

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**September 1, 2011**

A. John Voelker  
Acting 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. 2010AP1747-CR  
STATE OF WISCONSIN**

Cir. Ct. No. 2007CF1385

**IN COURT OF APPEALS  
DISTRICT IV**

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JOHN F. B.,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment and an order of the circuit court for Dane County: JAMES L. MARTIN and SARAH B. O'BRIEN, Judges. *Affirmed.*

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

¶1 PER CURIAM. John F.B. appeals a judgment convicting him of second-degree sexual assault of a child under sixteen years of age and an order denying his motion for a new trial. He contends that trial counsel provided ineffective assistance by failing to adequately impeach the victim with prior

inconsistent statements and by failing to introduce evidence that a prosecution witness had received favorable treatment in his own case after implicating Brown. We conclude that counsel's performance was not deficient in either respect and therefore affirm.

## BACKGROUND

¶2 The State charged John F.B. based upon allegations that a fifteen-year-old girl had performed oral sex on him in a car.

¶3 At trial, the girl testified that she had been shopping, hanging out, smoking marijuana, and drinking vodka that day with her boyfriend, her boyfriend's brother, her boyfriend's father—John F.B., and a female friend. At one point, while the brother was driving a car around town with the female friend in the front seat and the girl in the back seat between her boyfriend and his father, the girl performed oral sex on her boyfriend at his request. The boyfriend then wanted the girl to perform oral sex on John F.B., which she did for about a minute before she stopped and said she didn't want to do it. Shortly thereafter the boyfriend invited a male friend they passed on the street into the car and directed the girl to give him oral sex as well, which she did.

¶4 After John F.B., the boyfriend and his male friend left, the brother was going to drive the girl and her female friend home. However, he told her that he wasn't going to do it for nothing. When the girl initially refused to give the brother sexual favors, he left the girl and her friend by the side of the road. The brother returned after the girl called and asked him to bring her some shopping bags she had left in the car, but he would not give her the bags back until after she gave him oral sex as well. The girl's mother eventually came and picked her up, at which time the girl told her mother about the incident with her boyfriend's

brother, but not about any of the earlier sexual activity in the defendant's car, including any allegations against John F.B.

¶5 The girl's female friend and the boyfriend's brother both testified for the prosecution. The friend largely confirmed the account the girl gave at trial, including that the girl had performed oral sex on John F.B. while her boyfriend's brother drove the car around. The brother confirmed that he had driven the car around while the girl performed oral sex on the boyfriend and his friend, and that he had later made the girl give him oral sex in exchange for bringing her shopping bags to her, but he denied that she had performed oral sex on his father. The brother acknowledged that he had told investigators and testified at the preliminary hearing that the girl had performed oral sex on John F.B., but claimed that he had only done so because he was upset with his father and was trying to divert attention from his own sexual assault case or obtain favorable treatment at sentencing.

¶6 The defense elicited testimony that the girl had not mentioned John F.B.'s involvement until her third interview, more than ten months after she had first reported the incident with the brother. However, defense counsel did not cross-examine the girl about specific discrepancies among the statements she had made to the police and the testimony she had given at the preliminary hearing. The defense also did not introduce evidence that the brother had, in fact, received favorable sentencing treatment in exchange for his preliminary hearing testimony against the defendant.

#### STANDARD OF REVIEW

¶7 Claims of ineffective assistance of counsel present mixed questions of law and fact. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). We will

not set aside the circuit court's findings about counsel's actions and the reasons for them, unless they are clearly erroneous. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's constitutional right to have effective assistance of counsel is ultimately a legal determination, which this court decides *de novo*. *Id.*

## DISCUSSION

¶8 A claim of ineffective assistance of counsel has two parts: (1) deficient performance by counsel; and (2) prejudice resulting from that deficient performance. *State v. Swinson*, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. To prove deficient performance, a defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms and show that his or her attorney made errors so serious that he or she was essentially not functioning as the counsel guaranteed the defendant by the Sixth Amendment. *Id.* To prove prejudice, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. *Id.* We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. *Id.*

¶9 Having reviewed the testimony produced at the *Machner*<sup>1</sup> hearing as well as the arguments of both parties, we conclude that counsel's performance was not deficient here.

---

<sup>1</sup> *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979) discusses evidentiary hearings on claims of ineffective assistance of counsel.

¶10 The defendant first contends that trial counsel should have been much more aggressive in attempting to impeach the victim. However, counsel explained that he made a last-minute decision not to ask the victim a number of questions he had prepared about her prior inconsistent statements because he observed some women on the jury appear to react emotionally when the victim entered the courtroom crying. Given that reaction, he reasoned that attacking the victim might be counter to what they were trying to accomplish. Part of his calculation was that there would be only limited value in impeaching the victim in detail about her inconsistent statements anyway, since there were corroborating witnesses and counsel thought it would be fairly easy for the jury to understand why a teenager would not want to admit to her parents or police that she had performed sex acts on multiple men. We are satisfied that counsel's tactical decision was reasonably based upon an analysis of the strengths and weaknesses of the case and personal courtroom observations, and was well within professional norms.

¶11 The defendant also argues that defense counsel should have introduced evidence that the brother did, in fact, receive favorable treatment in exchange for his earlier accusations against his father. However, the relevant information for assessing the brother's motivation for making earlier incriminating statements against his father was what treatment the brother hoped or believed he might receive at the time he made the statements. Therefore, counsel provided effective assistance by asking the brother whether he thought his statements would help him at his own sentencing hearing.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE  
809.23(1)(b)5 (2009-10).

