COURT OF APPEALS
DECISION
DATED AND RELEASED

May 13, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1426-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

QUINTON K. WASHINGTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: STANLEY A. MILLER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Quinton K. Washington appeals from a judgment entered after a jury found him guilty of two counts of first-degree sexual assault of a child, contrary to § 948.02(1), STATS. He also appeals from an order denying his postconviction motion. Washington claims that he received ineffective assistance of trial counsel. Because Washington received effective assistance, we affirm.

I. BACKGROUND

In July 1994, Washington married Debra Ann. Debra Ann had a twelve-year-old daughter, Latasha. Shortly after the wedding, Debra asked Latasha whether Washington had "been touching" her. Latasha told her mother that a few weeks before the wedding Washington had "fingered her and was biting and sucking her breasts." Over the next few days, Latasha reported these incidents to police officers, a counselor and a nurse. Washington was charged with two counts of first-degree sexual assault of a child.

The case was tried to a jury. Washington was convicted. He filed a postconviction motion alleging ineffective assistance of counsel. The trial court denied the motion after holding an evidentiary hearing, concluding that trial counsel's performance was not deficient in three instances and not prejudicial as to the fourth instance. Washington now appeals.

II. DISCUSSION

Washington claims he received ineffective assistance of trial counsel when: (1) counsel failed to prepare him to answer the question regarding his prior convictions, which led Washington to tell the jury that he had been convicted of four felonies instead of telling the jury simply that he had four prior convictions; (2) counsel failed to impeach Latasha with her diary, which did not record the sexual assaults; (3) counsel failed to inquire about the timing of Latasha's disclosure that the assaults occurred; and (4) counsel failed to introduce into evidence a prior untruthful allegation of sexual assault allegedly made by Latasha in 1992. The trial court determined that three of the alleged instances of ineffective assistance of counsel actually constituted reasonable trial strategy and, therefore, were not deficient and the fourth was not prejudicial. We agree.

To prove that he received ineffective assistance of trial counsel, Washington must show that the two-pronged test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984), is satisfied. *See* ***id.*** at 687. He must show that his counsel's performance was both deficient and prejudicial. ***State v. Bentley***, 201 Wis.2d 303, 312, 548 N.W.2d 50, 54 (1996). Counsel's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. "In order to show 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996) (citations omitted). Further, we need not address both the deficient-performance and prejudice prongs if the defendant does not make a sufficient showing on one. ***Strickland***, 466 U.S. at 697.

The issues of performance and prejudice present mixed questions of fact and law. ***Sanchez***, 201 Wis.2d at 236, 548 N.W.2d at 76. Findings of historical fact will not be upset unless they are clearly erroneous, and the questions of whether counsel's performance was deficient or prejudicial are legal issues that we review *de novo*. ***Id.*** We now address each of Washington's alleged instances of ineffective assistance.

A. Criminal Convictions.

Washington claims that his counsel failed to adequately prepare him to answer the question regarding his past criminal convictions. As a result, he argues that he told the jury that he was convicted of four *felonies*, instead of

simply four convictions. The trial court ruled that this response was not prejudicial, finding that neither side "said anymore about it," and that there was no evidence "to cause a belief that there is a reasonable probability that the result of the proceeding would have been different." We agree with the trial court's analysis on this issue.

The record demonstrates that Washington's response was not mentioned again by either side during the course of the three-day trial. Nor is there evidence that the fact of his prior convictions or the nature of his prior convictions was referred to again by either party. We conclude, therefore, that Washington was not prejudiced by any failure to prepare him for the past conviction question.

B. Diary.

Next, Washington claims counsel was ineffective for failing to impeach Latasha with her diary. He argues that her diary makes no mention of the sexual assaults, and that the diary also documents various sexual thoughts and discussions with various friends. The trial court ruled that trial counsel's decision not to impeach Latasha with her diary was reasonable trial strategy. We agree.

At the postconviction motion hearing, counsel testified that he thought it was important to maintain a consistent theme of his theory of defense–that Latasha had fabricated the sexual assault allegations because she did not like Washington. The record does not support Washington's assertion that Latasha would have recorded the assaults in her diary if they actually occurred. There are large time gaps in the diary entries and there is nothing in the diary that necessarily indicates either that there was a blank entry on the date of the assaults or that other personal information was recorded. Thus, to argue that the absence

of an entry proves the assaults did not occur is mere speculation and is insufficient to support an allegation of ineffective assistance. *See* ***State v. Flynn***, 190 Wis.2d 31, 48, 527 N.W.2d 343, 350 (Ct. App. 1994), *cert. denied*, 115 S. Ct. 1389 (1995).

Further, Latasha may have provided damaging testimony if she was asked why her diary did not record the assaults. There is also evidence that Latasha's mother was monitoring the diary and, therefore, the absence of an entry would support Latasha's claim that she had not immediately reported the assaults in order to protect her mother. Accordingly, we conclude that counsel's choice to not impeach Latasha with her diary was a reasonable one and, therefore, did not constitute deficient performance.

