

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

August 16, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2339-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES D. TURNER, JR.,

Defendant-Appellant.

APPEAL from an order of the circuit court for Sheboygan County:
GARY LANGHOFF, Judge. *Affirmed.*

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

PER CURIAM. James D. Turner, Jr. has appealed from an order denying his motion for postconviction relief from a judgment convicting him of second-degree sexual assault in violation of § 948.02(2), STATS. He raises two issues on appeal: (1) whether he was deprived of effective assistance of trial counsel when his trial attorney failed to convey his acceptance of a plea bargain to the prosecutor; and (2) whether the trial court erroneously exercised its discretion by excluding evidence regarding a false allegation of sexual assault previously made by the victim, Michelle H. We conclude that both issues are without merit and affirm the trial court's order.

Initially, as contended by the State, we agree that both issues are inadequately briefed. Appellate counsel fails to set forth the legal standards to be applied by this court in addressing his claims and does not clearly develop any argument or support his arguments with legal reasoning and reference to the record. He also fails to provide a minimally complete and intelligible description of the facts upon which he relies to support his claims, fails to provide adequate citations to the record to support his claims, and fails to discuss the findings of fact and conclusions underlying the trial court's rulings. His brief therefore does not comply with the requirements of RULE 809.19(1)(d) and (e), STATS.

This court need not address issues which are inadequately briefed or which fail to comport with the requirements of RULE 809.19(1), STATS. *State v. Pettit*, 171 Wis.2d 627, 646-47, 492 N.W.2d 633, 642 (Ct. App. 1992). Nevertheless, we exercise our discretion to address them here.

In his postconviction motion, Turner alleged that he told his trial attorney that he wanted to accept a plea agreement proffered by the prosecutor, and that his trial attorney rendered ineffective assistance when she failed to convey his acceptance to the prosecutor. To establish a claim of ineffective assistance, a defendant 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, a defendant must show that his counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight. *State v. Johnson*, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990). The case is reviewed from counsel's perspective at the time of trial, and the burden is placed upon the defendant to overcome a strong presumption that counsel acted reasonably within professional norms. *Id.* at 127, 449 N.W.2d at 847-48.

The appropriate measure of attorney performance is reasonableness, considering all of the circumstances. *State v. Brooks*, 124 Wis.2d 349, 352, 369 N.W.2d 183, 184 (Ct. App. 1985). If deficient performance

is not shown, this court need not address the prejudice prong of the ineffectiveness test. See *State v. Hubanks*, 173 Wis.2d 1, 25, 496 N.W.2d 96, 104 (Ct. App. 1992), *cert. denied*, 510 U.S. ___, 114 S. Ct. 99 (1993).

The question of whether there has been ineffective assistance of counsel is a mixed question of law and fact. *State ex rel. Flores v. State*, 183 Wis.2d 587, 609, 516 N.W.2d 362, 368-69 (1994). An appellate court will not overturn a trial court's findings of fact concerning the circumstances of the case and counsel's conduct unless the findings are clearly erroneous. *State v. Knight*, 168 Wis.2d 509, 514 n.2, 484 N.W.2d 540, 541 (1992). However, the final determinations of whether counsel's performance was deficient and prejudiced the defense are questions of law which this court decides without deference to the trial court. *Id.*

Both Turner and his trial counsel testified at the postconviction hearing. Trial counsel acknowledged that the prosecutor had offered to recommend a five-year prison sentence if Turner pleaded guilty. She testified that she discussed this offer with Turner approximately one month before trial and again after an initial mistrial. She testified that Turner rejected the offer both times, telling her that he did not want to accept it because he did not commit the crime, he wanted to have a jury trial, and there was no guarantee that the sentencing judge would follow the prosecutor's recommendation of a five-year sentence. She further testified that she discusses the advantages and disadvantages of plea offers with clients, but does not make a recommendation as to whether the client should accept the offer and leaves the decision up to them.

Turner testified that he told his trial attorney that he did not want to spend ten years in prison for something he did not do, so he would take the five-year plea bargain. He testified that he never agreed to go forward with trial.

In findings of fact made by the trial court at the conclusion of the hearing, the trial court specifically found that Turner did not accept the plea offer and told his trial attorney that he wanted to proceed with trial. Since the trial court's findings are supported by trial counsel's testimony and are not clearly erroneous, no basis exists for disturbing them on appeal. Based on those

findings and because the decision to accept or decline a proffered plea agreement is for the defendant, *State v. Ludwig*, 124 Wis.2d 600, 611, 369 N.W.2d 722, 727 (1985), no basis exists to conclude that trial counsel performed deficiently. The trial court therefore properly denied Turner's claim of ineffective assistance of counsel.

