

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 30, 2008

David R. Schanker
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. 2008AP177-CR

Cir. Ct. No. 2006CF516

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL D. BOLSTAD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: ROGER W. LEGRAND and RAMONA A. GONZALEZ, Judges. *Affirmed.*

Before Vergeront, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Daniel Bolstad appeals a judgment convicting him of attempted second-degree sexual assault. He also appeals an order denying his motion for postconviction relief. The issues are whether he received effective

assistance from trial counsel, and whether we should exercise our discretion to grant him a new trial in the interest of justice. We affirm on the first issue, and deny his request for a new trial.

¶2 The State alleged that Michelle S. was the victim of Bolstad's attempted assault. At Bolstad's jury trial, Michelle testified that on the night of June 20, 2006, Bolstad and Jason Conry were guests at her house. She went to her bedroom and fell asleep, and later woke up with Bolstad in her bed, attempting to sexually assault her. Conry testified that after Michelle went to bed he and Bolstad went out into the yard to smoke. Bolstad then returned to the house and locked Conry out. Michelle and Conry testified that they and Bolstad were the only adults present at the residence until after the attempted assault. Michelle's sister, Christina Lorenz, lived across the street, and corroborated much of Michelle's and Conry's testimony, including their assertion about who was present during the described events.

¶3 Bolstad testified that he did not attempt to assault Michelle. He also testified that a man named Todd Mitchell, the father of Lorenz's children, was present, along with Lorenz, Conry, and one other man, on the night of the assault. He also testified that earlier in the day Mitchell and a social worker had been at the house at the same time. Michelle testified that Mitchell had not been present at her house that day. Mitchell was not available to testify, and did not appear at the trial. Bolstad presented no other witnesses to corroborate his testimony concerning Mitchell's presence. In closing arguments, the prosecutor argued that Bolstad lied about Mitchell's presence, and this lie was an indication that Bolstad also lied when he denied the attempted assault.

¶4 After Bolstad’s conviction, he filed a postconviction motion alleging ineffective assistance of trial counsel. He claimed that counsel should have called as witnesses the social worker who was present at Michelle’s residence on the afternoon of the assault, and Michelle’s mother, because both could have corroborated Bolstad’s testimony concerning Mitchell’s presence on the scene. He also alleged that counsel should have called witnesses to testify as to Michelle’s reputation for untruthfulness.

¶5 At the hearing on Bolstad’s motion, trial counsel testified that he had subpoenaed the social worker in question, but decided not to call her as a witness because she had no information specific to the assault, which occurred long after she had left the residence. Counsel also testified that Bolstad gave him the names of witnesses who could have testified as to Michelle’s reputation for untruthfulness. Mitchell was again unavailable to testify. The social worker also did not testify. Bolstad did not call or identify any of the persons whose names he had given to counsel as witnesses willing to testify to Michelle’s reputation for untruthfulness. Bolstad did not pursue the allegation that Michelle’s mother could have testified to Mitchell’s presence.

¶6 The subject of this appeal is the circuit court’s holding that counsel did not provide ineffective representation. To prove ineffective assistance, a defendant must show both deficient performance by counsel and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance consists of specific acts or omissions by counsel that fall “outside the wide range of professionally competent assistance.” *Id.* at 690. To prove prejudice the defendant must demonstrate that those acts or omissions were sufficiently serious to deprive him or her of a fair proceeding and a reliable outcome. *See id.* at 694 (“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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”). Whether counsel's performance is deficient or prejudicial is a question of law that we review *de novo*. *State v. Jeannie M.P.*, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694.

¶7 Bolstad failed to prove either deficient performance by trial counsel, or prejudice. The social worker's only possible value as a witness would have been to bolster Bolstad's credibility, and undermine Michelle's, by corroborating Bolstad's testimony that Mitchell was present at Michelle's residence several hours before the attempted assault. However, Bolstad failed to present any testimony or evidence showing that the social worker would have confirmed Mitchell's presence. Bolstad therefore failed to show that counsel performed unreasonably when he failed to call the social worker as a witness, or that he was prejudiced by her absence from the trial. Likewise, Bolstad failed to prove either the performance or prejudice prong on his claim as to the reputation witnesses counsel failed to call, because he presented no evidence that there were, in fact, any such witnesses available and willing to testify.

¶8 We decline Bolstad's request for a new trial. He contends that we should use our discretionary authority under WIS. STAT. § 752.35 (2005-06)¹ to grant him a new trial, because it is probable that justice has miscarried in his case. We will exercise our discretion to grant a new trial under this section only in exceptional cases. *State v. Cuyler*, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

We will grant a discretionary reversal for a miscarriage of justice only if there is a substantial probability of a different result on retrial. *See State v. Cleveland*, 2000 WI App 142, ¶21, 237 Wis. 2d 558, 614 N.W.2d 543. We conclude that Bolstad has not shown on appeal that there is a substantial probability that a retrial would result in acquittal.

By the Court.—Judgment and order affirmed.

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

