

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 22, 1997

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.

NOTICE

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No. 97-0610-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TIMOTHY J. DAVIDS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County:
DENNIS G. MONTABON, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Roggensack, JJ.

PER CURIAM. Timothy J. Davids appeals from a judgment convicting him of two counts of second-degree sexual assault of a minor, felonies contrary to § 948.02(2), STATS. The trial court sentenced him to concurrent four-year prison terms, which it stayed, and imposed ten years of probation with, among other conditions of probation, a one-year jail term. The state public

defender appointed Joseph W. Kryshak to represent Davids on appeal. Kryshak has filed a no merit report with this court, pursuant to *Anders v. California*, 386 U.S. 738 (1967), and RULE 809.32, STATS., and states that a copy has been sent to Davids. In compliance with *Anders*, this court informed Davids that he could respond to the report, but he has not done so. After an independent review of the record as mandated by *Anders*, we conclude that any further proceedings in this matter would be without arguable merit. Davids's conviction is affirmed, and we grant Attorney Kryshak's motion to withdraw from further representation before this court.

The no merit report addresses: (1) whether trial counsel was ineffective; (2) whether the State inappropriately referred to unproven conduct by Davids at the sentencing hearing; (3) whether a dismissed alternate juror's view of Davids's innocence affected the verdict; (4) whether Davids's *Miranda* rights were violated; and (5) whether there was legal significance to Davids's allegations that a witness was pregnant at the time of trial, and to the trial court's deferral of a jail sentence¹ pending appeal.

At trial, several witnesses testified. The victim herself unambiguously testified to two acts of sexual assault perpetrated in the presence of a witness who was not paying attention because the victim, Davids and the witness were all watching television at the time. The witness's statement corroborated the victim's testimony regarding where all three were sitting during the assault, what happened before and after, how long Davids was in the house and other similar details. Davids's testimony contradicted the victim's and the witness's testimony

¹ Although it is unclear, the record indicates that Davids may have received an additional 30 days in jail for probation violations occurring after sentencing.

in several significant respects, including who was sitting where, how much total time he spent in the presence of the victim and witness, how the victim behaved at various times, and how the victim and witness interacted with each other and with him. Accordingly, the case became a credibility contest between the victim and Davids; the jury disbelieved Davids and found him guilty.

We agree with appellate counsel that there is no merit to Davids's² argument that he received ineffective assistance of counsel. To prevail on this claim, Davids would have to show that (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We must scrutinize counsel's performance to determine whether "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688; *see also State v. Ambuehl*, 145 Wis.2d 343, 351, 425 N.W.2d 649, 652 (Ct. App. 1988).

Davids specifically finds fault with counsel's failure to object when the victim mentioned Davids's access to a gun. However, in our analysis, no error occurred. While cross-examining the victim about the gun, trial counsel elicited that even though she wrote a five-page police statement, she never mentioned the gun. Furthermore, counsel elicited testimony that she "didn't think that that [gun] was really important." Such a line of cross-examination indicates that counsel was aware of the problem raised by the victim's mention of a gun, and chose strategically to deal with it by cross-examination rather than objection. As the United States Supreme Court has held, informed "strategic choices ... are virtually unchallengeable." *Strickland*, 466 U.S. at 690-91. Similarly, trial counsel's

² Although Davids has not filed a response, his attorney's no merit brief lists several objections that Davids personally raised with his appellate attorney concerning events at trial.

failure to introduce some letters from the witness into evidence constituted a strategic choice, not ineffective assistance. The letters clearly indicated that the witness and Davids had discussed sexual matters. In our objective analysis, introduction of such evidence would have reflected poorly on Davids because the witness was a minor, regardless of the content of the balance of the letters.

Another claim of ineffectiveness arises from trial counsel's alleged failure to provide Davids with copies of the victim's police statement. The record contains the original statement, which is written in pencil in a cramped hand and is difficult to read. We are therefore well inclined to credit trial counsel's assertion that it was difficult to obtain a legible copy of the statement. Further, Davids's argument—as relayed by appellate counsel—fails to allege how such lack of access was prejudicial.

Davids also believes he received ineffective assistance because trial counsel was unable to elicit from the victim or the witness the alleged fact that either or both had falsely accused others of sexual assault. We reject this argument also. Counsel moved for *in camera* inspection of the victim's and the witness's statements to social service agencies. The court granted the motion, examined the record and found nothing to substantiate these allegations.

Davids also raises concerns about: (1) a stricken alternate juror who approached him with the assurance that she thought him innocent; and (2) how an alleged rumor—that the witness who testified was pregnant with his (Davids's) baby—adversely impacted him. We have carefully scrutinized the entire record. These matters are outside the record, and therefore we will not consider them. However, even if we were to consider them, it is difficult to comprehend how a stricken alternate juror's opinion, given before jury deliberation, could affect the

impaneled jurors' verdict, which was reached after deliberation. Nor can we conclude that an unproven and—so far as we can tell from the record—unmentioned “rumor” about the witness could influence the jury about Davids’s behavior with the victim.

Davids’s unsupported allegation that he was denied his *Miranda* rights is contradicted by the record and we do not consider it further.

Finally, Davids believes some unfavorable inference can be drawn from the fact that the trial court has stayed imposition of jail time pending this appeal. We reject this argument. The circuit court’s action cannot be read to imply that the system somehow mistreated Davids.

Based on our independent review of the record, we conclude that any further appellate proceedings would be frivolous and without arguable merit within the meaning of *Anders*, as well as RULE 809.32, STATS. Accordingly, the judgment of conviction is affirmed, and Attorney Kryshak is relieved of further representation of Davids in this appeal.

By the Court.—Judgment affirmed.

