

**COURT OF APPEALS
DECISION
DATED AND FILED**

DECEMBER 2, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 97-0680-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KENNETH D. PAULSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County:
ERIC J. WAHL, Judge. *Affirmed.*

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

CANE, P.J. Kenneth Paulson appeals an order denying his motion for a new trial. He claims he is entitled to a new trial because he was denied effective assistance of counsel and because the real controversy in his case has not been fully tried. We reject Paulson's claims and affirm the trial court's order denying a new trial.

BACKGROUND

After trial to a jury, Paulson was convicted of three counts of second-degree sexual assault, contrary to § 940.225(2)(a), STATS.; one count of disorderly conduct, contrary to § 947.01, STATS.; and one count of bail jumping, contrary to § 946.49(1)(a), STATS. The State presented testimony from the victim, Cynthia Hopf; her boyfriend, Dennis Smith; and two police officers. Two defense witnesses also testified.

Hopf testified essentially as follows: On September 24, 1995, after having three or four drinks at her apartment, she went to the Barstow Tap with Smith. They had an argument there, and she left and went to Mr. A's bar. There she met Paulson, a person previously unknown to her. She left Mr. A's at closing time to look for Smith. At that time, Paulson told her he had found a ride for them. Hopf rode with Paulson and four other individuals she did not know to a residence on Fourth Street in Eau Claire.

Hopf testified the first sexual contact took place on the enclosed porch area of the Fourth Street residence. She remembers Paulson pushing her to the floor, kissing her on the mouth and breasts, and touching her breasts while pinning her arms down. She was crying, asking him not to do it and to stop. She said Paulson remarked to her that he had recently gotten out of prison and that he was "packing." She understood that to mean he had a weapon.

Hopf and Paulson left the Fourth Street residence and walked toward Hopf's residence on Second Street. Paulson had stopped the sexual contact on the porch when Hopf told him that they should go to her apartment because it would be warmer and more comfortable there. She believed if she could return to her

apartment, she could prevent further contact with Paulson because Smith lived in an apartment in the same building, and he would intervene in the situation.

Two similar episodes of sexual contact occurred between Hopf and Paulson before reaching Hopf's apartment. Hopf entered Smith's apartment and introduced Paulson. The two men spoke in Smith's apartment while Hopf went upstairs to her apartment. Smith then entered Hopf's apartment, at which time Hopf told Smith what had happened. Smith began conversing with Paulson, who was at the bottom of the stairs. Paulson went upstairs. He and Smith argued, began to struggle, and eventually, both men fell out of a second-story window.¹

Paulson's counsel tested Hopf's credibility on cross-examination by asking her questions that established that she had lived in the same apartment for twelve years; she had an off-and-on relationship with Smith; if Smith was intoxicated, she did not feel safe around him; and that her trial testimony conflicted with statements she made to the police on September 24, 1995, and at the preliminary hearing. Counsel also questioned Hopf about the reasonableness of her belief and fear that Paulson had a weapon.

At the postconviction motion hearing on January 29, 1997, defense counsel, William Schembera, testified that the defense theory centered on Hopf's credibility, the reliability of her account, and her motive to fabricate the incident to avoid damaging her relationship with Smith. Schembera testified that he was

¹ Additional facts about the events that took place at the residence after the police arrived, as well as at the hospital, are not included here as they are not relevant to the issues on appeal.

unaware of Smith's criminal history.² Although he contacted the Criminal Investigation Bureau (CIB), he had received no information on Smith. Schembera believed if that information had been known to him at trial, it was reasonably probable the outcome would have been different. He thought evidence that Smith had been charged with disorderly conduct and intentional causation of bodily harm to a child was important in discrediting Smith's credibility. In addition, he believed the modified no-contact order lent significant support to the theory that Hopf would go to great lengths to protect her relationship with Smith.

Postconviction counsel, Norman Singleton, was prepared to present testimony of Ann Nicolai-Henning, Julie Erickson and Robert Erickson by telephone. The court, however, chose to accept their affidavits, as well as Paulson's, as an offer of proof. The court also accepted Singleton's affidavit and statements to the court as an offer of proof of Debra Johnson's testimony. The court denied Paulson's motion for a new trial, finding that counsel's representation was not ineffective, and that the real controversy had been fully tried. This appeal followed.

