

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 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. 2013AP2409-CR

Cir. Ct. No. 2010CF1097

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH A. JAMES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: ANTHONY G. MILISAUSKAS, Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 REILLY, J. Kenneth A. James appeals from a judgment of conviction for repeated sexual assault of a child and from a postconviction order denying his request for a new trial. James contends that he received ineffective

assistance of counsel when his trial counsel proceeded to trial without a transcript from his preliminary hearing. The circuit court found James's trial counsel to be credible when he testified that James insisted on proceeding to trial despite knowing he could have asked for an adjournment due to the lack of the transcript. We affirm as James has not shown this testimony was incredible and James cannot claim his trial counsel was ineffective for following James's own directive.

BACKGROUND

¶2 James was charged with one count of repeated sexual assault of a child, in violation of WIS. STAT. § 948.025(1)(e) (2011-12),¹ based on three alleged incidents involving M.J. A preliminary hearing was held on August 1, 2011, and trial was set for October 17, 2011. On October 17, James's trial counsel moved for an adjournment on the basis that he needed more time to review discovery. James "reluctantly agreed" to his counsel's request for an adjournment, despite his preference to go to trial. James's trial was rescheduled for November 28.

¶3 Prior to trial, James's trial counsel made multiple unsuccessful requests for the transcript from the preliminary hearing. By the time of the November trial, James still did not have a copy of the transcript. James proceeded to trial without the transcript and was convicted by a jury. James's postconviction counsel filed a motion for a new trial alleging that James's trial counsel was deficient for proceeding to trial without the preliminary hearing transcript and that

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

James was prejudiced by not being able to confront M.J. with statements from the preliminary hearing that were contrary to her trial testimony.

¶4 At a *Machner*² hearing, James’s trial counsel testified that he talked to James before trial about his inability to get the transcript and stated that James told him he did not want another adjournment. Trial counsel testified that James “seemed to understand there were things in the preliminary hearing transcript that could be beneficial to us but he still did not want to have the trial adjourned.” The prosecutor testified that she had a discussion with James’s trial counsel during the trial where trial counsel shared that he had suggested adjournment but that James “was adamant that he did not want another adjournment and that he wanted to proceed to trial and that he, Mr. James, believed that they had sufficient other grounds to impeach [M.J.] even without the preliminary hearing transcript.” James denied that his trial counsel had told him that he could ask for an adjournment to wait for the transcript.

¶5 The circuit court denied James’s motion, finding that the testimony of James’s trial counsel was credible and that James had insisted upon going to trial while knowing the consequences of his decision. The court found that James’s regrets were based on hindsight because he was not happy with the result. James appeals.

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

STANDARD OF REVIEW

¶6 A criminal defendant claiming ineffective assistance of counsel bears the burden of proving that counsel's performance was deficient and that this deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We will not reverse the circuit court's findings of fact as to what happened unless they are clearly erroneous. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Whether counsel's performance was deficient and whether it was prejudicial are questions of law for which we give no deference to the circuit court. *Id.*

DISCUSSION

¶7 James argues that his trial counsel was ineffective for proceeding to trial without a transcript from the preliminary hearing. James points to "inconsistencies" between M.J.'s testimony at the preliminary hearing and at trial and contends that there is a reasonable probability the outcome of the trial would have been different had his trial counsel confronted M.J. with her testimony from the preliminary hearing. Even assuming that M.J.'s testimony differed between the preliminary hearing and trial and that James was prejudiced by not being able to confront her with these inconsistencies, we conclude that James's trial counsel was not deficient as he was following James's directive in proceeding to trial without the preliminary hearing transcript.

¶8 The court made a finding of fact that James's trial counsel credibly testified that he would have requested an adjournment but that James insisted upon proceeding to trial without the preliminary hearing transcript. In order for us to reverse a circuit court's credibility determination, James must convince us that no finder of fact could believe the testimony. *See Teubel v. Prime Dev., Inc.*, 2002

WI App 26, ¶13, 249 Wis. 2d 743, 641 N.W.2d 461 (2001). James has not met this burden. James also argues that even if trial counsel’s testimony is credible, trial counsel admitted to deficient performance in proceeding to trial without a key piece of evidence and that a defendant cannot waive counsel’s deficient performance. We disagree.

¶9 “A defendant who insists on making a decision which is his or hers alone to make in a manner contrary to the advice given by the attorney cannot subsequently complain that the attorney was ineffective for complying with the ethical obligation to follow his or her undelegated decision.” *State v. Divanovic*, 200 Wis. 2d 210, 225, 546 N.W.2d 501 (Ct. App. 1996). “If a defendant selects a course of action, that defendant will not be heard later to allege error or defects precipitated by such action. Such an election constitutes waiver or abandonment of the right to complain.” *State v. Robles*, 157 Wis. 2d 55, 60, 458 N.W.2d 818 (Ct. App. 1990) (citation omitted). The circuit court found that James knew the consequences of proceeding to trial without a transcript from the preliminary hearing and that James chose to go to trial anyway. James cannot now claim his trial counsel was deficient for following his own informed choice because the outcome was not as he hoped.³ *See id.*

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

³ Best practice in a fact situation as presented here is for defense counsel to inform the circuit court of the lack of transcript prior to trial such that the defendant’s knowledge and consent to proceed without the transcript is on the record. The court may also be able to promptly obtain the desired transcript from the reporter.

