

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 22, 2003

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. 01-3317-CR
STATE OF WISCONSIN**

Cir. Ct. No. 99-CF-82

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY L. SHADE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: HENRY B. BUSLEE, Judge. *Affirmed.*

Before Nettlesheim, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Gregory L. Shade has appealed from a judgment convicting him of the repeated sexual assault of a child in violation of WIS. STAT.

§ 948.025(1) (1999-2000),¹ and from an order denying his motion for postconviction relief. We affirm the judgment and order.

¶2 Shade was convicted after a jury trial. Shade was the uncle of Ashley K., an eleven-year-old child, and the brother-in-law of Ashley's mother, Debra K. Evidence at trial indicated that when Shade and his wife separated, Shade moved into the trailer home in which Ashley, her mother, her father, and her two younger siblings resided. Evidence also indicated that Shade had sexual contact with Ashley on three or more occasions between May 1998, when he moved into the trailer, and February 1999. Ashley first reported the sexual assaults in March 1999 while hospitalized for treatment at the Winnebago Mental Health Institute.

¶3 At trial, Shade argued that Ashley fabricated the charges. At the postconviction hearing, Shade's trial counsel explained that his theory of defense was that the events alleged by Ashley could not have occurred in the small trailer home without having been discovered by another family member. According to trial counsel, Shade's defense also included the theory that Shade was having an affair with Debra, and that Ashley fabricated the allegations to get Shade out of her home. Trial counsel's testimony concerning his theory of defense was consistent with his opening and closing statements at trial.

¶4 Shade raises four issues on appeal: (1) whether the trial court erred in denying his motion for a new trial based on ineffective assistance of trial counsel; (2) whether the trial court erroneously exercised its discretion by

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

admitting into evidence the written statement made by Ashley to police on March 10, 1999; (3) whether the trial court erroneously exercised its discretion by admitting into evidence a taped telephone conversation between Shade and Debra, and permitting the jury to play the tape of that conversation during deliberations; and (4) whether the criminal complaint violated Shade's due process right to notice of the charges against him by alleging conduct over a ten-month time period. We will address each argument in turn.

¶5 In his postconviction motion, Shade contended that his trial counsel was ineffective because he failed to impeach Ashley with prior inconsistent statements contained in her medical records, and failed to conduct an adequate investigation to support Shade's claim that he was having an affair with Debra. At trial, Shade was the only witness who testified that he was having an affair with Debra. In response to questioning by defense counsel, Debra denied having an affair with him, and Ashley testified that she was sure her mother was not having an affair with him.

¶6 At the postconviction hearing, Shade presented testimony by Debra Kannass, who worked and socialized with Debra prior to February 1999. She testified that she saw Debra and Shade together approximately twenty times, and that Debra told her that she loved Shade and had sexual relations with him. Shade contends that his trial counsel's failure to investigate and discover this evidence constituted ineffective assistance because the evidence would have diminished Debra's credibility and enhanced his credibility at trial, and would have supported his theory that Ashley fabricated charges against him because he was having an affair with her mother.

¶7 To establish a claim of ineffective assistance, an appellant must show that counsel's performance was deficient and that it prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, an appellant must show that his or her counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* "Even if deficient performance is found, judgment will not be reversed unless the defendant proves that the deficiency prejudiced his defense." *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

¶8 Determining whether there has been ineffective assistance of counsel presents a mixed question of law and fact. *State ex rel. Flores v. State*, 183 Wis. 2d 587, 609, 516 N.W.2d 362 (1994). A trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy will not be overturned unless they are clearly erroneous. *State v. Knight*, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540 (1992). However, the final determinations of whether counsel's performance was deficient and prejudicial are questions of law which this court decides without deference to the trial court. *Id.*

¶9 "[T]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *State v. Pitsch*, 124 Wis. 2d 628, 637, 369 N.W.2d 711 (1985) (citation omitted). An attorney's failure to investigate potential witnesses known to the defendant does not constitute ineffective assistance if the defendant himself or herself did not

inform counsel of the existence of such witnesses. *See State v. Hubanks*, 173 Wis. 2d 1, 26-27, 496 N.W.2d 96 (Ct. App. 1992).

