

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 6, 2008

David R. Schanker
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. 2007AP246

Cir. Ct. No. 2003CF376

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL S. DANFORTH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Jefferson County:
JOHN M. ULLSVIK, Judge. *Affirmed.*

Before Higginbotham, P.J., Vergeront and Bridge, JJ.

¶1 PER CURIAM. Michael Danforth appeals an order denying his postconviction motion in which he alleged ineffective assistance of trial counsel. Because we conclude that Danforth failed to establish deficient performance and

prejudice as to each of his allegations, individually and collectively, we affirm the order.

¶2 The complaint charged Danforth with sexually assaulting Caitlyn T. and Heather S. at Danforth's home between August 2001 and January 2002. At the time, the girls were seven and eight years old, respectively. Caitlyn spent several nights at Danforth's home because her mother, Ronna T., was ill. Caitlyn alleged that Danforth called her and Heather into his room where they watched a movie. He asked them to remove their clothes. He then began massaging Heather and touched her vagina. Then he touched Caitlyn's vagina and asked her to touch his penis.

¶3 Caitlyn's allegation came to light in December 2002 after Caitlyn moved to Iowa to live with her father. Stacie Mitchell, a social worker, videotaped an interview of Caitlyn at that time. Mitchell testified that the Iowa Department of Human Services (IDHS) initially found the allegations "not confirmed," but later, for unknown reasons, labeled the allegations "founded." Mitchell also testified that the results of a medical examination were consistent with the sexual assault Caitlyn described.

¶4 Ronna testified for the defense. She testified that Caitlyn stopped being friends with Heather and seemed to be jealous of another friend. Caitlyn had been having behavioral problems since she was six years old and indicated she wanted to kill herself. Ronna testified that Caitlyn was frequently untruthful and typically did not admit it. On cross-examination, Ronna testified that her children stayed with Danforth when she had in-patient surgery in March 2002.

¶5 Heather testified that on one occasion she and Caitlyn asked Danforth to watch a movie on the VCR in his bedroom because the other

television set was being used by their brothers. She denied that either she or Caitlyn removed their clothing and denied that Danforth touched them. She also testified that Caitlyn never told her of any sexual assault.

¶6 Danforth testified that he had no sexual contact with either of the girls. He said he made a mistake when he told police that Caitlyn spent a week with him in December 2001. Caitlyn stayed with him when Ronna was ill. Although he was not certain when that occurred, in light of Ronna's testimony that her surgery was in March 2002, Danforth corrected his statement to police.

¶7 The jury acquitted Danforth of sexually assaulting Heather, but convicted him of assaulting Caitlyn. Evidence admitted at the postconviction hearing suggests Danforth correctly remembered babysitting Caitlyn in December 2001.

¶8 Danforth argues that his trial counsel was ineffective for (1) failing to discover or elicit the correct dates of Ronna's surgery; (2) failing to object to entry of the reports by the IDHS; (3) failing to object to Mitchell's testimony regarding Caitlyn's medical examination; and (4) failing to impeach Caitlyn with a prior inconsistent statement, or with her diary that did not include mention of the assault, or by failing to call Caitlyn's younger brother to testify that Caitlyn never expressed fear for his safety and never told him of the assault. Danforth argues that the cumulative effect of these alleged errors establishes sufficient prejudice to justify a new trial.

¶9 To establish ineffective assistance of trial counsel, Danforth must show that his counsel's performance was deficient in a manner that prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The test for deficient performance is whether counsel's representation fell below an objective

standard of reasonableness. *Id.* at 688. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* Strategic choices made after thorough investigation of the law and facts are virtually unchallengeable. *Id.* at 690-91. To establish prejudice, Danforth must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is one that undermines this court's confidence in the outcome. *Id.* Because Danforth must establish both deficient performance and prejudice as to each issue, this court does not have to address both components if his showing is insufficient on one. *Id.* at 697.