C. Timing of Report of Assault.

Washington also argues that counsel was ineffective for failing to expose to the jury that Latasha reported the assaults to her mother the night after Washington had threatened to divorce Debra Ann. He contends that the argument gave Latasha a motive or bias to suddenly fabricate the assaults in support of her mother. The trial court determined that failing to reveal this argument to the jury was reasonable trial strategy and, therefore, did not constitute deficient performance. We agree.

Counsel testified at the postconviction hearing that he did not pursue the deteriorating relationship "angle" in detail because Debra Ann had been ambivalent while the case was pending as to her position. Counsel also indicated that he was concerned about opening the door on Washington and Debra Ann's relationship if he pursued the challenged line of questioning. Counsel believed that this questioning would be detrimental to the defense. Counsel testified that he

instead decided to focus on the defense theory that Latasha had fabricated the allegations.

We agree that counsel's strategic choice was reasonable. Further, the only evidence that Latasha was even aware that the argument occurred was Washington's testimony at the postconviction hearing that he heard the floor creak and saw the bathroom light on. This does not prove that Latasha could hear the argument which occurred behind a closed bedroom door. The record, in fact, supports the opposite conclusion. Latasha did not immediately come to her mother to report the assaults after the argument. Her mother confronted Latasha. Accordingly, we reject Washington's claim that he received ineffective assistance on this ground.

D. Prior Instance of Sexual Assault.

Lastly, Washington claims he received ineffective assistance because his counsel failed to introduce evidence of a prior untruthful allegation under § 972.11(2)(b)3, STATS.[1] Specifically, he asserts that Latasha had made a similar false allegation of sexual assault against an uncle in 1992. The trial court

[1] Section 972.11(2)(b)3, STATS., provides in pertinent part:

> (b) If the defendant is accused of a crime under s. 940.225, 948.02, 948.025, 948.05, 948.06 or 948.095, any evidence concerning the complaining witness's prior sexual conduct or opinions of the witness's prior sexual conduct and reputation as to prior sexual conduct shall not be admitted into evidence during the course of the hearing or trial, nor shall any reference to such conduct be made in the presence of the jury, except the following …:
>
> 3. Evidence of prior untruthful allegations of sexual assault made by the complaining witness.
>
> 4.

ruled that counsel's failure to seek admission of this evidence under the statute was not deficient. We agree.

Counsel attempted to introduce this evidence under ***State v. Pulizzano***, 155 Wis.2d 633, 456 N.W.2d 325 (1990), as an alternate source of how Latasha gained her sexual knowledge. *See* ***id.*** at 638-43, 456 N.W.2d at 327-29. He chose this route rather than introducing it pursuant to § 972.11(2)(b)3, STATS., because he did not know whether the allegation was true. To introduce this evidence pursuant to the statute, counsel would have to have shown that the evidence fit within § 972.11(2)(b)3, that the evidence was material to a fact at issue and that the probative value outweighed its prejudicial nature. ***State v. DeSantis***, 155 Wis.2d 774, 785, 456 N.W.2d 600, 605 (1990). In order to satisfy the first criteria, the proponent must show that a reasonable person could infer that the prior assault allegation was untruthful, either with evidence of a recantation or proof of falsity. *See* ***State v. Moats***, 156 Wis.2d 74, 110, 457 N.W.2d 299, 315 (1990).

Counsel testified that he was informed that the uncle was out of state. Further, Washington admitted that he never gave counsel any reason to believe that the 1992 allegation was untruthful. Under these circumstances, it was reasonable trial strategy to attempt to introduce this evidence under ***Pulizzano***

rather than § 972.11(2)(b)3, STATS. Accordingly, we reject Washington's claim that counsel's performance regarding this issue constituted ineffective assistance.[2]

By the Court.—Judgment and order affirmed.

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

[2] Washington also argues that he was denied due process because the State failed to turn over exculpatory evidence, and the trial court denied his request for an *in camera* review of the State's file relating to the alleged 1992 assault. We summarily reject both arguments. Washington has failed to provide any evidence to show that the State failed to disclose any exculpatory information. His assertion that the 1992 file possibly contains information that could be helpful to the defense is pure speculation. This court cannot rely on argument of appellate counsel in the absence of a proper record. ***State v. Krieger***, 163 Wis.2d 241, 254, 471 N.W.2d 599, 605 (Ct. App. 1991). Likewise, Washington has failed to make a sufficient showing to warrant an *in camera* review of the State's file. He offers only speculation that the State's 1992 file regarding the alleged assault may contain information beneficial to his defense. This is not sufficient to require an *in camera* review. ***State v. Munoz***, 200 Wis.2d 391, 395, 546 N.W.2d 570, 572 (Ct. App. 1996).