The trial court also properly exercised its discretion to exclude testimony regarding an allegedly false prior claim of sexual assault by the victim, Michelle. At trial, Turner claimed that he should be permitted to present evidence that Michelle previously made an allegation of sexual assault against her father which was found to be false. He claimed that the evidence was admissible under § 972.11(2)(b)2, STATS., and was required for a complete understanding of the testimony of a psychological expert who had been named by the State as a witness at trial.

Neither of these arguments provided a basis for admitting the evidence. Section 972.11(2)(b)2, STATS., bears no relationship to this case, which involves no evidence concerning semen, pregnancy, disease or injury. Moreover, the State ultimately never presented any psychological expert or counselor as a witness at trial, obviating any need to admit evidence to assist in understanding that testimony.

Before trial, the trial court also heard and rejected a claim by Turner that the evidence was admissible pursuant to § 972.11(2)(b)3, STATS. Evidence may be admitted under § 972.11(2)(b)3 only if the trial court can conclude from evidence produced by the defendant "that a reasonable person could reasonably infer that the complainant made prior untruthful allegations of sexual assault." *State v. DeSantis*, 155 Wis.2d 774, 787-88, 456 N.W.2d 600, 606-07 (1990). If the defendant fails to meet his or her burden of producing evidence from which a reasonable person could infer that the complainant made prior false allegations, the trial court must conclude that the evidence is inadmissible under § 972.11(2)(b)3. *State v. Moats*, 156 Wis.2d 74, 110, 457 N.W.2d 299, 315 (1990).

Based on police and social services reports concerning the prior allegations made by Michelle, the trial court found that the allegations were not untruthful. Specifically, it noted that in 1985, Michelle alleged that her father

excessively tickled her and that some of the tickling was in the breast and buttock area. The trial court also noted that the allegations were investigated by the police and social services department. Both agencies concluded that the tickling occurred, but that it was not done for purposes of sexual gratification.

The reports reviewed by the trial court and parties are in the record and were prepared after Michelle, who was then eight years old, told a friend that her father tickled her in her private areas and "it hurts." The investigative reports that followed the allegations essentially describe head-to-toe tickling of Michelle by her father. While Michelle described the tickling as going across her chest area and buttocks, she also indicated that the tickling occurred on the outside of her clothing, was not concentrated in any one area, and occurred while her father was dressed, sometimes in the presence of her grandparents or her father's roommate. According to the police report, she indicated that her main concern was that her father did not stop tickling her when she asked him to stop. She also indicated that when tickling occurred in her chest or buttocks area, it was usually while she was attempting to squirm away from her father. The conclusion reached in both the police and social service reports was that the touching was not sexual in nature.

Based on these reports, the trial court properly concluded that no false allegations had been made by Michelle. Based on the reports, the only inference that could reasonably be drawn was that Michelle previously made truthful allegations regarding her father's activities. The fact that social services and law enforcement authorities concluded that those activities did not constitute sexual assault did not render her allegations false. The trial court therefore properly determined that the evidence was inadmissible pursuant to § 972.11(2)(b)3, STATS.

A defendant may be constitutionally entitled to present evidence of a prior allegation of sexual assault, even though the evidence is inadmissible under § 972.11(2)(b), STATS. However, the defendant must present a sufficient offer of proof in order to establish the existence of this right. *Moats*, 156 Wis.2d at 111-12, 457 N.W.2d at 316. He or she must show: (1) that the prior acts clearly occurred, (2) that the acts closely resemble those of the present case, (3) that the prior act is clearly relevant to a material issue, (4) that the evidence is necessary to the defendant's case, and (5) that the probative value of the

evidence outweighs its prejudicial effect. *Id.* at 112, 457 N.W.2d at 316 (citing *State v. Pulizzano*, 155 Wis.2d 633, 656, 456 N.W.2d 325, 335 (1990)).

Based on these standards, the trial court properly excluded evidence regarding the prior allegations made by Michelle. Based on its pretrial review of the police and social services records, the trial court knew that the prior acts consisted of overly playful, nonsexual tickling of Michelle by her father. Based on Michelle's testimony, the trial court also knew that the allegations in this case were that Turner rubbed Michelle's breast beneath her clothing, massaged her "butt" and touched her vaginal area inside her clothing, inserted his finger into her vagina and attempted to insert his penis into her vagina. Based on the differences in the nature of the acts alleged, the trial court properly determined that the acts involved in the prior allegations did not closely resemble those of the present case. Absent such a showing, no basis existed to admit evidence regarding the prior allegations under the *Pulizzano* test.

By the Court. – Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.