COURT OF APPEALS
DECISION
DATED AND FILED

June 30, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3746-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES PETERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

HOOVER, J. James Peterson appeals a judgment finding him guilty of one count of first-degree sexual assault of a child under thirteen years of age, contrary to § 948.02(1), STATS., and an order denying postconviction relief. Peterson contends his trial counsel was ineffective and that he was improperly denied a preliminary hearing after he initially waived the hearing and the State

then issued an amended information. We reject these arguments and, accordingly, affirm.

Peterson was originally charged with one count of having sexual contact with a child under thirteen years of age on or about June 1993. The offense was to have occurred while Peterson lived with the child's father. Believing that he could prove the incident did not occur because he did not live with the father on or about June 1993, Peterson waived his right to a preliminary hearing. The State later amended the information, charging that the alleged incident occurred sometime between December 1991 and May 1992. The defense moved for a preliminary hearing, and the motion was denied.

At trial, the child, Jessyca, testified that she walked in on Peterson while he was in his bedroom masturbating. She stated that he asked her to participate in masturbating him, and she did so. A detective, John Vogler, testified that Peterson denied that he touched Jessyca or allowed her to touch him inappropriately. Vogler stated, however, that Peterson said he was not surprised when the detective came to question him, and claimed that Jessyca was an oversexed girl with whom he exercised admirable restraint.

The jury convicted Peterson of the offense. On appeal, he contends his trial counsel's performance was prejudicially deficient for three reasons. Specifically, he claims his attorney failed: (1) to challenge the admissibility of statements he made to Vogler; (2) to seek and present expert testimony on child memory; and (3) to seek admission of other alleged sexual acts of the victim. He also contends he was entitled to a preliminary hearing on the amended charge.

We first consider whether trial counsel was ineffective for failing to challenge the admissibility of inculpatory statements Peterson made to Vogler. At

trial, Peterson testified that Vogler threatened to charge him with having sexual contact with a child if he did not admit that he had the victim touch his penis, and that the sexual contact charge would destroy his transcendental meditation business. He also testified that the detective told him no charges would be brought if he admitted the contact. Finally, Peterson claimed he admitted sexual contact with the victim only to avoid being charged and tried.

Vogler testified that he informed Peterson at the beginning of the interview that he was exposed to possible criminal charges and that whatever was said during the interview would be forwarded to the district attorney for charging consideration. He stated that when Peterson expressed concern that the charges might adversely affect his business, Vogler told him it might be possible to handle the matter in a more discreet way that would avoid publicity. He denied ever threatening Peterson or that he ever told Peterson the matter would be dropped if he admitted sexual contact. The trial attorney testified that he did not challenge the admissibility of the statements because he believed they were voluntary.

A claim of ineffective assistance of counsel presents a mixed question of law and fact. ***State v. Pitsch***, 124 Wis.2d 628, 633-34, 369 N.W.2d 711, 714 (1985). We will not reverse the lower court's findings of fact unless they are clearly erroneous. ***Id.*** at 634, 369 N.W.2d at 714. Whether counsel's assistance was ineffective and whether counsel's behavior was prejudicial is a question of law we review without deference to the trial court. ***Id.*** at 634, 369 N.W.2d at 715.

A criminal defendant who claims his conviction should be reversed because he received ineffective assistance of counsel must demonstrate both that his attorney's performance was deficient and that any deficient performance

prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "Unless a defendant makes both showings, it cannot be said that the conviction … resulted from a breakdown in the adversary process that renders the result unreliable." ***Id.*** at 687. Counsel is presumed to have acted properly, so that the defendant must demonstrate that his attorney made serious mistakes which could not be justified in the exercise of objectively reasonable professional judgment. ***Id.*** at 687-91; ***State v. Pitsch***, 124 Wis.2d 628, 636-37, 369 N.W.2d 711, 716 (1985). 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; ***Pitsch***, 124 Wis.2d at 641-642, 369 N.W.2d at 718-19.

We need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. *See* ***State v. Kuhn***, 178 Wis.2d 428, 438, 504 N.W.2d 405, 410 (Ct. App. 1993). We conclude that Peterson fails to demonstrate that trial counsel's failure to challenge the admissibility of the statements prejudiced his defense. In its decision, the trial court stated that there is no reasonable probability that any motion attacking the admissibility of the statements would have been granted.[1] There is no prejudice when an attorney fails to bring a motion that would have been denied. *See* ***State v. Golden***, 185 Wis.2d 763, 771, 519 N.W.2d 659, 662 (Ct. App. 1994). Peterson further fails to demonstrate that denial of such a motion, based upon a finding that Peterson made the statements voluntarily in a

[1] During the trial, the court heard testimony concerning the circumstances under which Peterson gave his statement. During the postconviction motion hearing, the court indicated that, based on this testimony, had a suppression motion been filed the court would have found that Peterson's statement was voluntary.

noncustodial interrogation, is clearly erroneous. *See* § 805.17(2), STATS. Instead, there is evidence to support these findings.

