

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 10, 2002**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

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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. 00-2909-CR**

**Cir. Ct. No. 98-CF-1008**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**THOMAS G. HENKEL,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

Before Dykman, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Thomas Henkel appeals a judgment of conviction and an order denying his postconviction motion. He raises a number of issues, including ineffective assistance of counsel, whether the court should have granted a continuance, and whether the court erred by excluding evidence. We affirm.

¶2 Henkel was convicted of one count of first-degree sexual assault of a child under thirteen, contrary to WIS. STAT. § 948.02(1) (1999-2000).<sup>1</sup> The assault was alleged to have occurred in the victim's residence, and was witnessed by the victim's sister. In the interest of preserving the victim's privacy, we will not otherwise describe the facts of the crime, except to the extent necessary to address the issues raised.

¶3 Henkel argues that his trial counsel was ineffective by not offering to stipulate to certain elements of the crime, with the intent of keeping out certain other acts evidence. *See, e.g., State v. DeKeyser*, 221 Wis. 2d 435, 585 N.W.2d 688 (Ct. App. 1998); *State v. Veach*, 2001 WI App 143, 246 Wis. 2d 395, 630 N.W.2d 256, *review granted*, 2001 WI 114, 246 Wis. 2d 171, 634 N.W.2d 318. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We affirm the trial court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the trial court. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985).

¶4 We conclude that counsel's performance was not deficient on this point. The test for deficient performance is whether counsel's representation fell below "an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. At the postconviction hearing, Henkel's trial counsel testified that he would have offered a stipulation if he had thought of it, and that he had no strategic reason for not

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

doing so. However, because we are applying an objective standard, we are not bound by counsel's lack of a strategic reason. We may still conclude that an objectively reasonable attorney *could* have had a strategic reason for taking the action in question, and that therefore counsel's performance was not deficient.

¶5 According to Henkel's argument on appeal, the stipulation in this case would have included his admission that if touching did occur, it was for the purpose of sexual gratification. His defense at trial was based on his assertion that no touching occurred, and this was what he testified to, and what his attorney argued in his opening statement. However, this defense was not fully consistent with his own earlier statement to police, in which he admitted that the touching might have happened, and if it did, it was accidental. Under these circumstances, counsel could reasonably conclude that it would have been unwise to enter a stipulation that would give up the opportunity for the jury to decide that any touching was accidental.

¶6 Henkel's next argument is that the jury "never heard a considerable amount of relevant and exculpatory evidence." Henkel's brief is vague as to what legal theory this argument is based on, although he makes a passing reference to due process. We are not aware of any due process theory that allows reversal of a conviction based simply on the fact that the jury did not hear relevant and exculpatory evidence. Remarkably, Henkel's brief entirely fails to discuss *why* the jury did not hear this evidence. However, in his postconviction motion, he alleged that his trial counsel was ineffective by failing to present this evidence. We will address the issue on that basis.

¶7 Our review of this issue is hampered by the fact that, at the postconviction hearing, the circuit court did not allow Henkel to present the evidence that he argues his counsel should have presented at trial. Henkel sought to have

those witnesses testify at the postconviction hearing, but the court allowed Henkel to present the testimony of only his trial counsel. On appeal, Henkel has not argued that the court erred by limiting the evidence in this manner, and therefore we reach no decision on that point. Thus, we are limited to a postconviction record consisting of Henkel's motion, his offer of proof on the testimony of the excluded witnesses, and the actual testimony of his trial counsel. Under these circumstances, we will address each claim by either reviewing the testimony of trial counsel to see if it contains a sufficient basis to deny the claim, or by reviewing the trial court's decision as if the motion were denied without a hearing, using the test set forth in *State v. Bentley*, 201 Wis. 2d 303, 308-11, 548 N.W.2d 50 (1996).

¶8 Henkel claimed that his trial counsel should have presented the testimony of two friends of the victim's mother. Trial counsel testified that he didn't call one of those witnesses because she was "openly hostile" to the defense and counsel was afraid she might "dump on Tom in some unexpected way." He said that he did not call the other friend because she told counsel she "wanted nothing to do with the case," and because he believed he could introduce some of the same evidence through other witnesses. On appeal, Henkel has not argued, and we have not noted, any basis to conclude that these strategic choices were unreasonable. Therefore, this claim was properly denied.

