

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 8, 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. 2007AP1478-CR

Cir. Ct. No. 2005CF169

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS LYNN RUSSELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dunn County: WILLIAM C. STEWART, JR., Judge. *Affirmed.*

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

¶1 PER CURIAM. Thomas Russell appeals a judgment of conviction for burglary, false imprisonment, and first-degree sexual assault, along with an order denying his motion for postconviction relief. Russell asserts multiple ineffective assistance of counsel claims. We reject his arguments and affirm.

BACKGROUND

¶2 In October 2005, Russell's case was tried to a jury, which was presented with two completely different versions of events. The victims, Sarah L. and Krista P., were college students at the University of Wisconsin-Stout in Menomonie. They contended a masked stranger came into their house while they slept, bound them, and sexually assaulted Krista.

¶3 Sarah testified that, on the morning of September 7, 2003, she and Krista were asleep on a futon in an upstairs bedroom. They were awakened by a masked man with a knife who threatened to kill them if they made noise. The man stuffed pillow cases in their mouths and bound their wrists with cable cords. He cut off Sarah's bra and Krista's tank top with the knife.

¶4 Sarah got her hands loose from the restraints and struggled with the man, who re-tied her wrists. During the struggle, Sarah's thumb was cut by the knife, causing her to bleed on the futon. Sarah testified that the man then told Krista to come over by him. Sarah was not watching because she was scared, but she heard the man moaning and Krista crying; she also heard Krista ask the man to move the knife away from her face. Afterward, the man's demeanor changed, "like he got what he wanted," and he cut Sarah free and told them not to tell anyone.

¶5 After he left, Sarah found Krista's cell phone in pieces on the floor downstairs. Within minutes after the attack, Sarah called police. During her testimony, Sarah also identified multiple photographs, including photos of her severed bra, the pillowcases, her cut thumb and resulting blood stains, a cable cord used to bind her wrists, marks on her wrists from being bound, and Krista's tank top.

¶6 Krista also testified at trial, corroborating, in detail, Sarah's testimony. Krista confirmed that the man made her perform oral sex on him while he held the knife by her face. Afterward, Krista testified that she was "spitting everywhere." She also testified that about 400 of her compact discs were stolen. Both Krista and Sarah testified that they had never seen or spoken with Russell before.

¶7 The first officer to arrive at the scene observed that Sarah appeared "very dazed" and Krista was "lying in almost a fetal type position" and sobbing. Sarah and Krista were taken to the hospital for a sexual assault nurse examination. Officers also collected samples from the scene for possible DNA testing. A forensic scientist testified that sperm obtained from an oral swab of Krista's mouth originated from Russell, with the odds of it originating from anyone else being 1 in 163 quadrillion.

¶8 Pursuant to a court ruling prior to trial, the State also introduced "other acts" evidence. Most notably, another young woman, Krista W., testified about a separate incident occurring at her home in Menomonie. On September 20, 2003, approximately two weeks after the incident at issue here, Krista W. was awakened early in the morning by an unknown man. It was dark in the room, and she could not see his face. He choked her and put something in her mouth. He told her to be quiet if she did not want to die. As she struggled with the man, the gag came out of her mouth. She screamed for help, which drew the attention of her roommates, and the man fled. Pieces of rope were left at the scene, and DNA from the ropes matched Russell's.

¶9 Russell's version of events was completely different. Russell is a man in his forties who admitted having ten burglary convictions on direct

examination. He testified that he knew Sarah and Krista. He also testified that Sarah had previously borrowed \$550 from him, but he required collateral, which he took in the form of hundreds of compact discs.

¶10 According to Russell, on the day of the attack, he stopped at Sarah and Krista's house, and Sarah invited him inside. After smoking marijuana, glass, and methamphetamine with the women, Russell attempted to leave. The women asked what they could do to make him stay. Russell asked for a strip show and the women obliged. According to Russell, he ultimately agreed to forgive \$250 of Sarah's debt in exchange for a threesome. He testified that Krista performed oral sex on him, but asked him not to ejaculate in her mouth. Russell stated that he ejaculated in her mouth and she became angry and began screaming at him. Russell stated the drama was "too much for me," and, as he left, Krista threw her cell phone at him, causing it to break into pieces on the floor. Russell testified he never saw the women after that, though he began to receive prank phone calls, which he implied came from them. He stated that his girlfriend, who answered the phone, knew "it's some bitches" because she could hear them laughing in the background.

