

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 25, 2005**

Cornelia G. Clark  
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 No. 2004AP2030-CR**

**Cir. Ct. No. 2002CF6897**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MICHAEL E. STUMPS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHAEL B. BRENNAN, Judge. *Affirmed.*

Before Lundsten, P.J., Deininger and Higginbotham, JJ.

¶1 PER CURIAM. Michael Stumps appeals a judgment convicting him of one count of first-degree sexual assault of a child and one count of second-degree sexual assault of a child and an order denying his motion for postconviction relief. He claims trial counsel provided ineffective assistance in

several respects and that the real controversy in his case was not fully tried. We disagree and affirm for the reasons discussed below.

### **BACKGROUND**

¶2 Stumps was charged with having sexual intercourse with one child under the age of sixteen (the teenaged victim) and one child under the age of thirteen (the younger victim). At trial, the State presented testimony from a police detective who had been involved in the investigation of the incidents, as well as testimony from both victims. The parties also stipulated that hospital records of the examinations of the two victims would be admitted into evidence and could be sent to the jury upon request.

¶3 The police detective who interviewed Stumps read Stumps' signed statement to the jury. Stumps told the detective that the teenaged victim had been staying over for the weekend at the residence of a mutual relative where he was also staying. Stumps claimed the girl had come up to him while he was watching a movie and told him she liked him and wanted him to take her virginity, but that he had told her "no." Later that night, however, Stumps said he came over to where the girl was sleeping on the couch in shorts and a top, near where five other children were sleeping on mattresses on the living room floor, woke her up and asked her if she still wanted to have sex with him. After she said yes, he proceeded to have intercourse with her on the couch "for a few minutes," until he ejaculated. Stumps denied that the girl ever told him to stop or cried.

¶4 Stumps further told the detective that two years earlier the younger victim had been staying at the residence of another mutual relative where Stumps was also staying. Stumps claimed the girl had come in to use the bathroom while he was taking a bath, that she had seen his penis and touched it, and that he had

inserted two of his fingers in her “co[o]chie.” He denied having made the girl “suck his thing,” which he claimed the girl’s grandmother had confronted him about.

¶5 The detective also read to the jury a letter of apology which Stumps had handwritten at the police station after giving his statement, in which Stumps wrote that he was deeply sorry for his actions and asked his two victims to forgive him, even if they could not forget what he had done. The detective admitted that no effort had been made to test the couch where the incident with the teenaged victim was to have occurred or to retrieve her clothing, citing her delayed reporting.

¶6 The teenaged victim testified that she had been spending the weekend at a relative’s house and was sleeping on the couch when she woke up to find Stumps on top of her, with her nightgown pulled up and her panties pushed aside. She said Stumps held her arms above her head, inserted his private part into her private part, and had intercourse with her. She told him to stop, but he kept going. She said that she did not tell anyone about the incident at first because she was afraid no one would believe her — noting that no one had believed her cousin (the younger victim), when her cousin had previously accused Stumps of sexual misconduct. Contrary to Stumps’ account and her own prior statements, the teenaged victim testified there was no one else present during the incident. She admitted on cross-examination that she did not like staying over at that relative’s house, and was no longer required to do so after she made her allegations.

¶7 The younger victim testified that Stumps “put his penis in [her] coochie a lot” and into her “booty” once or twice while she had been in second and third grade and was living with a relative. The younger victim said she told

her uncle and grandmother, but the abuse continued until much later when she went to the hospital. She testified that the incidents occurred mostly in her room, and once in the basement and once by the living room door. She did not recall that any of the incidents had occurred in the bathroom. On cross-examination, she admitted discussing her dislike of Stumps with her cousin, the teenaged victim, and agreed that the older girl had urged her to “say things about [Stumps] too.” She did not remember having told a hospital nurse about a dream in which a fat lady in the movie “[The] Nutty Professor” had touched her.

¶8 Following a colloquy with the court, Stumps waived his right to testify, and did not present any witnesses. The jury returned guilty verdicts on both counts. Stumps filed a postconviction motion alleging ineffective assistance of trial counsel and claiming that the real controversy had not been tried. The trial court denied the motion without a hearing, and Stumps now appeals on both grounds.

## DISCUSSION

¶9 In order to obtain a hearing on a postconviction motion, a defendant must allege sufficient material facts to entitle him to the relief sought. *State v. Allen*, 2004 WI 106, ¶36, 274 Wis. 2d 568, 682 N.W.2d 433. We agree with the trial court that Stumps’ allegations were insufficient to warrant a hearing on either his ineffective assistance or real controversy claims.

*Ineffective Assistance*

¶10 The framework for evaluating claims of ineffective assistance of counsel is well established:

The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them.

*State v. Swinson*, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12 (citations omitted). Stumps claims that counsel was ineffective for: (1) advising Stumps not to testify without fully explaining the strategic implications of that decision; (2) failing to interview and present testimony from several witnesses who were in the house at the time of the incident with the older girl; (3) failing to impeach the older girl about inconsistencies in the details of her account; and (4) failing to point out to the jury that the medical reports revealed no signs of sexual assault on the younger girl. We address each contention in turn.