INEFFECTIVE ASSISTANCE OF COUNSEL

Paulson claims the trial court erred by denying his postconviction motion for a new trial based on a claim of ineffective assistance of counsel. He asserts that counsel's performance was deficient because he failed to fully

² Two exhibits were presented at the postconviction motion to establish Smith's criminal record. The first exhibit is a criminal complaint issued in December 1993, charging Smith with one count of disorderly conduct and one count of intentional causation of bodily harm to a child. The second exhibit is a copy of the court's minutes from December 29, 1993, modifying the conditions of Smith's bond to allow contact with Cynthia Hopf away from her residence and outside the presence of her son Dustin. Postconviction counsel Norman Singleton's affidavit indicates Smith pleaded guilty to disorderly conduct and was placed on probation for one year.

investigate the case, failed to call critical witnesses at trial, and failed to properly advise him of his right to testify in his own defense. He contends that but for these deficiencies, individually and cumulatively, the likelihood of conviction would have been substantially less.

In reviewing a trial court's decision on a claim of ineffective assistance of counsel, we accept its findings of fact unless they are clearly erroneous. Section 805.17(2), STATS. However, the determination whether counsel's performance was deficient and prejudicial we review de novo without deference to the trial court's decision.³ *State v. Johnson*, 153 Wis.2d 121, 127-28, 449 N.W.2d 845, 848 (1990). In order to prevail on a claim of ineffective assistance of counsel, Paulson must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984).⁴ Paulson must show that counsel's performance was deficient and that it resulted in prejudice to the defense. *See id.* We may address the tests in the order we choose. If he fails to establish prejudice, we need not address deficient performance. *State v. Sanchez*, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996).

1. Failure to Investigate

Paulson contends counsel was deficient for failing to demand Hopf's medical records and physical evidence, such as her clothing or photographs; for failing to personally inspect and familiarize himself with the geographical layout

³ Because we determine the deficiency and prejudice components de novo, we do not address Paulson's claims that the trial court was not impartial and applied an erroneous legal standard.

⁴ Wisconsin has adopted the analysis in *Strickland v. Washington*, 466 U.S. 668 (1984), for reviewing ineffective assistance of counsel claims. *State v. Sanchez*, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996).

of the vicinity of the events; and for failing to discover the existence of Smith's criminal charge. He claims he was prejudiced by these failures because counsel could not effectively attack Hopf's credibility.

In order to prove deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. In reviewing counsel's performance, we judge the reasonableness of counsel's conduct based on the facts of the particular case as they existed at the time of the conduct, and determine whether, in light of all the circumstances, the omissions fell outside the wide range of professionally competent representation. *Id.* at 690.

Schembera testified that he received discovery from the district attorney's office pursuant to its open records policy. Based on his experience with that office, he believed he had been given all pertinent records. He did not think it was necessary to demand medical records or physical evidence because no issue existed about any physical evidence of sexual contact or any bruising or torn clothing.

Paulson suggests a personal inspection of the neighborhood was crucial to effectively refute Hopf's testimony about the location of the assaults, the distance between the Fourth Street residence and her apartment, and landmarks in the area. Schembera testified he did not believe it was necessary to personally inspect the location of the alleged assault. Based on the fact that the parties essentially agreed that Hopf was intoxicated and confused about her location, he felt he was adequately prepared to cross-examine her regarding her recollection of the events and the location of the assaults. The record shows Schembera did, in fact, inquire into these areas.

"[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 691. Schembera's professional opinion, based on his familiarity with the facts of the case, his assessment of the credibility of the victim, and the strength of the State's case, was that it was unnecessary to demand medical or physical evidence or to personally view the vicinity of the alleged assaults. Counsel's decisions were strategic in nature and had a reasonable basis under all of the circumstances; his decisions not to pursue avenues now suggested by Paulson do not constitute deficient performance. We need not visit whether Paulson's defense was prejudiced since we determine counsel's performance was not deficient. *See Sanchez*, 201 Wis.2d at 236, 548 N.W.2d at 76.

Paulson also asserts that counsel's failure to discover Smith's 1993 criminal charge was deficient performance. Schembera testified that he "wrote to the Criminal Information Bureau for Mr. Smith's record and this did not show up on the record check that I had." Smith's record apparently was available through the Eau Claire criminal records and was obtained in that fashion by postconviction counsel Singleton. Schembera believed this information would have been useful in discrediting Smith's credibility. He believed the modified no-contact order significantly supports the defense theory that Hopf fabricated the assault to protect her relationship with Smith. The omission of this evidence undermined Schembera's confidence in the reliability of the trial.