¶10 Danforth demonstrated neither deficient performance nor prejudice from his counsel's failure to discover or present Ronna's medical records to establish the exact dates she was in the hospital. Because Ronna's testimony caused Danforth to correct his statement to the police that he babysat Caitlyn in December 2001, he argues that his retraction adversely affected his credibility. At the postconviction hearing, trial counsel testified that she wanted Ronna to appear credible because her testimony called Caitlyn's credibility into question. Regardless of when Ronna had her surgery, counsel reasonably chose to enhance Ronna's credibility because of the powerful effect on the jury from hearing that the mother sided with the accused against her daughter. In addition, there is no dispute that Caitlyn and Heather at some point were in Danforth's bed with him watching a movie while he babysat. The precise date is immaterial and it is unlikely that a jury would find Danforth's testimony incredible merely because he was unable to remember the dates he babysat. The State never suggested that Danforth was less credible because he could not correctly remember the dates.

¶11 Danforth established neither deficient performance nor prejudice from counsel's failure to object to Mitchell's testimony regarding the IDHS investigation that determined Caitlyn's allegations were "founded." Danforth argues that the reports were hearsay, violated his right to confront witnesses and improperly vouched for Caitlyn's credibility. See *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004); *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). At the postconviction hearing, counsel identified a valid strategic reason for not objecting to Mitchell's testimony. The "founded" report followed an assessment that Caitlyn's allegations were "not confirmed." Mitchell offered no explanation for the change. Counsel wanted the jury to be aware that the IDHS initially determined that Caitlyn's allegations were not confirmed and that there was no basis for the IDHS to change its assessment. Because the State must establish guilt beyond a reasonable doubt, unexplained waffling by the IDHS assessment team might suggest reasonable doubt as to the validity of Caitlyn's allegations.

¶12 Danforth failed to establish any prejudice by counsel's failure to object to Mitchell's testimony that Caitlyn's medical examination was consistent with the sexual assault Caitlyn described. Mitchell explained that the assault Caitlyn described would leave no physical evidence. Mitchell testified that the doctor found Caitlyn's genital examination was within the normal limits for her age and her hymen was intact. Mitchell explained that "[y]ou wouldn't necessarily expect to see any type of physical damage, based on the type of touching [Caitlyn] described." The State acknowledged in its opening statement that Caitlyn's exam did not reveal any damage to her genital areas. No reasonable jury would have been confused by Mitchell's testimony into believing that the medical report confirmed the sexual assault.

¶13 Danforth argues that his counsel was ineffective for failing to impeach Caitlyn with three pieces of evidence. First, he argues that counsel should have impeached Caitlyn with an assertion, apparently made in a videotape interview, that Danforth had sexually assaulted her in the summer of 2001.¹ Caitlyn testified at trial that she did not meet Danforth until four or five weeks after the school year started in the autumn of 2001. While counsel did not cross-examine Caitlyn on that discrepancy, she pointed out the inconsistency in her closing argument. Therefore, Danforth established neither deficient performance nor prejudice on this issue.

¶14 Danforth next argues that counsel was ineffective for failing to ask Ronna about Caitlyn's diary. According to Ronna's postconviction hearing testimony, she looked through Caitlyn's diary and found no reference to the assault. Ronna did not produce the relevant pages of the diary at the postconviction hearing. Danforth argues that the jury could have concluded that, had the assault occurred, Caitlyn would have mentioned it in her diary. Danforth has not established prejudice from his trial counsel's failure to present the absence of a diary entry. It is undisputed that Caitlyn did not write in her diary every day. There is no indication that Caitlyn wrote about important matters. Because Caitlyn told no one of the assault, it does not appear significant that she would not describe it in writing, particularly in a diary that she left behind when she moved.

¶15 Danforth also argues that trial counsel should have called Caitlyn's younger brother, Tommy, to testify that Danforth did not assault him, and Caitlyn never expressed concern for Tommy's safety and never told him she had been

¹ The videotape is not included in the record on appeal, but it was played for the jury.

assaulted. Danforth has established no prejudice from counsel's failure to call Tommy as a witness. Because Caitlyn testified that she never told Tommy of the assault, a reasonable jury would infer that she never told Tommy she was worried about him being assaulted. To the extent her failure to discuss the assault with Tommy impeaches Caitlyn's testimony that she was afraid that Danforth would touch Tommy, Tommy's testimony would have been cumulative because Caitlyn admits she told no one of the assault.

¶16 Finally, the cumulative effect of counsel's alleged errors do not establish that Danforth was prejudiced. Counsel reasonably presented Danforth's case. The unfavorable outcome does not establish deficient performance. The errors alleged in Danforth's postconviction motion do not undermine this court's confidence in the verdict.

By the Court.—Order affirmed.

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

