

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 5, 1996

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. 96-0862-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JONATHAN C. GARCIA,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Brown County: PETER J. NAZE, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Jonathan Garcia appeals a conviction of three counts of first-degree sexual assault of a child and an order denying postconviction relief. Garcia contends that he was denied due process when the State failed to disclose exculpatory evidence in its possession. Garcia further alleges that he did not receive effective assistance of counsel because of his counsel's failure to impeach the credibility of the State's witness with the two prior convictions that the court ruled admissible; failed to introduce a 1984 conviction for child abuse of the victim's mother in furtherance of Garcia's theory that the child was intimidated into testifying falsely against Garcia; failed

to conduct a sufficient investigation to discover various exculpatory records in possession of the department of social services; and failed to call an alibi witness to establish that he did not reside in the household with the victim during the summer months when the alleged sexual assault occurred. Because we conclude the exculpatory evidence was not in the exclusive possession of the prosecution and was known by Garcia at the time of trial, and that counsel was not ineffective, the judgment of conviction is affirmed.

Garcia asserts that the State's failure to voluntarily produce two records located in the Department of Social Services violated Garcia's right to exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963). The social services' records Garcia contends the prosecution should have disclosed include a 1985 report showing the victim was in foster care during that year, and a social services' interview of the victim in which she alleged that Garcia engaged in sexual intercourse with her. We conclude that the social services' record demonstrating that the victim was in foster care in 1985 was not known by the prosecution to be exculpatory until the victim testified at trial that she had been a resident of her mother's household during that year. It was only after such testimony that the record may have been relevant to impeach the victim's contention in regard to her residency in her mother's household several years prior to the alleged sexual assault.

Garcia also contends that the social services' records would have demonstrated that when first reporting the sexual assault the victim contended that Garcia had engaged in sexual intercourse with her. At the time of trial, however, the victim testified that Garcia engaged in sexual contact and denied that the sexual conduct included sexual intercourse.

The assertion that the State's failure to produce the social services' records is a violation of *Brady* must fail for two reasons. First, the information Garcia sought was contained in social services' records. As a result, Garcia had the right to obtain such records, but made no effort to obtain the records. Accordingly, we cannot conclude that the records were in the exclusive control of the prosecution, which is an essential element of the *Brady* requirement that the prosecution produce potentially exculpatory evidence.

More importantly, information contained in the records was fully known by Garcia at the time of trial. He obviously was aware of the victim's residence in 1985 because he was residing with the victim's mother during that period of time. He could have impeached the victim based upon a myriad of evidence available to Garcia, including his knowledge that her testimony that she was a resident of her mother's household during that time was erroneous. Garcia cannot contend that the failure to produce one piece of evidence that could have been used to impeach the victim is a denial of due process when a variety of other impeaching evidence was readily available, including the mother's testimony, the supervising social worker's testimony and Garcia's own testimony.

The record discloses Garcia was also well aware of the nature of allegations made in the first interview. Indeed, his counsel cross-examined on the discrepancy between the sexual conduct alleged in the initial interview and the sexual conduct described in the victim's testimony during trial. Because he had a fair opportunity to impeach the victim based upon this discrepancy, he cannot now claim that the failure to produce the written records he made no independent effort to obtain somehow denied him his right of due process.

Next, Garcia contends that he was denied the effective assistance of counsel because: (1) Counsel failed to impeach the victim's mother by demonstrating that she had two prior criminal convictions that the trial court determined to be a proper basis of impeachment prior to trial; (2) counsel failed to introduce the mother's 1984 conviction of child abuse in support of Garcia's theory that victim's mother had intimidated the victim into falsely testifying because her mother was retaliating against Garcia for his abuse of her; (3) counsel failed to obtain social service's records demonstrating that the victim was in foster care in 1985, a contradiction of her trial testimony that she was a resident of her mother's household at that time, and the initial interview of the social worker in which the victim indicated sexual intercourse had occurred with Garcia contrary to her trial testimony regarding the sexual contact; and (4) an "alibi" witness was available that would have demonstrated that Garcia was not a member of the household in which the victim resided during a portion of the summer when the sexual assault occurred, despite the testimony from other witnesses that he was.