¶10 At the postconviction hearing, Shade testified that he gave the names of witnesses to his trial counsel, including the name of Debra Kannass. However, his trial counsel testified that Shade was not a very cooperative client, that he was sure that he asked Shade for any witnesses who had knowledge of the affair, and that he did not recall Shade giving him the names of any witnesses. Trial counsel further testified that if Shade had given him the names of witnesses, he would have sent someone to interview them.²

¶11 After listening to the testimony at the postconviction hearing, the trial court denied Shade's motion, concluding that trial counsel's representation was not ineffective. The trial court relied on trial counsel's testimony that Shade was uncooperative and did not offer information. It noted that an attorney "has to rely on his client telling him exactly what he's got to look for so that he can conduct an investigation." Although the trial court did not expressly find that Shade was incredible when he testified that he gave Kannass' name to trial counsel, the implication from the trial court's comments and its determination that Shade received effective assistance is that the trial court believed counsel's testimony that Shade failed to provide him with the name of any witness to support his allegation that he was having an affair with Debra. *See id.* at 27. Because the record supports a finding that Shade failed to provide trial counsel with Kannass' name or the name of any other witness who could support his claim

² The record reveals that an investigator was available to counsel, as evidenced by a trial court order for the appointment of an investigator.

that he was having an affair with Debra, trial counsel cannot be deemed deficient for having failed to adequately investigate the issue and obtain witnesses to support Shade's claim.³

¶12 The trial court also properly rejected Shade's claim that trial counsel rendered ineffective assistance when he failed to impeach Ashley with prior inconsistent statements contained in her medical records. The alleged inconsistencies dealt with the number of times Shade assaulted her and the nature of the assaults.

¶13 At trial, trial counsel impeached Ashley with prior inconsistent testimony given at the preliminary hearing, pointing out that at the preliminary hearing Ashley testified that the assaults occurred five times, and that at trial her statements indicated that they happened every day or every other day. Trial counsel also impeached Ashley with her preliminary hearing testimony indicating that Shade removed her clothes, a statement she admitted was a lie on cross-examination at trial.

¶14 When questioned at the postconviction hearing regarding his failure to impeach Ashley with prior inconsistent statements in her medical records, trial counsel testified that he "felt it was very important that the jury not get the idea that we were beating up on this child victim." He testified that his idea was to

³ Shade also contends that trial counsel was unprepared to respond when Debra denied under oath that she was having an affair with Shade. However, Shade does not explain what action counsel could have taken except to cross-examine her as he did. Deficient performance is therefore not shown.

attack Debra's credibility more than Ashley's.⁴ He also indicated that the prior inconsistent statements were of lesser importance to him because they were inconsistent primarily as to the type of sexual activity that took place, and that questioning Ashley about some of those statements would have elicited prior statements that were even more damaging to Shade.

¶15 A trial attorney may select a particular defense from the available alternative defenses. *Id.* at 28. There is a strong presumption that an attorney's choice is sound trial strategy. *State v. Marty*, 137 Wis. 2d 352, 360, 404 N.W.2d 120 (Ct. App. 1987), *overruled on other grounds by State v. Sanchez*, 201 Wis. 2d 219, 548 N.W.2d 69 (1996). This court will not second-guess a trial attorney's considered selection of trial tactics or the exercise of professional judgment in the face of alternatives that have been weighed by trial counsel. *State v. Elm*, 201 Wis. 2d 452, 464, 549 N.W.2d 471 (Ct. App. 1996). A strategic trial decision rationally based on the facts and law will not support a claim of ineffective assistance of counsel. *Id.* at 464-65.

