

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 17, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-3423-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

STACY D. DAVIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Trempealeau County: DANE F. MOREY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Stacy Davis appeals a judgment convicting him of two counts of recklessly endangering safety, contrary to WIS. STAT. § 941.30(2),¹

¹ All statutory references are to the 1999-2000 version unless otherwise noted.

and an order denying postconviction relief. He argues that his trial counsel rendered ineffective assistance because he failed to make an appropriate offer of proof, failed to conduct an adequate investigation and failed to present relevant evidence. We reject these arguments and affirm the judgment and order.²

¶2 The charges arose from altercations between Davis and R.K., a woman with whom he was living. R.K. claimed that he had jabbed a knife at her throat and abdomen, but did not make contact. She also claimed that Davis repeatedly kicked her while she was lying on the ground.

¶3 At trial, R.K. testified that while she was sitting outside the motel where they lived, Davis pulled a knife out of his back pocket and said, “You think you have a scar on your neck. Wait until you see what I am going to do to you. ... I’m going to cut your ... head off.” She testified that he opened the blade and pointed it near her neck. She testified that it was so close to her neck, and she was afraid to move.

¶4 R.K. testified that Carl Fike, the motel manager, was sitting near her at the time. Fike “kind of chuckled,” and Davis backed off and put the knife away. When the victim got up and started walking toward the police department, Davis ran up to her and said, “Why don’t you get over here so I can fucking kill you now?” As he reached for his knife again, it flew out of his hand. She returned to her motel room and watched Davis drive away.

² Davis also argues that the trial court erroneously sustained the State’s objection to evidence that R.K. had stolen property from him. The record reveals that defense counsel, however, failed to preserve this claim of error with an offer of proof. *See* WIS. STAT. § 901.03(1)(b). Accordingly, we do not address this issue directly, but instead review it within the context of Davis’s ineffective assistance of counsel argument.

¶5 Later, when R.K. was sitting in front of the motel talking to Fike, Davis drove up and walked toward them. After an angry interchange, he held a wine bottle near her face “like he was going to smash it into my face.” After more arguing, he pulled his knife out again and said, “I ought to just gut you open right now I’m going to cut you open, rip that baby out, and stomp on it.” R.K. testified that Davis had hold of her shoulder and jabbed the knife at her shirt, four to six times. She kept jumping back. She testified that he put the knife away, pushed her to the ground and “I remember [Davis] jumping on top of me. ... He kicked me on my stomach on the left-hand side. ... I rolled ... to get away from the kicks.” She testified that Davis repeatedly kicked her on her left thigh. She testified that Davis knew she was pregnant.

¶6 Fike also testified at trial. Fike saw Davis and R.K. arguing and saw Davis kick R.K. three or four times when she was lying on the ground. He denied seeing Davis threaten R.K. with a bottle. He claimed that he knew Davis had a knife in his pocket, but that Davis did not take it out. Fike stated that Davis took out a lighter, as if to give the victim a light for a smoke. Fike denied telling investigating officers that he told them he heard Davis threaten to cut out the victim’s heart. He acknowledged saying that he was afraid of Davis.

¶7 Police officer Timothy Wilson testified that he was the first to arrive at the scene. Fike told Wilson that he heard Davis threaten R.K. while he was waving something at her and that Davis stated that he was going to cut her heart out. Another officer who arrived on the scene testified that he found a folding knife in Davis’s pockets. The second officer testified that Fike told him that he saw Davis threatening R.K. with a knife in his hand.

¶8 Another witness, Paul Middleton, testified that he lives across the street from the motel and, on the night in question, awoke to the sound of a female screaming. He looked out his window and saw a “gal laying on the ground screaming for help and a guy kicking her and swinging his arms.” He did not see any knives or a wine bottle, however. Middleton’s wife also witnessed the kicking.

¶9 The jury returned a verdict of guilty on both counts. At the postconviction hearing, Davis claimed that defense counsel was ineffective for failing to present evidence relating to R.K.’s lack of credibility. The trial court rejected his challenges. This appeal follows.

¶10 Davis contends that the trial ultimately rested on how the jury perceived the credibility of the State's witnesses balanced against his own credibility. Therefore, Davis argues that counsel’s failure to impeach R.K. by eliciting the following evidence was deficient and prejudicial: (1) Counsel failed to adequately investigate and make an offer of proof that showed that R.K.’s theft from Davis motivated her to testify falsely; (2) counsel failed to investigate or present evidence of R.K.’s motive to testify falsely in order to prevent him from seeking custody of their unborn child; and (3) counsel failed to investigate or present evidence of R.K.’s mental health and drug use.

¶11 To prevail on his claim, a defendant must establish that his trial counsel's performance was deficient and that this performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Whether trial counsel's actions constitute ineffective assistance presents a mixed question of law and fact. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will not reverse the trial court's factual findings regarding counsel's actions at trial

unless those findings are clearly erroneous. *Id.* at 634. Whether trial counsel's performance was deficient and whether that behavior prejudiced the defense, however, are questions of law which we review de novo. *Id.*

¶12 Effective representation hinges on adequate investigation and pre-trial preparation. *Crisp v. Duckworth*, 743 F.2d 580, 583 (7th Cir. 1984). Counsel's failure to bring a motion that would have been denied, however, is no basis for an ineffective assistance of counsel claim. *State v. Golden*, 185 Wis. 2d 763, 784, 519 N.W.2d 659 (Ct. App. 1994).

¶13 To prove prejudice, the defendant must establish that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *State v. Harvey*, 139 Wis. 2d 353, 375, 407 N.W.2d 235 (1987). The court need not address both the deficient performance and prejudice components if the defendant cannot make a sufficient showing on one of them. *Strickland*, 466 U.S. at 697.

¶14 We are satisfied that the trial court performed the correct analysis. The trial court observed:

The fundamental problem with the defendant's approach to impeachment here is that it would have required trials within a trial and diverted and diffused the jury's attention from the issues before it to many mini-trials of victim[']s acts concerning collateral matters. While tactically, a defendant may very well wish to shift the focus of scrutiny from himself to the victim, in this case the probative value of such evidence would have been outweighed by its prejudicial effect and it would have been an utter waste of time in a case such as this, where public violent acts of physical abuse against a pregnant female have occurred.

¶15 We agree with the court’s assessment. We are convinced that Davis has not overcome the presumption that his trial counsel provided reasonable professional assistance. Our review of evidentiary rulings is deferential. *State v. Pharr*, 115 Wis. 2d 334, 345, 340 N.W.2d 498 (1983). We are unpersuaded that there is a reasonable probability that, but for counsel’s alleged omissions, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. As a result, we conclude that counsel’s alleged omissions were not so serious as to deprive Davis of a fair trial whose result is reliable. *See id.* at 687.

¶16 Additionally, the trial court conducted an in-camera review of R.K.’s medical records and determined that they were “absolutely immaterial to the issue as to whether she has the ability to accurately perceive events and truthfully relate those perceptions.” Based upon our independent review of the records, we reach the same conclusion. Consequently, no prejudice results to Davis due to counsel’s failure to offer evidence of R.K.’s medical records. Finally, the jury heard Davis’s trial testimony that R.K. took a number of prescription drugs and also used marijuana. Accordingly, the record fails to support Davis’s contention that counsel omitted evidence of R.K.’s drug use.

By the Court.—Judgment and order affirmed.

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