¶11 First, Stumps claims that counsel provided ineffective assistance by advising him not to testify, when his testimony would have been the only way to challenge the accuracy of the statement he gave to police. Stumps further asserts that he mistakenly believed that counsel would be able to present the jury with Stumps' explanation of why he gave a false confession even if Stumps did not take

the stand. Stumps does not, however, allege that counsel provided him with any misinformation on that point. Counsel could not reasonably be expected to provide information to correct a misunderstanding that he had no way of knowing his client held. Furthermore, the trial court had already determined at a pretrial hearing that Stumps' statement to police was knowingly and voluntarily given. Therefore, we are not persuaded that counsel acted outside of professional norms by advising his client not to testify based on the general disadvantages of doing so, and conclude there was no deficient performance.

¶12 Next, Stumps contends that counsel should have interviewed and presented testimony from a number of people who were present on the night of the incident with the teenaged victim. We are not persuaded, however, that any of the evidence which Stumps claims should have been elicited had any reasonable probability of changing the outcome of the trial.

¶13 Several of the potential witnesses Stumps claims counsel failed to interview were children who were asleep during the incident, and Stumps has not shown that they would have had any useful information to offer.

¶14 Two adults provided affidavits explaining that they were awake most of the night, often looking in on the children sleeping in the living room, and that they were both motivated to watch the teenager carefully because they believed she had a crush on Stumps and had expressed interest in having sex with him, but that neither of them observed any inappropriate conduct. The fact that there were adults nearby periodically looking in on the sleeping children does not negate the fact that there were also periods of time when Stumps was alone in the room with the teenaged victim and other sleeping children. Thus, the adults' testimony would not have contradicted either the victim's testimony or Stump's statement,

particularly when Stumps himself told police the incident took only “a few minutes.”

¶15 Stumps’ sister would have testified that the teenaged victim had denied having sex with Stumps when directly asked about it by an adult the following day. The fact that the teenage victim denied that anything sexual had occurred when questioned by an adult would have been of limited significance, however, given that the sister would also have testified that the victim’s spontaneous statement to the sister about sexual activity the prior night was what prompted the questioning in the first place, and given the victim’s own explanation that she was afraid to tell about the incident because her cousin had not been believed after making similar accusations.

¶16 An uncle would have testified that he had been told about the younger victim’s claims that Stumps had assaulted her by a relative (as the younger girl had told investigators), rather than by the victim herself (as the younger girl had testified). The impeachment value of this testimony would have been of extremely limited value, given the victim’s young age at the time of the assaults, the time that had since passed, and the collateral nature of the detail.

¶17 Similarly, hospital records from an examination conducted some time after the assaults would have had limited significance. Although the records showed that the younger victim’s hymen was intact and that she showed no signs of trauma or scarring in her vagina or anus, that would not negate the possibility that Stumps had inserted fingers into the girl’s vagina (as he himself had admitted in his statement to police), or had touched her “bootie” (as the girl had claimed at the hospital that someone had done to her at her uncle’s house a long time ago), or had partially inserted or attempted to insert his penis into her vagina or anus, as the

girl may have meant by her testimony. Nor would the fact that the younger girl told hospital personnel she had dreamed that a character from a movie was touching her inappropriately have negated the possibility that actual improper contact had prompted such a dream or that she was afraid to name her actual attacker.

¶18 Finally, none of the inconsistencies in the teenaged victim's stories Stumps claims counsel should have highlighted during cross-examination undermine our confidence in the outcome at trial. We agree with the trial court that the statement Stumps gave to police and the apology he wrote to the girls constituted overwhelming evidence of his guilt on both charges. Discrepancies over what the teenaged victim was wearing, the date of the incident or how long before the incident she had broken her ankle, and whether she and Stumps were alone in the room or merely the only two people awake were all minor in comparison to the general consistency between her allegations and Stumps' acknowledgement that the two had sex on the couch.

¶19 In sum, we conclude that Stumps' allegations, taken as true for the purpose of evaluating his motion, were insufficient to establish deficient performance with respect to counsel's advice against testifying, or to establish prejudice with respect to counsel's other actions or omissions.

#### *Real Controversy*

¶20 Stumps makes an alternate argument that he is entitled to a new trial in the interest of justice because the real controversy in his case was not tried. *See*



WIS. STAT. § 752.35 (2003-04)<sup>1</sup> (allowing this court to reverse a judgment by the trial court “if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried”). We may conclude that the controversy has not been fully tried either when the jury was not given the opportunity to hear testimony relating to an important issue in the case, or when the jury had before it improperly admitted evidence which confused a crucial issue. *State v. Wyss*, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985). We will exercise our discretionary reversal power only sparingly, however. *Vollmer v. Luety*, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990).

¶21 We have already explained why we are not convinced that Stumps was prejudiced by counsel’s failure to present testimony from a number of additional witnesses. We are similarly satisfied that Stumps’ confession and apology, in conjunction with the victims’ testimony, presented the jury with all of the information necessary for it to decide the real controversy in this case.

*By the Court.*—Judgment and order affirmed.

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

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

