

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 11, 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. 2007AP1044-CR

Cir. Ct. No. 2005CF218

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN K. BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Polk County: JAMES C. BABLER, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Brian Brown appeals a judgment convicting him of sexually assaulting a six-year-old boy and an order denying his postconviction motion in which he alleged ineffective assistance of his trial counsel, William Lamb. He argues that Lamb failed to adequately cross-examine the

State's witnesses or present a defense, and was not adequately prepared for trial.¹ Because we conclude that Brown failed to establish deficient performance and prejudice as to any of counsel's decisions, we affirm the judgment and order.

¶2 Only two witnesses testified at trial. The victim's mother testified that Brown stayed overnight at their home and she found Brown and her son sleeping in a chair in the living room at 9:00 the next morning.

¶3 The victim testified that on the night of the assault, he had gone to bed around 11:00 p.m. Around midnight, Brown carried him from his bunk bed to a chair in the living room where Brown had sexual contact with him. When asked how he knew what time it was, he testified, "I can tell between one and midnight at night," but he denied looking at the clock in his room. When asked at what point during the night he had woken up, he replied, "I never woke up." When asked to clarify this statement, the victim again stated that he did not wake up between the time he went to bed and 9:00 the next morning. When asked how he knew he was touched, he answered, "I can feel things at night." On redirect examination, the State attempted to rehabilitate the victim by asking him again whether he had woken up upon being picked up. He again answered, "no," and twice reiterated that he had been sleeping during the entire night, including when

¹ Brown raises several claims of ineffective assistance of counsel that are not properly preserved for appeal. At the postconviction hearing, he did not ask Lamb to explain either his failure to question certain jurors about possible prejudice or his use of preemptory strikes. He also failed to ask Lamb about his failure to investigate a possible violation of the jury's sequestration, failure to pursue a plea bargain and failure to request a continuance. To preserve a claim of ineffective assistance of counsel, a defendant must ask counsel to explain his decisions so this court can determine whether his actions were the result of incompetence or deliberate trial strategies. See *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Because Brown failed to establish Lamb's rationale regarding these issues, they will not be addressed on appeal.

he was touched. Finally, when asked how he knew that the incident he described was not a dream, he answered, “I had a different dream when I was sleeping.”

¶4 After the State rested, Brown and Lamb discussed their defense. Lamb notified the court that they would offer no testimony. Brown confirmed that he discussed the matter with Lamb and decided not to present any evidence. During closing arguments, Lamb emphasized the victim’s testimony about being asleep the entire night and argued, as he suggested in his opening statement, that the victim dreamed about the sexual contact.

¶5 To establish ineffective assistance of counsel, Brown must show both deficient performance and prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Brown must show that his counsel’s representation fell below an objective standard of reasonableness. *Id.* at 688. Counsel’s reasonable strategic decisions are virtually unchallengeable. *Id.* at 690. The reasonableness of counsel’s actions may be determined or substantially influenced by Brown’s own statements or actions. *Id.* at 691. To establish prejudice, Brown 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 our confidence in the outcome. *Id.* Because Brown must show both deficient performance and prejudice, this court is not required to address both components if he fails to make a sufficient showing on one. *Id.* at 697.

¶6 Brown argues that Lamb should have cross-examined the State’s witnesses and called other witnesses to establish four points: (1) the victim made prior inconsistent statements regarding the time of the assault and what he was wearing at the time; (2) the initial interview of the victim was not properly

conducted; (3) the victim may have been induced to make a false report by family members who had a dispute with Brown regarding a \$1,000 estate; and (4) someone other than Brown might have assaulted the victim, such as the victim's older brother or his mother's boyfriend. At the postconviction hearing, Lamb testified that the victim's confusion about the time of day and what he was wearing could have been due to the fact that he alleged two sexual assaults by Brown, only one of which was charged. Impeaching his credibility by pointing out the marginally relevant inconsistencies could have opened the door to evidence that the inconsistent statements actually referred to the other assault. Lamb reasonably chose not to risk prejudicing the case by introduction of the second assault.

¶7 Brown has not established deficient performance or prejudice from Lamb's failure to present any defense, including calling an expert witness to criticize the initial interview techniques. Brown agreed with that strategy when he was questioned by the trial court, and the reasonableness of Lamb's actions can be determined by Brown's choices. *Id.* at 691. After the victim testified that he was asleep during the entire assault and his only explanation of how he knew he was not dreaming is that he had a different dream that night, Lamb and Brown reasonably believed they would prevail without presenting any evidence. Presenting any defense carries the risk of having the jury reject the defense rather than focusing on the weakness of the State's case. Presenting evidence also opens the door to rebuttal testimony that might rehabilitate the child's weak testimony.

¶8 Lamb also testified that he chose not to present any evidence of the family's dispute over the \$1,000 estate. Lamb thought the jury would not believe that a legal dispute over \$1,000 would cause the family to encourage a false sexual assault accusation. Any claim that the child was induced to fabricate the story

would undermine the defense that he dreamed he was being assaulted. Counsel may, on the basis of considered judgment, select a particular defense from among alternative defenses that are available. The defense selected need not be the one that by hindsight looks best. *See State v. Felton*, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983).

¶9 Likewise, Lamb reasonably chose to present no evidence that the victim's brother or his mother's boyfriend could have assaulted the victim. That evidence would also be inconsistent with the dream defense. At the postconviction hearing, Brown presented no evidence that the victim's brother or his mother's boyfriend ever assaulted the victim.

¶10 Brown also faults Lamb for inadequately preparing for trial. He alleges that, at their first meeting five days before trial, Lamb had not yet subpoenaed or interviewed witnesses, reviewed a videotape interview with the victim, examined the jury list or provided Brown with a copy of the list, ascertained Brown's criminal record or investigated other matters that may have helped his defense. Several of these alleged deficiencies were cured before trial. As to each of these claims, Brown does not establish that earlier trial preparation might have altered the result. None of the alleged deficiencies relate to the dream defense, the most reasonable defense available to Brown.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2005-06).

