

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 5, 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. 2004AP2498-CR

Cir. Ct. No. 2002CF21

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS L. BLONIGEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Green Lake County: WILLIAM M. McMONIGAL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Thomas L. Blonigen appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. He argues that he received ineffective assistance of trial counsel, and that he did not knowingly waive his right to testify. We conclude

that he did not receive ineffective assistance of trial counsel and that he did waive his right to testify. Therefore, we affirm the judgment and order of the circuit court.

¶2 Blonigen was found guilty after a jury trial of one count of sexual assault of a child under the age of thirteen, and one count of intimidation of a victim, both as a repeater. He subsequently filed a motion for postconviction relief alleging that he received ineffective assistance of trial counsel. After a hearing, the court denied the motion.

¶3 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. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. *Id.* at 697. We will not “second-guess a trial attorney’s ‘considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.’ A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel.” *State v. Elm*, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) (citations omitted). We review the denial of an ineffective assistance claim as a mixed question of fact and law. *See Strickland*, 466 U.S. at 698. We will not reverse the circuit court’s factual findings unless they are clearly erroneous. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). However, we review the two-pronged determination of trial counsel’s performance independently as a question of law. *Id.* at 128.

¶4 Blonigen argues that his trial counsel was ineffective in his cross-examination of the victim's mother, to whom the child first revealed the assault. At the *Machner*¹ hearing, trial counsel testified that he made a strategic decision about how to cross-examine the victim's mother. Counsel testified that the victim's mother was of limited mental capacity, that he was concerned about her credibility and uncertain about what answers she would give to the questions he asked. Further, when Blonigen's counsel suggested that a theory of defense could have been that the mother put the idea of the assault into her child's head, trial counsel testified that the mother did not appear to him to have the mental capacity to have done that. In his cross-examination, trial counsel did highlight some of the inconsistencies in the mother's testimony. Counsel testified that he did not "hit her as hard" as he might have because he did not think it was necessary. The defense that counsel chose to pursue was that the child victim's story was not credible. Based on trial counsel's testimony at the postconviction hearing, we conclude that counsel's decision was a reasonable strategic choice and did not constitute deficient performance.

¶5 Blonigen also argues that his trial counsel was ineffective because he did not subpoena a man named Jeff Parzy as a witness. Parzy apparently had conversations with the victim's father in which the father said that he did not believe that Blonigen committed the assaults. Parzy also apparently would have testified to the animosity between Blonigen and the victim's mother. Blonigen also argued that the victim's father should have been called to testify to the animosity between Blonigen and the victim's mother.

¹ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶6 At the *Machner* hearing, the circuit court found that counsel's decision not to call these witnesses was a reasonable strategic decision. Parzy testified at that hearing. The court found that counsel believed Parzy and the victim's father had credibility problems because they had a large number of criminal convictions between them. In addition, the court noted trial counsel's characterization of the victim's father as a "loose cannon." The court also doubted Parzy's credibility based on his manner of testifying at the hearing and the lack of precision in some of the elements of his testimony. The court noted that Parzy and Blonigen had been friends for about thirteen years and consequently Parzy's role as an impartial witness could be seriously questioned. The court concluded that counsel's decision not to call these witnesses was a reasonable strategic decision.

¶7 Blonigen also argues that he did not knowingly and voluntarily waive his right to testify at trial. The circuit court heard the testimony of both Blonigen and trial counsel about the discussions they had about whether Blonigen should testify. The court resolved this issue on credibility grounds. The court found that the decision was jointly made that Blonigen would not testify. Credibility determinations are left to the finder of fact. *See State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. We agree with the circuit court's determination that Blonigen knowingly and voluntarily waived his right to testify. Consequently, we agree with the circuit court's determination that Blonigen did not receive ineffective assistance of trial counsel. For the reasons stated, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2003-04).

