

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**September 14, 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. 2004AP2154-CR**

**Cir. Ct. No. 2003CF110**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**SHAUN T. NICHOLS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Manitowoc County: PATRICK L. WILLIS, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Shaun T. Nichols appeals from a judgment convicting him of first-degree sexual assault aided by others contrary to WIS.

STAT. § 940.225(1)(c) (2003-04),<sup>1</sup> bail jumping contrary to WIS. STAT. § 946.49(1)(b), and intimidating a victim by threat of force, violence or injury contrary to WIS. STAT. § 940.45(3). Nichols also appeals from an order denying his postconviction motion seeking a new trial on the grounds of ineffective assistance of trial counsel. Because we agree with the circuit court that Nichols was not prejudiced by the performance of his trial counsel, we affirm.

¶2 Nichols was charged with having forcible, nonconsensual sexual intercourse with April D. and later threatening her to keep her from reporting the assault. Nichols also faced a bail jumping charge arising out of this conduct. The circuit court granted Nichols' pretrial motion to permit Tara Blue, an acquaintance of April D., to testify about whether April D. had a reputation for truthfulness. However, during defense counsel's direct examination of Blue, he neglected to ask Blue any questions about April D.'s reputation for truthfulness. The circuit court rejected Nichols' ineffective assistance of counsel claim because Nichols was not prejudiced by counsel's omission.

¶3 The ineffective assistance standards are:

To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. Consequently, if counsel's performance was not deficient the claim fails and this court's inquiry is done.

We review the denial of an ineffective assistance claim as a mixed question of fact and law. We will not reverse the trial court's factual findings unless they are clearly

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

erroneous. However, we review the two-pronged determination of trial counsel's effectiveness independently as a question of law.

*State v. Kimbrough*, 2001 WI App 138, ¶¶26-27, 246 Wis. 2d 648, 630 N.W.2d 752 (citations omitted). To establish prejudice, “the defendant must affirmatively prove that the alleged defect in counsel’s performance actually had an adverse effect on the defense.” *State v. Reed*, 2002 WI App 209, ¶17, 256 Wis. 2d 1019, 650 N.W.2d 885. The defendant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). 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. *State v. Moats*, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶4 We decide this case based on the prejudice prong of the ineffective assistance analysis. In so doing, we examine the evidence at trial to evaluate whether Blue’s testimony would have made a different outcome reasonably probable.

¶5 April D. testified to the details of the sexual assault, which occurred in Nichols’ apartment. She met Nichols and a friend of his in a bar and accepted a ride from Nichols to his apartment. There, she was lured to the bedroom and held down on the bed. Nichols’ friend left the bedroom, and Nichols ripped off her blue jeans, punched her, cut her lip and had nonconsensual intercourse with her.

¶6 The treating emergency room physician testified that April D. was upset when he examined her, she had an abrasion on her lip, and she complained of jaw pain. The physician testified that April D.’s jaw injuries were consistent with being struck in the face and her abrasions were consistent with being grabbed

and held down. She also had bruises on her wrists and upper arms and around the urethra consistent with forcible intercourse.

¶7 The State also introduced evidence that April D.'s blood was found on Nichols' bed sheets, her blue jeans had been ripped, Nichols had scratches on his back consistent with the scratches April D. testified that she inflicted during the assault, and April D.'s roommate testified that when April D. came home after the assault, she was crying frantically and claiming to have been raped.

¶8 As part of the defense's case, trial counsel presented the testimony of Tara Blue, who has been acquainted with April D. since the third grade. Blue testified that April D. pointed out Nichols to her at the bar and stated that she would not mind having sex with him (a claim April D. denied). However, trial counsel neglected to ask Blue any questions about April D.'s reputation for truthfulness. After cross-examination, trial counsel attempted to raise the truthfulness issue on redirect examination, but the circuit court sustained the State's objection because the inquiry exceeded the scope of the direct examination. During his testimony, Nichols admitted that he had consensual intercourse with April D. The jury convicted Nichols of the sexual assault and related offenses.

¶9 Postconviction, Nichols moved the circuit court for a new trial because his trial counsel was ineffective for not having questioned Blue about April D.'s reputation for truthfulness. At the hearing on the motion, trial counsel conceded that he had inadvertently failed to question Blue. The court found trial counsel's explanation for the omission credible.

¶10 The circuit court then evaluated whether Nichols was prejudiced by counsel's error and whether Nichols could show a reasonable probability that but for counsel's error, the result of the proceeding would have been different. The

court concluded that “[t]here is not even a remote possibility that the outcome of this trial would have been different had [trial counsel] elicited testimony from Tara Blue concerning April [D.’s] character for truthfulness.” The court noted that even though the evidence would have been relevant, Blue’s testimony as set forth in Nichols’ offer of proof would not have been given weight by the jury because: (1) Blue only saw April D. once a year; (2) even though Blue contended that other persons shared her opinion regarding April D.’s diminished character for truthfulness, there was no indication who the other persons might be; (3) the defense did not offer any other witnesses to opine on April D.’s reputation for untruthfulness; and (4) Blue’s offer of proof related more to April D.’s emotions and feelings than her reputation for truthfulness.

¶11 The circuit court observed that Blue’s claim that April D. said she would not mind having sex with Nichols was important to the defense as a contemporaneous statement by the victim bearing on the element of consent. However, the court reasoned that because the jury did not credit Blue’s testimony in this regard, “it [was] even less likely that the jury would have given any weight to [Blue’s] vague opinion concerning April [D.’s] character for untruthfulness.” Therefore, trial counsel’s failure to elicit Blue’s opinion regarding April D.’s truthfulness did not undermine the court’s confidence in the outcome. Because Nichols was not prejudiced by counsel’s omission, the court denied Nichols’ motion for a new trial due to ineffective assistance of counsel.

¶12 On appeal, Nichols argues that his trial counsel’s performance prejudiced him. Nichols characterizes the case against him as a credibility contest between him and April D., making evidence of April D.’s character for truthfulness even more important to the defense. While the credibility of Nichols and April D. was certainly at issue in this case, we note that there was substantial

physical evidence corroborating April D.'s version of the events. The evidence establishes that Nichols forcibly sexually assaulted April D. Her jeans were ripped, and she had injuries and left blood on the sheets where she said the assault occurred. Additionally, the responding police officer found April D. sobbing uncontrollably and complaining of injuries, and Nichols had numerous scratch marks on his back. Nichols told the officer that he had consensual, but not rough, sex with April D., a claim which the jury was free to find inconsistent with April D.'s injuries.

¶13 We agree with the circuit court that Blue's testimony regarding April D.'s character for truthfulness was unlikely to change the outcome at trial, particularly since the jury was unpersuaded by Blue's testimony that April D. spied Nichols in the bar and announced that she would like to have sex with him. In conjunction with the substantial physical evidence, the jury clearly credited April D.'s testimony that she did not consent to sexual intercourse with Nichols. Therefore, it is not reasonably probable that the outcome of the trial would have been different had trial counsel asked Blue about April D.'s reputation for truthfulness.

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

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