¶16 As determined by the trial court, trial counsel's decisions regarding the impeachment of Ashley were clearly strategic decisions. Trial counsel's decision not to attempt to impeach Ashley with every prior inconsistent statement in order to avoid increasing the jury's sympathy for her was a reasonable strategic decision. As correctly noted by trial counsel, the core of Ashley's testimony that Shade had sexually assaulted her was not impeached by the prior inconsistent statements. Moreover, to the extent Ashley was inconsistent regarding the nature

⁴ Trial counsel's testimony also indicated that he wanted to focus on the argument that if the assaults had occurred in the small trailer home at the times Ashley said, Ashley's father would have discovered them.

of the assaults and the number of times they occurred, she was impeached with her preliminary hearing testimony. The decision not to attempt to impeach her further, particularly when the prior inconsistent statements reiterated that Shade had sexually assaulted her, was a reasonable strategic decision.⁵

¶17 In a final argument in support of his ineffective assistance claim, Shade contends that trial counsel failed to obtain and use other medical records of Ashley's, indicating that she was hospitalized at Charter Hospital four years before she was hospitalized at Winnebago Mental Health Institute, and that she had school problems unrelated to these sexual assaults. Shade argues that trial counsel should have obtained and used these records to rebut the prosecutor's argument that Ashley's altered behavior and lower grades after Shade moved in were evidence of sexual abuse.

¶18 It is not entirely clear from the transcript of the postconviction hearing whether trial counsel had these particular records in his investigatory file. In any event, nothing in the record on appeal shows the basis for the prior hospitalization, or its relevance to the events four years later. Moreover, in reference to Ashley's other alleged problems, trial counsel elicited from her at trial that she was taking Ritalin and medications for emotional problems prior to the time Shade moved into her home. No basis exists to conclude that further investigation by trial counsel would have produced additional information which

⁵ The fact that Shade's attempts to diminish Debra's credibility in the eyes of the jurors may have been damaged when she denied having an affair with Shade did not render unreasonable trial counsel's decision to avoid attacking the child victim with additional prior inconsistent statements.

would have had an impact on the trial. Consequently, we conclude that the trial court properly rejected Shade's ineffective assistance of counsel claim.

¶19 Shade's next argument is that the trial court erroneously exercised its discretion by admitting into evidence the written statement made by Ashley to police on March 10, 1999, after she reported the sexual assaults to medical personnel and her mother. He also challenges the trial court's decision to permit the prosecutor to read the statement to the jury.

¶20 We review a trial court's decision admitting or excluding evidence under an erroneous exercise of discretion standard. *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. The trial court has broad discretion, and our review is highly deferential. *Id.* at ¶¶28-29. We review whether the trial court exercised its discretion in accordance with accepted legal standards and the facts of record. *State v. Huntington*, 216 Wis. 2d 671, 680-81, 575 N.W.2d 268 (1998). However, if the trial court fails to set forth the reasons for its ruling, this court will independently review the record to determine whether it provides a basis for the trial court's exercise of discretion. *Martindale*, 2001 WI 113 at ¶29; *State v. Mainiero*, 189 Wis. 2d 80, 95, 525 N.W.2d 304 (Ct. App. 1994). We will uphold the trial court's decision if the record contains facts which would support the decision had the court fully exercised its discretion. *Mainiero*, 189 Wis. 2d at 95-96.

¶21 At trial, Ashley testified that Shade had sexual contact with her during the time that he resided in her family's mobile home. At trial, the State also introduced the statement regarding the assaults given by Ashley to the police at the Winnebago Mental Health Institute on March 10, 1999. Ashley was permitted to read the statement to herself and was asked to read it to the jury.

When she indicated that she could not read it out loud, despite being told to do so by the trial court judge, the prosecutor requested and was granted permission to read the statement to the jury.

¶22 Shade argues that the statement was improperly admitted as a past recollection recorded. However, as the State argues in its respondent's brief, the statement was properly admissible under WIS. STAT. § 908.01(4)(a)2, which provides that a prior statement by a witness is not hearsay if the declarant testifies at the trial and is subject to cross-examination concerning the statement, and the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."⁶

¶23 Ashley testified at trial and was subject to cross-examination regarding her statement. In addition, the statement was consistent with her trial testimony. The statement also served to rebut Shade's contention that Ashley fabricated the charges. During cross-examination, trial counsel implied that Ashley's testimony that Shade assaulted her was false, and that she would have told a family member about the assaults if they had really occurred. The March 10, 1999 statement rebutted the implication that Ashley fabricated her testimony at trial, particularly when considered in conjunction with her testimony that she felt safe from Shade while at the Winnebago Mental Health Institute. It was therefore properly admitted into evidence and, when Ashley indicated that she could not read it aloud, was properly read into the record by the prosecutor.

