

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 18, 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. 02-0462-CR
STATE OF WISCONSIN**

Cir. Ct. No. 00-CF-220

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SCOTT A. CHURCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: BRUCE SCHMIDT, Judge. *Affirmed.*

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

¶1 PER CURIAM. Scott A. Church appeals from the judgment of conviction and the order denying his motion for postconviction relief. He argues that he received ineffective assistance of trial counsel, and that the trial court erred in certain of its evidentiary rulings. We conclude that Church did not receive

ineffective assistance of counsel and that the trial court did not err. Therefore, we affirm.

¶2 Church was convicted after a jury trial of second-degree sexual assault of a child and two counts of child enticement. At the time of the incident, Church was the manager of an apartment complex. The incidents involved two girls, both under sixteen years of age. Church sexually assaulted one of the victims and enticed the other. The enticement victim lived in the apartment complex with her mother, and the other girl was her friend. At trial, the victim of the sexual assault testified that Church paid her \$100 to have sexual intercourse with him. She stated that they had sexual intercourse on the sofa in the living room of Church's apartment. She gave the police an accurate description of the layout of Church's apartment. Further, expert testimony established that a pubic hair found in Church's apartment near the sofa had the assault victim's DNA on it.¹

¶3 Church denied that he committed the crimes charged. He testified that he had never had the girls in his apartment but that the groundskeeper had taken the girls up to Church's apartment to smoke marijuana on the day the incident occurred. Church argued that he was about to evict the mother and the girl who lived in the apartment complex and that the girl made up the story to stop him from doing so. He also testified that he gave the police some "adverse" information about the groundskeeper.

¹ It was not clear whose pubic hair it was. The expert testified that there were two sources of DNA on the pubic hair and the victim was the major contributor and Church was not the source of the other DNA.

¶4 The court sentenced Church to five years in prison and ten years' extended supervision on the sexual assault, and five years of probation on each of the child enticement charges to be served consecutively to the sexual assault sentence but concurrently to each other. Church then brought a motion for postconviction relief asserting essentially the same allegations he has raised in this appeal. The court denied the motion, finding that even if Church were able to establish that his trial counsel's performance was deficient, he had not established that he was prejudiced by it. The court also found that its rulings during trial were proper.

¶5 Church argues that his trial counsel was ineffective because counsel did not object to inadmissible evidence and improper argument about Church's failure to respond to police questions or to give the police a statement before trial. Specifically, Church asserts that counsel should have objected to three different statements. He argues that counsel should have objected when one of the police officers testified that at one point while he was questioning Church, Church became upset and "told us that he had nothing further to say about it and he wanted us to leave." Church argues that this was inadmissible evidence under *State v. Brecht*, 143 Wis. 2d 297, 310-11, 421 N.W.2d 96 (1988), and *State v. Fencl*, 109 Wis. 2d 224, 233-34, 325 N.W.2d 703 (1982). He also argues that counsel should have objected to a statement by a different officer that Church chose not to give a statement. He further asserts that counsel should have objected during the State's closing argument when the prosecutor made the following statement:

Mr. Church never gave a statement before today. Mr. Church had one year since this happened April 18th until today's date to come up with his story as to what had taken place. I didn't have a previous statement to impeach him or to hold—ask him about specific details like [defense

counsel] had with the two young, impressionable girls. So he had free reign to come up over this year's time as to whatever story he could fit with these facts.

¶6 To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. If this court concludes that the defendant has failed to prove one prong, we need not address the other prong. *Id.* at 697. To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. *Id.* at 687. Consequently, if counsel's performance was not prejudicial, the claim fails and this court need not examine the performance prong. See *State v. Moats*, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). To meet the prejudice test, the defendant must show that, but for defense counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶7 Church first argues that he received ineffective assistance of counsel because his trial counsel did not object to the statements made about his refusal to continue talking without a lawyer, and his refusal to give the police a statement. Assuming that these statements were improper, Church is not able to show that he was prejudiced by them. Although there were some inconsistencies among the various witnesses' testimony, their testimony was consistent on the major points. Further, expert testimony established that the assault victim's DNA was found on a pubic hair. The police found that hair in the same place in Church's apartment where the victim said the assault took place. Given this evidence, we cannot conclude that the result of the proceedings would have been different if the jury

had not heard about Church's refusal to talk to the police without a lawyer. Since Church was not prejudiced by the arguably deficient performance, he did not receive ineffective assistance of counsel.

¶8 Church also argues that the trial court erred in certain of its evidentiary rulings and thereby deprived him of his right to present a defense. "A trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has 'a reasonable basis' and was made 'in accordance with accepted legal standards and in accordance with the facts of record.'" *State v. Jenkins*, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992) (citations omitted). We conclude that the trial court did not err.

¶9 First, Church argues that the court should not have ordered stricken his statement that he fled Wisconsin because he was afraid of the potential 120-year sentence he faced. As the State points out, however, Church did not raise this claim at trial and therefore has waived the right to challenge the ruling on appeal. Church argues that since the State suggested that his flight was evidence of his consciousness of guilt, he had a right to refute the State's argument. While there may be some merit to this argument, the record establishes that Church explained to the jury that he fled because he was afraid and he needed time to think and to sort things out. To the extent the trial court's initial ruling may have been in error, the error was harmless because the jury eventually heard the evidence.

¶10 Church next argues that the court erred when it excluded the testimony of a witness about a statement one of the victim's made to him. The witness apparently would have testified that the girl who lived in the apartments told him that Church would be leaving the apartments before she and her mother would. The court excluded this testimony as hearsay. Without deciding whether

this ruling was made in error, there was ample evidence presented to the jury of the disputes between Church, as the apartment manager, and the victim and her mother as the tenants. Consequently, even if the ruling was in error, it also was harmless because the jury once again heard the evidence through other means.

¶11 Church next argues that the court erred when it did not send an exhibit to the jury. The exhibit was the sexual assault victim's calendar. Again, as the State notes, Church did not ask to have the calendar sent to the jury room and did not object when the court denied the jury's request to see the calendar. Further, the jury was allowed to view the calendar during the course of the trial. The decision whether to allow the jury to see the calendar was properly within the trial court's discretion. The court denied the request because the exhibit contained too much irrelevant and potentially prejudicial material. We cannot conclude that this was an improper exercise of discretion. For the reasons stated, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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

