

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 30, 2002

Cornelia G. Clark
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. 01-3236-CR
STATE OF WISCONSIN**

Cir. Ct. No. 99-CF-134

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MAURICE A. FIELDS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Maurice Fields appeals a judgment convicting him of second-degree sexual assault by use of force, contrary to WIS. STAT.

§ 940.225(2)(a)¹. He also appeals the order denying his motion for postconviction relief. Fields argues that the circuit court erroneously exercised its discretion when it denied his ineffective assistance of counsel claim without conducting an evidentiary hearing. Alternatively, Fields argues that a new trial should be granted in the interest of justice because the real controversy was not fully tried. We reject Fields' arguments and affirm the judgment and order.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

¶2 Fields argues that the circuit court erroneously exercised its discretion when it denied his ineffective assistance of counsel claim without conducting an evidentiary hearing. We are not persuaded.

¶3 A defendant who alleges ineffective assistance of counsel is not automatically entitled to an evidentiary hearing. To obtain an evidentiary hearing, the defendant's motion must allege, with specificity, both that counsel provided deficient performance and that the deficiency was prejudicial. *State v. Bentley*, 201 Wis. 2d 303, 313-18, 548 N.W.2d 50 (1996). If the motion alleges facts that entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. *Id.* at 310. Whether a motion alleges facts that, if true, would entitle a defendant to relief is a question of law that we review independently. *Id.*

¶4 However, if the factual allegations of the motion are insufficient or conclusory, or if the record irrefutably demonstrates that the defendant is not entitled to relief, the circuit court may, in its discretion, deny the motion without a

¹ All references to the Wisconsin Statutes are to the 1999-2000 version.

hearing. *Id.* at 309-10. When reviewing a court’s discretionary act, this court utilizes the deferential erroneous exercise of discretion standard. *Id.* at 310-11.

¶5 The analytical framework that must be employed in assessing the merits of a defendant’s claim of ineffective assistance of counsel is well known. To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance was deficient, and that counsel’s errors were prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. *See id.* at 697.

¶6 With respect to the “prejudice” component of the test, the defendant must affirmatively prove that the alleged defect in counsel’s performance actually had an adverse effect on the defense. *See id.* at 693. The defendant cannot meet this burden by merely showing that the error had some conceivable effect on the outcome. Rather, the defendant must show that there is “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694.

¶7 Here, Fields argues that his trial counsel was ineffective for failing to impeach the State’s witnesses with evidence of prior inconsistent statements. Fields’ brief, however, fails to distinguish any allegedly inconsistent statements.

Rather, he merely identifies the subject matters in which they arose.² Generally, this court will not address issues on appeal that are inadequately briefed. *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). We nevertheless reject Fields' arguments on their merits.

a. How Sara T. ended up in bed with Fields

¶8 Fields challenges his defense counsel's handling of testimony regarding how Sara T., the victim of the sexual assault, ended up in bed with him. Sara testified at trial that after her friend Rene A. left the motel room in which Fields assaulted her, Fields "nudged [her] back over to the bed area, ... pushed [her] back down on the bed so [she] was sitting on the bed [and then] kind of laid [her] down on the bed." Although Fields claims that three of Sara's pretrial statements are inconsistent with her trial testimony, he has failed to establish any relevant inconsistency.

² Fields claims that State witness testimony was inadequately impeached on the following issues:

- a. How Sara T. ended up alone in a room with Fields and in bed with him;
- b. Whether Sara T.'s shirt was pushed up or removed by Fields;
- c. Reason for Sara T. to be in room 217 with Fields;
- d. Whether or not Sara T. was yelling for Rene when she knocked on the door;
- e. Sara T.'s location when found by her mother;
- f. Sara T.'s activities after the incident;
- g. Various explanations for not telling the police about the incident when she saw them at the Wisconsin Inn;
- h. Sara T.'s differing descriptions of how intercourse occurred with Fields.

¶9 Fields' postconviction motion additionally emphasized Rene's trial testimony as evidence of inconsistency in Sara's account of how she and Fields ended up in bed. Rene testified that Fields and Sara were sitting on the bed when she left the room. To the extent that Rene's testimony differs from Sara's testimony, the jury heard both accounts. The jury resolves the credibility of witnesses and conflicts in their testimony. *State v. Alles*, 106 Wis. 2d 368, 377, 316 N.W.2d 378 (1982). Because the jury heard both accounts, Field's attorney's performance was not deficient. In any event, for the same reason, Fields was not prejudiced.

b. Clothing

¶10 In his postconviction motion, Fields claimed Sara gave inconsistent testimony regarding whether her shirt was pushed up or removed by Fields. Sara's pretrial statement to police and trial testimony provided that her shirt was left on but pushed up. Fields emphasizes preliminary hearing testimony in which Sara stated that Fields took her shirt off. However, Sara later clarified at the preliminary hearing that Fields "flipped my shirt up but it was still on." Thus, Fields has failed to establish any inconsistency on this issue, and in turn, ineffective assistance.

