

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 8, 2008

David R. Schanker
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. 2007AP882-CR

Cir. Ct. No. 2005CF650

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DOMINIQUE A. AGUIRRE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: RICHARD J. DIETZ, Judge. *Reversed and cause remanded.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Dominique Aguirre appeals a judgment convicting him of sexually assaulting Mary E. by threat of force. He also appeals an order

denying his postconviction motion in which he alleged ineffective assistance of trial counsel.¹ We conclude that Aguirre's trial counsel's performance was deficient in ways that undermine our confidence in the trial's outcome. Therefore, we reverse the judgment and order and remand the matter for retrial.

¶2 Mary testified that she, Aguirre, Hernandez and four other people were at a gathering at Christen Roberts' apartment. Aguirre and Hernandez asked her into a bedroom where they accused her of "narking them out to the police." Aguirre slapped her and threatened to slit her throat. He told her she would be "taking a ride with one of [Hernandez's] friends and they'd do something bad to [her]." Later, when walking approximately one-quarter mile to a gas station to buy cigarettes, Aguirre told her she would not have to go with Hernandez's friends if she would perform oral sex on him. When she refused, Aguirre took her by the arm into the backyard of a residence, pushed her to her knees and forced her to perform oral sex. He also put on a condom and attempted vaginal and anal intercourse, but eventually removed the condom and again forced her to perform oral sex. Police later recovered the condom with Aguirre's and Mary's DNA on it.

¶3 Mary testified after the sexual assault, she and Aguirre went to the gas station and bought the cigarettes. She waited for Aguirre while he used the restroom. They walked past a hospital on the way back to the gathering. When they returned, Roberts accused Mary of stealing the change from the money Roberts had given her to buy cigarettes. Roberts physically attacked Mary with

¹ Because we conclude Aguirre's counsel was ineffective, we need not review other issues raised in Aguirre's postconviction motion and on appeal.

her fists and a shoe, and threw beer cans at her. Mary fled to the nearby hospital where she reported the battery and the sexual assault.

¶4 Aguirre testified he had consensual oral sex with Mary. His testimony was consistent with the physical evidence. He admitted initially lying to police when he denied any sexual contact with Mary.

¶5 Marie Lewis testified for Aguirre that she met Mary four months after the alleged sexual assault. Mary told her the charges against Aguirre were false and she wanted to drop the charges. Lewis testified wearing a jail uniform.

¶6 In his postconviction motion, Aguirre alleges ineffective assistance of trial counsel on several grounds. His counsel did not interview or subpoena Hernandez, who would have refuted Mary's claim that she was threatened at the gathering before the sexual encounter. Counsel also failed to interview or call several witnesses who would have testified Aguirre was not sexually aggressive. Counsel also failed to arrange for Lewis to change into street clothes when testifying that Mary told her the accusations were false.

¶7 Aguirre's trial counsel, Leonard Kachinsky, testified at the postconviction hearing. He indicated he planned on attacking Mary's credibility by pointing out her prior convictions and by investigating possible witnesses to testify about Mary's untruthfulness. He admitted he did not interview Hernandez about the alleged threats and Mary's statement that Aguirre slapped her. Kachinsky explained the "focus of the defense wasn't gonna be on what happened at the house," but on the assault itself. Kachinsky conceded Hernandez's testimony would have been relevant to Mary's credibility.

¶8 Kachinsky also testified that he knew he would have problems with Aguirre’s credibility because of his initial false statement to the police. Kachinsky did not believe character witnesses as to either Aguirre’s truthfulness or his character regarding respect for women would be effective. He never interviewed the character witnesses Aguirre suggested. Because Aguirre is a large man, Kachinsky concluded “some people would regard ’em as intimidating regardless of his character.” Kachinsky conceded there was no strategic reason for Lewis testifying in her jail uniform.