¶11 On cross-examination, Russell could not explain the bind marks on the victims' arms. To explain why Sarah would call police, Russell suggested that Sarah may have been mad at him for keeping the compact discs. He also suggested that Krista's ex-boyfriend may have "came there right after I walked out," implying that perhaps the ex-boyfriend committed the crime. When asked about his employment and income, Russell testified he received money from "a certain agency."

¶12 The jury found Russell guilty on all counts. Russell moved for postconviction relief, claiming ineffective assistance of counsel. The circuit court denied the motion, and Russell appeals.

DISCUSSION

¶13 A defendant claiming ineffective assistance of counsel must establish that a defense attorney's performance was deficient, and that the deficient performance prejudiced the defense. *State v. Allen*, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). An attorney's performance is deficient when the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Allen*, 274 Wis. 2d 568, ¶26. Prejudice exists when there is "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (citations omitted). A claim for ineffective assistance of counsel fails if we conclude either that counsel's performance was not deficient or that the deficient performance did not prejudice the defense, and we may begin with either inquiry. *State v. Johnson*, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990) (citing *Strickland*, 466 U.S. at 697).

¶14 Russell asserts ineffective assistance of counsel on three grounds. First, he asserts his attorney failed to adequately investigate and present crucial defense evidence. Specifically, he claims his attorney should have obtained his telephone records to corroborate his testimony that he received prank phone calls. These records demonstrate that he changed his phone number after the September 7 attack, which he contends provides strong circumstantial evidence

that he was receiving prank calls from women who knew him. He also asserts his counsel failed to adequately investigate the financial assistance he received from “a certain agency,” which actually was the FBI. Russell was paid in exchange for aiding in the investigation of a robbery-homicide in Minnesota. Russell contends this information would have bolstered his credibility.

¶15 Russell’s second ineffective assistance claim is based upon counsel’s asserted failure to adequately advocate against the State’s motion to introduce other acts evidence at trial, specifically evidence of the September 20 incident involving Krista W. He contends counsel failed to adequately argue the distinctions between the two incidents and that counsel failed to adequately research the legal issues.

¶16 Finally, Russell asserts his counsel was ineffective for failing to address the other acts evidence during Russell’s direct examination and by advising Russell to assert his Fifth Amendment right against self-incrimination if questioned about the other acts evidence by the State. Russell contends his attorney could have diffused the harm done by the State’s cross-examination by addressing that evidence on direct examination. Russell further asserts his attorney’s advice to exercise his Fifth Amendment rights if questioned about this evidence exacerbated the harm done on cross-examination. Russell contends this is true even though he did not follow the advice.

¶17 We need not address Russell’s claims independently because, taken together, Russell is unable to show he was prejudiced by counsel’s alleged

deficiencies.¹ As a premise to his prejudice arguments, Russell claims his case turned on the jury's credibility determinations regarding him and the victims. However, Russell fails to acknowledge that his version of events was patently incredible. There is no reasonable probability that, but for counsel's alleged deficiencies, the outcome of Russell's trial would have been any different.

¶18 While Russell's story clearly attempted to explain much of the physical evidence against him, the physical evidence as a whole corroborated the victims' story, while contradicting his. His story could not be reconciled with the severed bra and cut tank top, the cut on Sarah's thumb and the resulting blood stains, the bind marks on Sarah's wrists, and the cable cord used to bind her wrists. Further, the responding officer's observations of the traumatized women corroborated their version of events, not Russell's. Conversely, there was no credible evidence that both corroborated Russell's story and contradicted the victims' story.

¶19 Further, while the overwhelming physical evidence gave Russell every reason to falsify a story, there is no apparent motivation for the victims to falsify theirs. Any implication that the victims wished to falsely incriminate Russell is implausible. The victims did not directly identify Russell as their attacker, despite his claims that they knew him. Additionally, Russell described a seemingly spontaneous series of events. Yet, to make Russell's story consistent with the evidence, Sarah and Krista would have had to, just as spontaneously, manufacture the bind marks and cable cord, severed bra and cut tank top, Sarah's

¹ While we need not address Russell's claims independently, were we to do so, we would not conclude that Russell's attorney provided constitutionally deficient representation.

cut thumb, and the blood on the futon—all immediately after Russell left. Further, Russell’s theory of another attacker after he left is incredible because Russell already attempted to explain most of the physical evidence, including his DNA, with his own story.

¶20 None of the alleged deficiencies of counsel, if corrected, would change the patently incredible nature of Russell’s story. Therefore, we are confident the jury’s verdicts would have been the same regardless.

By the Court.—Judgment and order affirmed.

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