⁶ Shade does not respond to this argument in his reply brief.

¶24 Shade's next argument is that the trial court erroneously exercised its discretion by admitting into evidence the tape of a telephone conversation between him and Debra, and permitting the jury to play the tape of that conversation during deliberations. The record indicates that Debra taped two telephone conversations that she had with Shade in which they discussed Ashley's allegations of sexual assault. The first tape was made with the assistance of a police detective and was admitted into evidence and played for the jury. The second tape was made from a recording on Debra's answering machine. Like the first tape, the tape was admitted into evidence without objection from Shade. However, the quality of the second tape was poor, and the trial court determined that the jurors could not understand it when it was played for them. The trial court therefore directed the prosecutor and defense counsel to read the transcript of the tape to the jury. Transcripts of both tapes were also admitted into evidence.

¶25 Because Shade did not object to the admission into evidence of the second tape, he waived any objection to its admission. *See Allen v. Allen*, 78 Wis. 2d 263, 270, 254 N.W.2d 244 (1977). Moreover, because the tape was admitted without objection, we find nothing erroneous in the trial court's discretionary decision to permit the transcript of the tape to be read to the jury when the tape could not be understood. Shade did not demonstrate in the trial court, and does not argue on appeal, that the transcript did not accurately set forth the words on the tape. Absent a material inaccuracy, no basis exists to conclude that the trial court erroneously exercised its discretion by permitting the jury to listen to a reading of the transcript of the tape, which was already admitted without objection.

¶26 With the exception of the tapes, all exhibits, including the transcripts of the tapes, were provided to the jury during its deliberations. During

deliberations, the jury requested to hear the second tape. Because the tape already had been admitted into evidence, the trial court permitted the jury to listen to the tape. The trial court stayed in the jury room while the tape was played. Because Shade did not object to the admission of the tape into evidence, and, in fact, wanted the tape played rather than a transcript of the tape to be read, no basis exists to conclude that the trial court erroneously exercised its discretion by permitting the jury to listen to the tape during its deliberations.⁷

¶27 Shade's final argument is that the criminal complaint violated his due process right to notice of the charges against him by alleging conduct over a ten-month time period. He contends that the time period set forth in the complaint was too expansive to permit him to prepare a defense and provide him with notice of the charges against him.

¶28 An objection challenging the sufficiency of the complaint must be raised before trial by motion or it is deemed waived. *See State v. Copening*, 103 Wis. 2d 564, 570, 309 N.W.2d 850 (Ct. App. 1981). Shade never filed a motion to dismiss the complaint before trial, nor did he move to make the complaint more specific. Because Shade failed to raise the issue in a timely manner in the trial court, he cannot raise it as a matter of right on appeal. *See id.* at 570-71.

⁷ Shade contends that he was not given the opportunity to attack the content of the tape because the trial court would not permit him to pursue that area on cross-examination and because the tape was played to the jury only after the close of the case. In fact, after the transcript of the tape was read at trial, Shade's attorney was permitted to question Debra regarding the circumstances under which the tape was made. However, when Shade's counsel asked Debra what Shade said or meant on the tape, the trial court properly sustained the prosecutor's objections on the ground that the jury had already listened to the transcript of the tape. Shade has not shown that he had other proper questions that he was foreclosed from asking. Moreover, since the jurors had already listened to the transcript of the tape being read at trial, Shade has not shown that he was prejudiced when they listened to the tape during deliberations.

Although we may address a waived issue in the interests of justice and where there are no factual issues that need resolution, *id.* at 571, we are not persuaded that the interests of justice necessitate review of Shade's argument. We therefore decline to address it.

By the Court.—Judgment and order affirmed.

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

