIN SUPREME COURT**  
**Thursday, January 8, 2009**  
**9:45 a.m.**

07AP1849-CR      State v. Jordan L. Gajewski

*This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversed a conviction in Marathon County Circuit Court, Judge Patrick M. Brady presiding.*

This case involves a high school student who was convicted of third-degree sexual assault after allegedly having intercourse with a high school student at a party. The Supreme Court is expected to clarify how 'ineffective assistance of counsel' claims are to be analyzed.

Here is the background: Jordan L. Gajewski and the alleged victim, R.B., were students at the same high school. R.B. testified that after attending a party on May 8, 2005, she spent the night at a friend's house. Gajewski spent the night at the same house. R.B. said she recognized Gajewski from school but did not know him well. She testified at trial that she woke up to find him kissing her and removing her clothing. She said he then had intercourse with her. She testified that she told the defendant to stop and that he eventually did stop and went back to sleep. Two other people were sleeping in the same room at the time, and two other friends of R.B. were in the house. None of them awoke, and R.B. did not yell for help. She reported the assault 10 days later. Gajewski was arrested, charged and brought to trial.

On cross-examination, the defense turned its attention briefly to the alleged encounter that has become the focus of this appeal. Gajewski's counsel asked R.B. whether she had a conversation with the defendant at school several days after the alleged assault but before she reported the assault. She said she did not remember. Gajewski's attorney asked, "If you had been raped a few days earlier . . . you wouldn't want to talk to him at all; would you?" R.B. answered, "Right."

The defendant did not testify. The only defense witness testified that he was sleeping three feet away from R.B. and did not hear anything. He also said the next morning she did not appear upset.

The jury found Gajewski guilty of third-degree sexual assault. Sentence was withheld and he was ordered to serve 12 months in jail with work-release privileges as part of a five-year probation sentence. The sentence was stayed pending this appeal.

After his conviction, Gajewski filed a post-conviction motion seeking a new trial. He alleged (1) that new evidence had surfaced, and (2) that his trial attorney had been ineffective.

The new evidence was this: One day after Gajewski was convicted, a witness came forward to report overhearing R.B. make the following statement in a beer tent at a local fair: "It never happened; I just did it to piss him off." The trial court declined to grant a new trial based upon this evidence, finding that the comment was so vague that there was no reasonable probability that it would have changed the outcome of the case.

The 'ineffective assistance of counsel' argument was based upon Gajewski's claim that his lawyer failed to present full evidence about the alleged encounter between

Gajewski and R.B. shortly after the alleged assault. The trial court concluded that the attorney had done a reasonable job, and had not presented more information because Gajewski had not provided it to him.

The detailed version of the alleged encounter, as provided by Gajewski at the post-conviction hearing, is as follows: R.B. allegedly approached him several days after the party where the assault allegedly occurred, but before she reported the assault. He said that she wrote her cell phone number on his hand, and invited him to a concert. He declined, indicating that this would conflict with prom, to which he was taking another girl, and further explaining that he was not interested in her romantically. He testified that she responded with anger, calling him a name and storming off. Another boy testified to having witnessed the end of this encounter.

During the post-conviction hearing, R.B. denied having asked the defendant to go out with her, and said “I don’t recall” when questioned about whether she gave Gajewski her cell phone number.

Gajewski’s trial counsel acknowledged that a jury would probably have found R.B.’s alleged behavior inconsistent with having been assaulted, and he agreed he should have cross-examined her about it at trial. He also acknowledged he had not offered any evidence of motive for R.B. to fabricate the assault, and that Gajewski’s alleged rejection of R.B. would have provided such a motive.

After the trial court denied Gajewski’s post-conviction motion, he went to the Court of Appeals, which agreed that his lawyer had been ineffective, and granted him a new trial. Now, the State has appealed that ruling to the Supreme Court.

The State argues that the Court of Appeals got it wrong. Specifically, the State asserts that the appellate court improperly blamed defense counsel for not possessing all the information that the defendant later asserted counsel should have known. The State maintains that the client bears the responsibility of providing sufficient information to counsel. The State also argues that the Court of Appeals failed to hold Gajewski to the burden of proving by clear and convincing evidence that his trial counsel was ineffective.

The Supreme Court will decide if Gajewski will receive a new trial, and is expected to clarify how the courts are to analyze ‘ineffective assistance of counsel’ claims.