

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 15, 2003

Cornelia G. Clark
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. 02-2390-CR

Cir. Ct. No. 00-CF-740

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HENRY BLOOMFIELD,

DEFENDANT-APPELLANT.

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

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Henry Bloomfield appeals a judgment convicting him of second-degree sexual assault and felony bail jumping. He also appeals an order denying postconviction relief. He argues that he received ineffective assistance of counsel because his counsel failed to present evidence relevant to his

defense. Because the record fails to demonstrate prejudice, we affirm the judgment and order.

¶2 Bloomfield was a friend of Ashley J.'s parents and was staying at their home. Ashley was thirteen at the time of the assault. The charge stemmed from Ashley's report that while she was at home watching television with two girls for whom she was babysitting, Bloomfield placed his hand under her pants and touched her buttocks and fondled the area of her rib cage near her breast. At that point Ashley jumped away. Ashley immediately went to her parents' bedroom to report the incident and her father ordered Bloomfield out of the house. Her mother called the police, who arrested Bloomfield while he was walking near the home.

¶3 Bloomfield was charged with one count of first-degree sexual assault contrary to WIS. STAT. § 948.02(2). At a pretrial hearing, Bloomfield's defense counsel argued that Ashley's sister had been a victim of a sexual assault. Counsel had a witness who would testify that after the assault, Ashley was overheard saying to her sister "something to the effect, this is my case, you had your case, and butt out." Defense counsel argued that this statement tended to show that Ashley had fabricated the assault to get attention. The trial court disagreed, stating:

[Y]ou may be able to argue that butt out, its my case has some relevance or materiality, but I don't see how you can reach the conclusion that there's any relevancy at all to the fact that the sister was sexually assaulted. It's pure—pure speculation that doesn't even bear any resemblance to the relevancy in terms of the charges against your client. ...

And on that basis there's no relevance, from this Court's perspective, and I'm not going to allow that line of questioning.

¶4 In chambers, five minutes before starting to impanel a jury, defense counsel asked permission to withdraw because Bloomfield expressed dissatisfaction with his representation. The court granted the motion and rescheduled the trial for a later date.

¶5 Bloomfield obtained a second defense attorney. At the two-day jury trial, Ashley testified that while she was lying on a pull-out couch watching television, Bloomfield “started touching my back” under her shirt and “then he would go along the side of my breasts” and touched her buttocks under her pants.

¶6 On cross-examination, defense counsel asked whether “this story that you’re telling about him touching your back and your butt and your rib cage is something you made up because you were mad at him?” Ashley answered “No.” Counsel also asked: “Isn’t it true that you thought about this idea of telling people that he touched you when you thought about your sister and an event of sexual contact that she had?” Ashley responded that she did not make up anything.

¶7 One of the children for whom Ashley was babysitting testified that she saw Bloomfield touching Ashley’s back inside her shirt near her belt. She did not see his hand below the belt level. She did not watch him the whole time, but saw Ashley jump up from the couch. Ashley went into her parents’ bedroom and came out crying. The other child testified that she saw Bloomfield touch Ashley’s back near her belt.

¶8 Defense counsel elicited evidence that Ashley resented Bloomfield because he had discussed discipline with Ashley’s parents, including boot camp. Also, Ashley indicated that she was mad at Bloomfield for disappointing her with some birthday plans they had talked about. At closing, defense counsel pointed to inconsistencies and contradictions in the testimony. He argued that the record

indicated Ashley liked attention, was angry with Bloomfield and fabricated the assault to her parents and the two children.

¶9 The jury returned a guilty verdict and Bloomfield was convicted and sentenced to twenty years, consisting of fifteen years' confinement and five years' extended supervision. At the postconviction hearing, Bloomfield argued that defense counsel failed to present evidence showing that Ashley lied about the assault. Bloomfield relied on a note from his first defense counsel's file, stating:

On November 14, 2000, I called Jodi Steel at her residence. Jodi had overheard a comment made by Ashley to Toni. Jodi said, Toni was getting nosey and she wanted to know what was going on with Ashley and [Bloomfield]. Ashley told Toni to stay out of her business because she couldn't be part of her deal when she had hers, so Toni can't be part of Ashley's.

Jodi said, Ashley is always seeking out attention. Jodi gets the feeling that Ashley always wants to be the center of attention.

Bloomfield claimed counsel should have asked Ashley the following questions:

Was your sister, Toni, the victim of a sexual assault?

Did she receive a lot of attention from that?

You like to get attention. Didn't you make this up because you wanted the same kind of attention that Toni got?

The court ruled:

Even if the "butt out" statement had been in the record ... it would not have mattered in this case.

....

I can't imagine ... there being a different result simply because of that "butt out" statement. ... It wasn't significant in relationship to the overall presentation here. It didn't matter in terms of the ultimate result.

The court denied Bloomfield's postconviction motion and this appeal follows.

¶10 Bloomfield argues that his defense counsel was ineffective because he failed to introduce exculpatory evidence supporting his defense. He claims that defense counsel failed to inform the jury that Ashley had a motive to fabricate in order to get attention like Toni did when she was a crime victim. He claims the question defense counsel asked Ashley about making up the story was vague and confusing. He summarizes his argument:

Trial counsel knew that Ashley liked to get attention and he argued this to the jury. However, he did not establish that before the jury, nor tie it to a motive to falsely accuse Bloomfield. He did not establish that Toni was the victim of a crime, that as a result, Toni received much attention and that Ashley was excluded from Toni's "deal." He did not introduce Ashley's statement to Toni "to stay out of her business because she couldn't be part of her deal when she had hers, so Toni can't be part of Ashley's."

¶11 We are unpersuaded. In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court established a two-pronged test to determine whether counsel's assistance was ineffective. *State v. Golden*, 185 Wis. 2d 763, 770, 519 N.W.2d 659 (Ct. App. 1994). "The first prong requires the defendant to show that counsel's performance was deficient." *Id.* The second prong requires a showing that the deficient performance prejudiced the defense so that the result of the trial cannot be said to be reliable. *Id.* "Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* (quoting *Strickland*, 466 U.S. at 687). "Additionally, if a defendant fails to sufficiently demonstrate one prong, we need not review the other prong." *Id.*

¶12 Here, the record fails to support a finding of prejudice. The record contains only a note from the first attorney's file. It does not contain Jodi Steele's

testimony. Also, the record fails to establish whether the answers Ashley would have given to the proposed line of questioning would have been favorable to the defense. In addition, Bloomfield fails to adequately address the admissibility of the proposed testimony. The court's ruling indicates that it would have been largely excluded.

¶13 Finally, we agree with the trial court's ruling that the result of the trial cannot be said to be unreliable. Had the proposed testimony been admitted, there is an inadequate showing that it would have had any effect on the result. The anticipated testimony is capable of more than one interpretation. For example, a reasonable inference from Ashley's alleged desire not to have her sister interfere could have been due to feelings of shame and embarrassment resulting from the incident, not because she wanted attention. Because it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable, Bloomfield's ineffective assistance of counsel claim fails.

By the Court.—Judgment and order affirmed.

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

