

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 23, 2014

Diane M. Fremgen
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. 2013AP1314

Cir. Ct. No. 2010CV577

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. RYON S. REESE,

PETITIONER-APPELLANT,

V.

GREG GRAMS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Columbia County:
DANIEL GEORGE, Judge. *Affirmed.*

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Ryon Reese appeals an order denying his petition for a writ of habeas corpus in which he alleged ineffective assistance of counsel at a probation revocation hearing. His probation was revoked based on a finding that he sexually assaulted a child. He argues that his counsel was ineffective in three

main respects: (1) deciding not to call the victim to testify at the revocation hearing; (2) calling his former wife, the victim's mother, to testify without having personally interviewed her; and (3) using his adult daughter rather than a private detective to gather information.¹ Because we conclude that Reese failed to establish deficient performance or prejudice from his counsel's performance, we affirm the order.

BACKGROUND

¶2 In 1995, Reese was placed on probation for sexual assault of a child. In 2004, allegations emerged that he had additional sexual contact with the same victim. At the revocation hearing, his probation agent presented documentary evidence including the victim's written statement about having been sexually assaulted by Reese. A police officer who investigated the allegations also submitted a child advocacy center video interview of the victim. In the interview, the victim detailed sexual abuse by Reese. The officer also testified that officers conducting a search of the home of Reese and his former wife found dildos that matched the victim's descriptions. The officer further testified that both Reese's then wife and the victim reported that he said the same thing while performing anal sex on each of them, "Take it like a woman."

¶3 Reese's attorney called several witnesses at the revocation hearing, including neighbors, Reese's older daughter, his former wife, and Reese. The

¹ Reese also faults his attorney because she lacked experience in probation revocation proceedings. Lack of experience does not constitute deficient performance. Reese also notes his repeated requests for appointment of counsel. He has no constitutional right to counsel in a habeas corpus proceeding. *State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶18, 290 Wis. 2d 352, 714 N.W.2d 900.

neighbors and Reese's older daughter testified that they had never seen any indications of sexual abuse of the victim. His former wife also denied witnessing any sexual abuse. However, on cross-examination, she admitted that Reese told her to "Take it like a woman." Reese testified on his own behalf, denying the allegations.

¶4 Reese unsuccessfully challenged the revocation via certiorari in the circuit court and on appeal. Five years after the revocation, he filed the present habeas corpus petition alleging ineffective assistance of counsel. His attorney at the revocation hearing was the only witness called at the *Machner*² hearing. Counsel explained her decisions not to call the victim to testify, to calling Reese's former wife to testify, and to use Reese's adult daughter to gather information. The circuit court denied Reese's petition, concluding that his attorney had made strategic decisions reasonably based on the circumstances at the time and therefore the attorney was not constitutionally deficient.

DISCUSSION

¶5 To establish ineffective assistance of counsel, Reese must show both deficient performance and prejudice. *State v. Balliette*, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334. Counsel is not required to act perfectly, but is only required to be reasonably effective. *Id.*, ¶22. The analysis is not based on hindsight, and performance is not deficient solely because the defense proved unsuccessful. *Id.*, ¶25. Even decisions made with less than thorough investigation can be sustained if reasonable, given the strong presumption of effective assistance

² *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

and deference to reasonable strategic decisions. *Id.*, ¶26. Deficient performance is judged objectively. *State v. Jackson*, 2011 WI App 63, ¶9, 333 Wis. 2d 665, 799 N.W.2d 461. Therefore counsel’s thought process does not matter as long as the conduct falls within what a reasonably competent defense could have done. *Id.* To establish prejudice, Reese must show a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *See Balliette*, 336 Wis. 2d 358, ¶24. A reasonable probability is one that undermines our confidence in the outcome. *Id.*

¶6 Reese’s counsel’s decision not to call the victim to testify did not constitute deficient performance. The video of the victim’s interview was recorded a few months before the revocation hearing. Reese concedes that the video was properly admitted into evidence regardless of whether it was hearsay. Counsel explained that she hoped to “chip away” at the victim’s credibility by attacking inconsistencies in the video interview, and by calling into question the victim’s motive by relying on testimony from other people. Counsel believed that she had a better chance of discrediting the victim based on the video without giving her an opportunity to explain away any inconsistencies.

¶7 Counsel elicited testimony from Reese’s former wife that she had a vendetta against him and wanted him gone, and that Reese was a disciplinarian who upset the victim, giving her a motive to lie. Counsel called into question the victim’s statements that Reese had purchased a pool and a horse for her as payoffs for tolerating sexual abuse. Reese’s attorney elicited statements from his former wife suggesting that the pool and horse were purchased for other reasons. Counsel’s decision to chip away at the victim’s statement and not give the victim an opportunity to explain inconsistencies is an approach a reasonably competent attorney could employ. That it was ultimately unsuccessful and that other possible

strategies could have been used does not establish deficient performance. Reese appears to believe that calling the victim as a witness would have established that she was intimidated into making the accusations in the video interview. However, the alleged intimidation, regarding the victim's ability to stay in the household, occurred only after the victim reported the sexual assault allegations to a counselor and a Department of Corrections employee. Counsel's decision not to call the victim to testify regarding intimidation was not deficient.

¶8 Counsel's decision to call Reese's former wife without personally interviewing her also did not constitute deficient performance. Reese contends that, had his attorney interviewed his former wife and learned of potentially damaging testimony, the attorney would not have called her as a witness. That argument fails for several reasons. First, Reese wrongly assumes that a personal interview was the only way to determine what his former wife might say. Counsel explained that she consulted with Reese and read statements and police and probation records to determine what the witness would say. Second, counsel had made a strategic reason to call Reese's former wife regardless of the potentially damaging testimony. The most damaging testimony, his use of the phrase "Take it like a woman," was already disclosed by previous witnesses. On the other hand, the former wife was the only potential source of (1) her testimony that she had never come across a situation of the victim and Reese being in any "compromising position," even though she lived in the same household, (2) her description of Reese as the disciplinarian, and (3) her contradiction of the victim's statements that Reese bought the pool and horse as payoffs for tolerating sexual abuse. Without her testimony, Reese was left with little more than his own denials. Denying the victim the opportunity to explain inconsistencies and calling Reese's

former wife to reveal the inconsistencies constituted two sides of the same, reasonable strategy.

¶9 Counsel's reliance on Reese's adult daughter for information gathering did not constitute deficient performance. Counsel explained that she found Reese's older daughter to be "bright and articulate" and capable of tracking down information. The circuit court found that Reese's older daughter was effective under the circumstances. Her familiarity with relatives and neighbors and her apparent motivation to assist her father support counsel's decision to use her to assist in the investigation.

¶10 Reese cites to the administrative code provisions requiring licensing for private detective agencies. Those provisions set the requirements for persons seeking to hold themselves out as private detectives for hire. They do not prohibit an attorney from using a family member to assist in an investigation.

¶11 Finally, as to each of Reese's allegations, he fails to establish prejudice. The evidence from the victim's videotaped interview, the testimony of the investigating officer and probation agent, and the exhibits made a strong case against Reese. There is no reason to believe that a different strategy by his counsel would have affected the result. Reese does not show that the victim would have disavowed her claim of sexual abuse if called to give live testimony. He fails to identify any prejudice from his former wife's testimony because her most harmful statements were already introduced through other witnesses and he identifies no alternative, effective way of attempting to undermine the victim's statements. None of the alleged deficiencies in his counsel's performance undermine our confidence in the outcome.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5. (2011-12).