¶9 Henkel also claims that his trial counsel should have presented evidence about the victim's mother's "illegitimate personal and financial motives" to obtain Henkel's conviction. We conclude that this claim could properly be denied without a hearing. Although Henkel's motion clearly alleged and offered to prove various personal and financial reasons the mother might want to convict Henkel, the motion does not offer any evidence connecting the mother's motivation directly to the victim's allegation in this case. There is no allegation or evidence that the

mother suggested, induced, or otherwise caused the victim to create a false allegation, even if the mother did have the motive to do so. In the absence of such allegation or evidence, Henkel's motion fails to allege either deficient performance or prejudice.

¶10 Henkel argues that his trial counsel should have presented certain evidence regarding the victim's uncle, whose testimony at trial supported the victim's account of another act by Henkel. According to Henkel, his counsel should have brought out that the uncle did not come forward with his observations until more than a year after Henkel was charged, and that the uncle had long held ill will toward Henkel. We conclude that this claim could properly be denied without a hearing. As the State suggests, even if this information had been brought out, it appears likely there were reasonable explanations for the delay. We also think, as to both points, that it is unlikely this information would have affected the outcome of the trial.

¶11 On the morning of jury selection, the State informed Henkel's counsel that the victim had changed the alleged time of the offense, from the afternoon of a certain date to the morning of that date. Henkel's counsel then requested a continuance. He argued that Henkel's defense was based substantially on information showing that Henkel had a minimal opportunity to commit the crime during the afternoon. The court offered to let the trial proceed into an extra day to allow more time for Henkel to conduct additional investigation to develop the same exculpatory information as to the morning of that date, but the court did not grant a continuance.

¶12 Henkel argues that the circuit court erred by denying his motion for a continuance. The State argues, and Henkel does not dispute, that the proper

standard of review is found in *State v. Fink*, 195 Wis. 2d 330, 536 N.W.2d 401 (Ct. App. 1995). *Fink* requires: (1) actual surprise which could not have been foreseen; (2) where the surprise is caused by unexpected testimony, the party who sought the continuance must have made some showing that contradictory or impeaching evidence could probably be obtained within a reasonable time; and (3) the denial of the continuance must have been prejudicial to the party who sought it. *Id.* at 339-40. The State concedes that there was actual surprise in Henkel's case.

¶13 We conclude that Henkel's argument fails on the second element. His counsel's argument to the court did not show that contradictory or impeaching evidence could probably be obtained within a reasonable time beyond what the court allowed. Counsel's primary expressed concern was with obtaining certain school times. Henkel argues that his attorney attempted to explain to the court that he needed to investigate more than this, because his entire prepared defense had to be abandoned and a new one assembled. However, counsel's argument did not amount to a showing that evidence other than the school times could have been obtained.

¶14 Henkel argues that his trial counsel was ineffective by "placing all of Henkel's eggs into one basket," thus leaving him without a defense when the State changed its allegation on the day of trial. Underneath Henkel's egg-transport metaphor, his argument is essentially that counsel was ineffective by not investigating alternative defense strategies in anticipation of a change in the State's factual allegation. This is not a sufficient allegation of deficient performance. It would be impossible for counsel to anticipate and prepare for every possible change of circumstances that might occur. Henkel has not offered any reason to think this particular change should have been foreseen by counsel.

¶15 Henkel argues that the circuit court erroneously exercised its discretion by excluding evidence of the victim's anxiety and depressive disorder, and her failure to take her medication for that disorder around the time she first reported the crime. The State moved before trial to exclude any such evidence. In response, Henkel's theory of relevance was that the victim made up the accusation against him as a way to retaliate against his wife for the measures that she used while attempting to control the victim's extreme behavior while unmedicated. The court ruled that the information about the victim's disorder and failure to take medication were not relevant. On appeal, Henkel argues that such information would have been relevant because it would have made more probable the premise that the victim's testimony may not be trustworthy due to psychological factors. Henkel's argument has not demonstrated that the court erred.

¶16 Finally, Henkel argues that we should order a new trial under WIS. STAT. § 752.35, our authority for discretionary reversal. The standards for that decision are well-established, and need not be repeated here. We are satisfied that the real controversy was tried, and justice did not miscarry.

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

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