Paulson focuses his argument on establishing the prejudice prong of the *Strickland* test. Our focus, however, is whether counsel's performance was deficient. Schembera attempted to locate a criminal record for Smith. Assuming that such an investigation was appropriate under the facts of this case, his request from the CIB was reasonable. There is nothing in the record to suggest that

Schembera should have pursued further investigation, exhausting every possible source for information. He had no reason to doubt the reliability of the CIB information, and ending his investigation at that point was within the realm of reasonable professional decision-making. Therefore, his failure to discover Smith's criminal history was not deficient performance. Since Paulson fails to establish the deficient performance prong, we need not address whether the introduction of Smith's criminal record may have had bearing on the outcome of the trial. *See Sanchez*, 201 Wis.2d at 236, 548 N.W.2d at 76. In summary, Paulson's claims of ineffective assistance of counsel for failure to demand medical and physical evidence, failure to investigate the vicinity, and failure to discover a criminal charge against a State's witness must fail because they do not meet the deficient performance prong of *Strickland*.

2. Failure to Call Witnesses

We next address Paulson's claim of ineffective assistance of counsel based on failure to call witnesses. Paulson claims counsel's performance was deficient because he failed to contact and call critical witnesses, including Ann Nicolai-Henning, Robert Erickson, Julie Erickson, and Debra Johnson. He asserts testimony from these witnesses would have established that the first assault could not have occurred at the time and place Hopf alleged and would have seriously discredited her account of the events surrounding the series of assaults.

At the postconviction motion, the court considered affidavits in support of Paulson's claim of ineffective assistance of counsel. Nicolai-Henning states she was not contacted by counsel prior to trial. She would have testified that she stayed at the Fourth Street residence on September 24, 1995; she was not certain whether she was awake at 3 a.m. on that date; that she slept in a location

adjacent to the porch; and that she did not hear any conversation or sounds of physical activity coming from the porch area. Paulson suggests Nicolai-Henning's testimony would have discredited Hopf's account of the first assault on the porch.

Julie Erickson would have testified that on September 23, 1995, at Mr. A's bar, Paulson pointed out a woman who had been following him around and would not leave him alone. Ms. Erickson believed the woman to be Hopf. Paulson maintains this evidence would show that Hopf was interested in him and had pursued him earlier in the evening.

If Robert Erickson had testified, he would have related that, sometime following September 24, 1995, Hopf told him that she did not intend to get Paulson in trouble and asked Erickson to tell Paulson she was sorry. Erickson indicates he was available to testify at the trial but was not contacted. Paulson submits this evidence undermines Hopf's credibility and supports his theory that Hopf fabricated her story to protect her relationship with Smith.

Debra Johnson would have testified that she lived at the Fourth Street residence on September 24, 1995; that she arrived at that location by taxi at approximately 2:50 a.m. on that date; that she observed Paulson and a female walking on the sidewalk about a half-block from the Fourth Street residence; that Hopf did not appear to be distressed at that time; and that she did not notice anything unusual about the porch area. Paulson believes this evidence directly contradicts Hopf's testimony and disputes the timeline of events presented by Hopf and Smith. Although counsel was aware of Johnson's willingness to testify and the nature of her testimony, she was not contacted to be a witness for Paulson.

In reviewing a claim of ineffective assistance of counsel, we may avoid the deficient performance analysis if the defendant has failed to show

prejudice. *State v. Wirts*, 176 Wis.2d 174, 180, 500 N.W.2d 317, 318 (Ct. App. 1993). More than mere speculation is required to establish prejudice; the defendant must affirmatively prove prejudice. *State v. Pitsch*, 124 Wis.2d 628, 641, 369 N.W.2d 711, 718 (1985). To establish prejudice under *Strickland*, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome." *Id.* The touchstone of the prejudice component is "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *State v. Smith*, 207 Wis.2d 259, 277, 558 N.W.2d 379, 387 (1997) (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993)).

Paulson argues counsel's failure to call these witnesses constituted deficient performance and that had their testimony been presented, there is a reasonable probability the outcome would have been different. We are not persuaded. The relevance of Nicolai-Henning's testimony is questionable. She cannot remember if she was awake at 3 a.m. on September 24, 1995, and there was no testimony to indicate there was any conversation or physical activity loud enough on the porch to be heard by anyone. Julie Erickson's testimony bears on events that took place well before the assault on the porch, and Hopf did not deny that she was socializing with Paulson at Mr. A's. Paulson suggests Robert Erickson's testimony implies Hopf made up the story. Johnson's testimony as to the time she saw Hopf and Paulson and that there was no appearance of struggle or distress is also not determinative because Hopf's recollection of the time and location of events, by her own admission, were not precise because of her intoxicated state.

