

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 19, 2011**

A. John Voelker  
Acting Clerk of Court of Appeals

**NOTICE**

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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. 2010AP749-CR**

**Cir. Ct. No. 2007CF572**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MICHAEL W. HUDSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for La Crosse County: ELLIOTT M. LEVINE, Judge. *Affirmed.*

Before Vergeront, P.J., Lundsten and Blanchard, JJ.

¶1 PER CURIAM. Michael Hudson appeals the judgment of conviction of one count of child enticement and one count of sexual assault of a

child under WIS. STAT. §§ 948.07(1) and 948.02(1)(b) (2009-10).<sup>1</sup> He also appeals the order denying his motion for postconviction relief. Hudson seeks a new trial on the ground of ineffective assistance of counsel. He asserts that his trial counsel was deficient for failing to use at trial a medical report and DNA evidence to impeach the credibility of the victim. We conclude counsel was not ineffective. We affirm the judgment and order of the circuit court.

¶2 Hudson was charged with child enticement and sexual assault of a child under 13 years of age. The following were among facts alleged at trial. Paula K. and Victor H. were babysitting for a family who lived in an apartment across the hall from Hudson's apartment. The doors between the apartments were kept open so that Hudson could help Paula K. and Victor H. watch the children. Paula K. testified that she entered Hudson's apartment twice, and during her second time in the apartment Hudson told her to go to his bedroom. Once in the bedroom, Hudson pushed Paula K. onto his bed, pulled down her underwear, and put his finger in her vagina three times.

¶3 After the assault, Paula K. returned to the apartment where she was babysitting with Victor H. and told him what had happened. Paula K. went to the police station, but no officer was on duty. She later went to the emergency room and was examined by a sexual assault nurse, who took swabs of her DNA and collected her underwear. Hudson's DNA was also collected and tested against the samples from Paula K. Hudson's DNA was found on the outside of the crotch part

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

and the waistband of Paula K.'s underwear. Paula K.'s DNA was found on samples collected from Hudson's hand.

¶4 Following the trial, a jury found Hudson guilty of both child enticement and sexual assault of a child under 13 years of age. Hudson filed a pro se motion for postconviction relief arguing that his trial counsel was ineffective because he did not use a medical report and DNA evidence to impeach the credibility of Paula K. The circuit court held a *Machner*<sup>2</sup> hearing at which Hudson's trial counsel was the only witness. The circuit court denied the motion.

¶5 On appeal, Hudson renews his argument that his trial counsel was deficient because of his failure to use a medical report and DNA evidence to impeach the credibility of Paula K. Hudson claims that he was prejudiced by this deficiency because, had the jury heard this evidence, it may have found the victim's account unreliable and therefore found him not guilty.

¶6 To establish ineffective assistance of counsel, a criminal defendant "must show (1) that his or her counsel's representation was deficient and (2) that this deficient performance resulted in prejudice to the defense." *State v. Franklin*, 2001 WI 104, ¶11, 245 Wis. 2d 582, 629 N.W.2d 289 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To satisfy the first part of the test, the defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. To satisfy the second part, the defendant must show that, but for his counsel's errors, the result of the proceeding would have been different. *Franklin*, 245 Wis. 2d 582, ¶14. In order

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<sup>2</sup> *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

to succeed on an ineffective assistance of counsel claim, the defendant must prove both components. *Strickland*, 466 U.S. at 697. We need not discuss both components of the test if there is an insufficient showing on one part. *State v. Manuel*, 2005 WI 75, ¶72, 281 Wis. 2d 554, 697 N.W.2d 811 (citations omitted).

¶7 When we review a claim of ineffective assistance of counsel, we uphold the circuit court’s factual findings unless they are clearly erroneous. *State v. O’Brien*, 223 Wis. 2d 303, 324-25, 588 N.W.2d 8 (1999). Whether counsel’s assistance was ineffective based on these facts presents a question of law, which we review de novo. *Id.*

¶8 With respect to the medical report, Hudson argues that his counsel did not review the medical report for inconsistencies with Paula K.’s testimony. He contends that cross-examining Paula K. on these inconsistencies would have been sufficient to discredit her testimony. At the *Machner* hearing, Hudson’s counsel testified that he had read the report but did not focus on it or use it to cross-examine Paula K. because he felt there were too many potentially incriminating or prejudicial items in the report.

¶9 We conclude this was a reasonable trial strategy. Although there was some information in the report that might have been helpful to Hudson, there was other information that was harmful to Hudson. For example, the report was consistent with Paula K.’s claim that Hudson had penetrated her vagina with his finger. It is not the job of an appellate court to “second-guess a trial attorney’s ‘considered selection of trial tactics or the exercise of a 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) (quoting *State v. Felton*, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983)). A strategic trial decision, based

on the facts and law of the case, will not support a defendant's claim of ineffective assistance of counsel. *Elm*, 201 Wis. 2d at 464-65. Because counsel's strategic decision here was a reasonable one based on the nature of the medical report, it does not constitute deficient performance.

¶10 With respect to the DNA evidence, Hudson argues that his counsel had a "duty to attack" Paula K.'s credibility by pointing out on the alleged inconsistency between the location of DNA evidence on Paula K.'s underwear and Paula K.'s testimony on how the assault occurred. At the *Machner* hearing, Hudson's counsel testified that he addressed this inconsistency in his closing argument. He further testified that he tries to be very careful when cross-examining child witnesses because of the sympathy that a jury might have toward that witness. Counsel noted that during the trial, the court had to take a recess during his cross-examination of Paula K. because she was crying. It was his opinion that he cross-examined her as aggressively as he should have under the circumstances.

¶11 We conclude that trial counsel's decision not to more aggressively cross-examine Paula K. was a reasonable one on these facts. *See State v. DeLeon*, 127 Wis. 2d 74, 85, 377 N.W.2d 635 (Ct. App. 1985) (concluding that failing to impeach a child witness with inconsistencies can be a legitimate tactical decision). During closing argument, Hudson's counsel argued that the DNA evidence did not support Paula K.'s version of how the assault occurred and that the fact that Hudson's DNA was on the outside waistband of Paula K.'s underwear was insufficient evidence of guilt. The decision to point out alleged inconsistencies during closing argument rather than during cross-examination of Paula K. in order to avoid creating sympathy for her was a reasonable strategy. It therefore does not constitute deficient performance.

¶12 Because Hudson has not shown that his trial counsel's performance was deficient, 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.