c. Reason for Sara to be in motel room 217 with Fields

¶11 Sara testified at trial that she was helping Rene move clothing and a pet ferret from room 220 to room 217 because Rene had a fight with Rene's boyfriend. Fields argues that in her statement to the police, Rene stated that she and Sara were not moving her belongings to room 217. This discrepancy, however, was brought to the jury's attention via testimony by Shawano police officer Randall Wright, who confirmed Rene's inconsistent statement. Field also

argued in his postconviction motion that Sara's testimony should have been impeached by statements made by motel employees Sandi Plansky and Gregory Smith. Plansky and Smith, however, testified at trial that there was no clothing found in room 217. Because the jury heard the alleged inconsistent statements, trial counsel was not deficient.

d. Whether Sara was yelling for Rene

¶12 Sara testified at trial that while Fields was assaulting her, she was yelling loudly for Rene. Consistent with this statement, Rene testified that when she was outside of the room, she heard Sara moaning but could not hear what she was saying or discern specific words. Fields also challenges Rene's testimony that she called room 217 and that when she knocked on the door, Fields responded, "Give me five more minutes." Any discrepancies with regard to this testimony were presented to the jury through officer Wright's testimony. Fields therefore fails to identify any deficient performance or prejudice.

e. Sara's location when her mother found her

¶13 Sara testified at trial that following the assault, she took a casino shuttle to Keshena and was walking home when her mother picked her up. Sara further testified that when she got in the car, she told her mother about the assault and her mother immediately drove her to the hospital. In one of her mother's police statements, she stated that she found Sara crying at home "and that is when it all came out about what happened."

¶14 At trial, Wright testified regarding the discrepancy in his report. However, Wright also testified that the report was based on "the impression that I had gotten when I first talked to them" and that the matter was "clarified in

another follow-up” report. Again, any claimed discrepancy on this issue was heard by the jury.

f. Sara’s whereabouts after the incident

¶15 At trial, Sara testified that following the assault, she left room 217 about two minutes after Fields and went to the lobby to talk to Allender. A motel employee testified, however, that he saw Fields and Sara in the hall talking, smiling and acting friendly toward each other. The jury heard both accounts.

g. Sara’s explanations for not informing the police about the incident when the police were at the motel.

¶16 Fields’ postconviction motion quotes two police reports regarding Sara’s reasons for not telling the police about the assault when she first encountered them at the motel. The police had arrived at the motel to investigate an unrelated fight. In one report, Sara stated that she did not report the assault because “[t]here was a whole crowd of people that I went to school with.” In the other report, Sara stated that she “didn’t want to talk about it in front of the others, and also she got the feeling the officers didn’t really care.” We conclude that Fields has failed to establish any inconsistency on this issue and therefore, any defective performance by his trial counsel.

h. Sara’s differing descriptions of the assault

¶17 Fields’ postconviction motion notes an apparent discrepancy between Sara’s preliminary hearing testimony and her trial testimony with regard to whether Fields was holding her legs or her wrists while he performed oral sex on her. Regardless of any discrepancy, trial counsel used Sara’s testimony that Fields held her wrists above her head during oral sex to argue the physical

impossibility of the situation. In any event, given the physical evidence of Fields' use of force, there is no reasonable probability that the verdict would have been different had counsel attempted to impeach Sara on this issue.³

¶18 Fields cannot show that he was prejudiced by trial counsel's failure to impeach Sara with her preliminary hearing testimony. With regard to the other discrepancies, where established, any inconsistencies were in fact heard by the jury. Thus we conclude that Fields was not denied the effective assistance of trial counsel and the trial court properly denied his postconviction motion without an evidentiary hearing.

II. NEW TRIAL IN THE INTEREST OF JUSTICE

¶19 Fields seeks a new trial under WIS. STAT. § 752.35, which permits us to grant relief if we are convinced "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." In order to establish that the real controversy has not been fully tried, Fields must convince us "that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." *State v. Darcy N.K.*, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoting *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996)). To establish a miscarriage of justice, Fields "must convince us 'there is a substantial degree of probability that a new trial would produce a different result.'" *Darcy*, 218 Wis. 2d at 667 (quoting *State v. Caban*, 210 Wis. 2d 597, 611, 563 N.W.2d 501 (1997)). An appellate court will exercise

³ Specifically, the jury saw photographs documenting Sara's injuries. They also heard the testimony of the examining nurse who described the tear she observed in Sara's perineal area.

its discretion to grant a new trial in the interest of justice “only in exceptional cases.” *State v. Cuyler*, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶20 As we discussed above, Fields has failed to establish that he was denied the effective assistance of counsel. Further, documents on which Fields bases his request for a new trial have not been included in the appellate record. Accordingly, we conclude there is no reason to exercise our discretionary authority under WIS. STAT. § 752.35 to grant Fields a new trial.

By the Court.—Judgment and order affirmed.

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