¶9 The trial court denied the postconviction motion, concluding it was reasonable trial strategy to downplay events at the apartment. Because Hernandez had multiple convictions, the jury would not have believed his testimony. Likewise, Aguirre’s character witnesses had extensive records. The court found an inconsistency between Aguirre’s statement to police, “I try to get sex as often as possible and I average having sex with two different women every week,” and the character witnesses’ proffered testimony that Aguirre was not sexually aggressive. Regarding Kachinsky’s failure to arrange for Lewis to testify in street clothes, the court concluded there was “no reasonable probability that a different result would be reached at trial.”

¶10 To establish ineffective assistance of trial counsel, Aguirre must show deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel’s strategic choices, if made with knowledge of the facts and law are virtually unchallengeable. *Id.* at 690-91. To establish prejudice, Aguirre must show a reasonable probability that but for counsel’s unprofessional errors, the result of the trial would have been different. A reasonable probability is one that undermines our confidence in the outcome. *Id.* at 694.

¶11 Kachinsky's failure to interview and call Hernandez and Aguirre's character witnesses, and his failure to arrange for Lewis to testify in street clothes constitute deficient performance, and the cumulative effect of these errors undermines our confidence in the outcome. Kachinsky cannot reasonably claim to have decided strategically to forego interviewing these witnesses. See *State v. Thiel*, 2003 WI 111, ¶40, 264 Wis. 2d 571, 665 N.W.2d 305. A strategy uninformed by facts is not a reasonable strategy. Hernandez's testimony refuting Mary's claims of threats and battery by Aguirre may have prompted jurors to question Mary's credibility. See *State v. Jeannie M.P.*, 2005 WI App 183, ¶12, 286 Wis. 2d 721, 703 N.W.2d 694. The record provides no rational reason to downplay the events in the apartment and focus on the assault itself. Mary's testimony intertwined the events. Her alleged fear of Aguirre was based on his actions and threats at the apartment. Evidence that would challenge Mary's credibility should have been presented to the jury.

¶12 The State notes that Hernandez had seven prior convictions and was intoxicated on the night in question, he was not a neutral witness because he was one of those who allegedly threatened Mary, and his knowledge of the events of that evening was limited to things that happened at the apartment. While these factors may adversely affect Hernandez's testimony, the jury should have been given an opportunity to measure his credibility against Mary's. Mary's failure to report the alleged assault at the gas station while Aguirre was using the restroom and her walking past the hospital on the way back to the apartment without reporting the assault create questions about her credibility that might cause the jury to more favorably consider Hernandez's testimony.

¶13 Kachinsky's failure to interview and call Aguirre's character witnesses also constitutes deficient performance and undermines our confidence in

the outcome. The trial court stressed “the bombastic statement given by Mr. Aguirre concerning his sexual prowess,” as justification for failing to call the witnesses who would have testified that Aguirre was not sexually aggressive. Aguirre’s alleged sexual prowess is not inconsistent with his character witnesses’ testimony that he was a gentle, law-abiding person and was not sexually aggressive.

¶14 The State argues that none of the four potential character witnesses had direct knowledge of what happened after Aguirre and Mary left the apartment. By its very nature, character evidence is not direct evidence. The State also notes that Mary’s story is supported by physical evidence. Aguirre’s testimony is also consistent with the physical evidence, even if his initial statement to the police is not. The State argues that Aguirre’s character toward women who are his friends and potential girlfriends was not at issue, but only whether he was sexually aggressive toward a woman he was not dating and barely knew, such as Mary. That distinction could have been considered by the jury, but does not render the proffered character evidence so weak as to render harmless Kachinsky’s failure to interview and call the character witnesses.

¶15 Finally, Kachinsky’s failure to arrange for Lewis to testify in street clothes constitutes deficient performance and undermines our confidence in the outcome. Although the jury was informed that Lewis had been convicted of nine crimes, there was no basis for further undermining her credibility by having her testify in jail attire. Lewis’s testimony that Mary told her the accusations were false was central to the defense. The cumulative effect of Kachinsky’s deficient performance accentuates the prejudice that arises from each of his errors.

By the Court.—Judgment and order reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2005-06).