Allegations of ineffective assistance of counsel are analyzed under the doctrine of *Strickland v. Washington*, 466 U.S. 668 (1984). To establish ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that counsel's errors or omissions were prejudicial to the defense. *Strickland*, 466 U.S. at 694; *State v. Pitsch*, 124 Wis.2d 628, 640-41, 369 N.W.2d 711, 718 (1985). Even if counsel's performance was deficient, if a defendant is not prejudiced by such deficiencies, the conviction will not be reversed for ineffective assistance of counsel. See *Pitsch*, 124 Wis.2d at 641-42, 369 N.W.2d at 718-19. Reversal is required only if counsel's performance was so deficient or prejudicial as to undermine this court's confidence in the outcome. *Id.* This is a question of law subject to de novo appellate review. *State v. Johnson*, 153 Wis.2d 121, 127-28, 449 N.W.2d 845, 848 (1990). Further, when reviewing this question, it is necessary to avoid the distorting effects of hindsight and accord deference to trial counsel's strategic decisions. *Strickland*, 466 U.S. at 680-82.

We conclude that none of the allegations of ineffective assistance of counsel meet the necessary burden. While counsel acknowledged his failure to impeach the mother's testimony by demonstrating she had two prior criminal convictions, we cannot conclude that Garcia was prejudiced by this omission. First, the mother was not an eyewitness to the charged offense and, therefore, her credibility is not essential to the jury's determination. Moreover, defense counsel attempted to impeach the mother on a variety of other issues. The existence of the other prior convictions based upon the totality of the cross-examination of this witness is not so serious as to cast doubt on the outcome of the trial.

The 1984 conviction of the mother for child abuse was so remote that it is unlikely that the court would have admitted the evidence as it relates to an alleged intimidation during the time of trial. The suggestion that the mother intimidated the child in order to advance her own retaliation against Garcia can be made based upon the parental relationship without demonstrating the fact that the child abuse occurred nine years previously. This is particularly true given the tender years of the child. Also, there was no indication that the child was in fear of physical abuse from her mother at or immediately before this trial. We, therefore, conclude that counsel's assistance was not ineffective for failing to impeach the victim's mother with her previous convictions.

As indicated in our previous discussion, the social service's records were not essential to Garcia's defense. The evidence reflected by the records was well known by Garcia at the time of trial and indeed the difference in the child's description of the sexual conduct that occurred from reporting to trial was used by defense counsel during his cross-examination of the victim. The report would have only marginally affected the cross-examination of the witness because the nature of the information in the report was already before the jury.

Finally, counsel indicated that he failed to produce the alibi witness for strategic reasons. Counsel did not want to risk opening the door for evidence that Garcia had physically abused the victim's mother during that same period of time. Strategic decisions by counsel are entitled to deference and counsel's decision not to open the door was certainly a reasonable basis for calling a witness whose testimony was only tangentially relevant. This witness could not testify that the sexual assault did not occur, but only that he was not a resident of the household during the time in which he was alleged to be. The fact that he was in the household at various times during this period was not denied, so the testimony was insufficient to demonstrate that Garcia did not have the opportunity to engage in the alleged sexual assaults.

Finally, Garcia argues that this court should exercise its power of discretionary reversal pursuant to § 752.35, STATS., and order a new trial because the real controversy was not fully tried. Because we believe the real controversy was fully tried, we decline to exercise our discretionary power in this case. Because we conclude that there was no violation of Garcia's right to due process based upon the prosecution's failure to produce exculpatory evidence and that Garcia was not denied the effective assistance of counsel, the judgment of conviction and sentence imposed are affirmed.

By the Court.—Judgment and order affirmed.

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