We turn now to Peterson's contention that his trial counsel was ineffective for failing to present expert testimony on child memory. Peterson claims that given Jessyca's inconsistent statements regarding the date of the sexual contact, an expert on child memory was necessary to adequately defend Peterson. He also contends that because the case centered around Jessyca's credibility vis-a-vis Peterson's, such an expert was essential for planning strategy and cross-examining Jessyca. He finally asserts that expert testimony was necessary to present evidence that false memories can be created by intentionally providing a child with false information or encouraging a child to mistakenly believe traumatic events occurred.

We conclude that trial counsel was not deficient for not presenting expert testimony on child memory. First, an expert was not necessary to assist the jury in appreciating that Jessyca gave inconsistent statements. Second, Peterson fails to show any evidence in the record from which it might be inferred that Jessyca's statement was perhaps the product of any suggestive technique. Finally, Peterson fails to demonstrate what specific assistance an expert could have offered to alter the outcome of the case.

We turn now to Peterson's argument that trial counsel was ineffective for failing to seek admission of the victim's other alleged sexual acts. Peterson and another person testified at the postconviction hearing that they met with the trial attorney and discussed an intercepted note from Jessyca describing her participation in a crotch-groping club in which Jessyca earned points for touching male genitals. The attorney testified that he did not remember any

discussion with Peterson about a club, and that his discovery efforts did not uncover such a note. He stated that when Peterson expressed an interest in raising the issue at a hearing, he did not support using the evidence because he felt it might tend to increase in a jury's mind the likelihood that Peterson allowed Jessyca to touch his penis. He testified:

> [Y]ou can't have any kind of contact, and that was basically our defense and Mr. Peterson's position in the case that there wasn't any sort of contact between him and Jessyca, and so this evidence showing that she was sexually aggressive undercut that particular theory.

We conclude that Peterson's trial attorney was not deficient for not attempting to present evidence regarding Jessyca's alleged prior conduct of participating in the crotch-groping group. Rather, the decision not to seek admission of the information was appropriate trial strategy that can be justified in the exercise of objectively reasonable professional judgment. *See* ***Strickland***, 466 U.S. at 687-91; ***Pitsch***, 124 Wis.2d at 636-37, 369 N.W.2d at 716. While Peterson contends it would have demonstrated Jessyca's motive to lie about the sexual assault so that she could get points in the group, a reasonable attorney could conclude that it might demonstrate what this trial attorney feared--that Peterson allowed Jessyca to touch his genitals. Had it been demonstrated that Jessyca participated in such a group, the jury could reasonably conclude that she was more easily persuaded to touch Peterson inappropriately. Because we conclude it was appropriate trial strategy to not attempt to admit this evidence, we do not address the State's alternate argument that the rape shield law, § 973.11, STATS., would have prevented its admission.

We further conclude that the supposed note of an alleged groping club was not relevant to either Jessyca's credibility or her motive to tell police she

touched Peterson's penis. Jessyca did not tell police about the sexual assault until February 1996, two and one-half years after she moved from Altoona and the school where the groping club allegedly met. Thus, at the time she reported the incident to police, she lived in a different city at a substantially later date. No evidence suggests she was still connected with a crotch-groping club, that she would still get points for groping, or that she had previously told other club members about this incident and feared being caught in an earlier lie. The evidence is thus irrelevant to demonstrate both credibility and motive.

Finally, we turn to Peterson's argument that he was denied a preliminary hearing. When charged with one count to have occurred in June 1993, Peterson waived his first preliminary hearing because he believed he could prove the incident did not occur during that time. When the State issued an amended complaint alleging that the same charge occurred between December 1991 and May 1992, Peterson asked for and was denied a new preliminary hearing. He contends the State failed to demonstrate that the new charge arose out of the same transaction, and that the date and time of the alleged offense was critical to this determination.

We need not address the merits of Peterson's argument. The jury found Peterson guilty beyond a reasonable doubt; any defect concerning a preliminary hearing is therefore cured. *See* ***State v. Webb***, 160 Wis.2d 622, 628, 467 N.W.2d 108, 110 (1991). The purpose of a preliminary hearing is simply to determine whether probable cause exists to bind a defendant over for trial. It is not a discovery device. *See* ***Bailey v. State***, 65 Wis.2d 331, 344, 222 N.W.2d 871, 878 (1974). Thus, Peterson's conviction under a higher burden of proof cures any error.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.