Even if relevant, the testimony of the additional witnesses is cumulative in nature and bears on issues the prosecution does not seriously dispute. Paulson has not satisfied his burden of showing a reasonable probability of a different outcome had the additional testimony been presented. Furthermore, we are not persuaded that the absence of testimony from the additional witnesses renders the jury's decision unreliable or the trial fundamentally unfair. We conclude Paulson has failed to establish prejudice as required by *Strickland*, and do not address the issue whether counsel's failure to call additional witnesses was deficient performance.

3. Decision not to testify

Paulson claims counsel's failure to put him on the stand to testify in his own defense was deficient performance and prejudiced his defense. He now asserts he wanted to testify but counsel wrongly informed him of the significance of his nine prior criminal convictions or overestimated the probable impact on the jury, thereby improperly dissuading him from testifying.

Schembera testified about his discussions with Paulson regarding Paulson's waiver of his right to testify. Schembera informed Paulson that he believed Paulson's testimony would be discredited based on his nine prior convictions and would also add credence to Hopf's testimony that she was afraid of Paulson because of his statements that he had recently been released from prison and her belief that he had a weapon. After weighing the advantages and disadvantages of putting Paulson on the stand, Schembera recommended that Paulson not testify. Schembera also recalled that Paulson thought they "were ahead fifteen to four."

Counsel's recommendation to Paulson not to testify was based on consideration of the State's case, Paulson's prior convictions, and counsel's evaluation of the advantages and disadvantages of Paulson's testimony. It was a strategic decision with a reasonable basis. Paulson has failed to demonstrate that counsel's recommendation was deficient performance. We do not address whether Paulson's defense was prejudiced by the absence of his testimony.

NEW TRIAL IN THE INTERESTS OF JUSTICE

Paulson claims he is entitled to a new trial in the interest of justice because the real controversy has not been fully tried. He characterizes the credibility of the victim as the heart of the controversy in his case and argues that the cumulative effect of counsel's omissions at trial prevented Hopf's credibility from being fully tested and, therefore, fully considered by the jury.

Generally, a trial court's denial of a motion for a new trial in the interest of justice will be upheld unless an erroneous exercise of discretion is shown. *State v. Albright*, 98 Wis.2d 663, 674, 298 N.W.2d 196, 202 (Ct. App. 1980). Although Paulson addresses the misuse of discretion issue separately and at length in his initial brief, he apparently does not assert that the trial court exercised its discretion inappropriately; rather, he asks us to exercise our authority under § 752.35, STATS., to grant a new trial in the interest of justice.⁵ We decide the question whether additional witnesses, including Paulson, and investigation

⁵ This position is evidenced in Paulson's reply brief at p. 10 where he states: "Mr. Paulson does not request review of the trial court's decision, but that this Court exercise its own discretionary reversal powers, under § 752.35, Stats., to grant a new trial in the interest of justice."

bearing on the credibility of a victim warrants a new trial in the interest of justice based on an independent review of the record. We conclude it does not.

The court of appeals has discretion to grant a new trial under § 752.35, STATS., if it appears from the record that the real controversy has not been fully tried or there has been a miscarriage of justice. An analysis of whether the real controversy has been fully tried does not include consideration of whether a different result at trial is probable. *State v. Wyss*, 124 Wis.2d 681, 734-35, 370 N.W.2d 745, 770 (1995), *overruled on other grounds by State v. Poellinger*, 153 Wis.2d 493, 451 N.W.2d 752 (1990). If the jury is erroneously deprived of the opportunity to hear important evidence bearing on an important issue, the real controversy may not have been fully tried. *Id.* at 735, 370 N.W.2d at 770. We will exercise our discretionary reversal power only sparingly. *See Vollmer v. Luetz*, 156 Wis.2d 1, 11, 456 N.W.2d 797, 802 (1990).

Both parties agree that Hopf's credibility was the critical issue. Paulson now asserts the real controversy was not fully tried because the jury did not hear testimony bearing on Hopf's credibility. He argues the testimony of the additional witnesses, as well as his own testimony, had direct bearing on Hopf's credibility. Paulson also argues the evidence that was presented to the jury was insufficient because counsel lacked the background knowledge to effectively test Hopf's credibility.

Our review of the record shows the jury had evidence before it bearing on Hopf's credibility. She admitted her recollection of time, location, and events was impaired due to her intoxicated state. Counsel cross-examined her at length about her version of events, her relationship with Smith, her familiarity with the neighborhood, and the reasonableness of her belief that Paulson had a

weapon. We conclude the jury heard sufficient evidence bearing on Hopf's credibility and that the real controversy has been fully tried. We, therefore, decline to exercise our discretionary power to grant a new trial.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

