

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 4, 2009

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. 2008AP852-CR

Cir. Ct. No. 2005CF463

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MONG LOR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: DALE L. ENGLISH, Judge. *Affirmed.*

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Mong Lor appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. He argues that his trial counsel was ineffective because she did not pursue a cultural marriage defense to the charge of sexual assault of a child. Because we conclude

that Wisconsin does not recognize such a defense in these circumstances, trial counsel is not ineffective for failing to raise it. We affirm the judgment and order.

¶2 Lor was charged with one count of sexual assault of a child under the age of sixteen. His defense at trial was that the victim falsely accused him of sexual assault to retaliate against him for abandoning her. Lor argued that older members of the Hmong families had decided, without consulting him, that he should marry the victim. The victim was fourteen years old at the time. He further argued that when the marriage fell through, she retaliated by accusing him of having sexual intercourse with her. Lor was found guilty.

¶3 After trial, Lor brought a motion for postconviction relief arguing that his trial counsel should have argued a cultural marriage defense. The motion acknowledged that there was no Wisconsin case law on the issue of whether a cultural marriage defense would be viable under these circumstances. At the postconviction hearing, trial counsel testified that she was aware that the victim and Lor may have been married within the Hmong culture. She further testified that they were not married under Wisconsin law. The circuit court denied the motion, concluding that, by statute, no one under the age of sixteen may be deemed married within the State of Wisconsin.

¶4 Lor renews his argument to this court that his trial counsel was ineffective for failing to raise the cultural marriage defense. Although Lor again acknowledges that there is no case law that establishes the defense, he nonetheless states that a cultural marriage defense is available to defend against a claim of sexual assault of a child.

¶5 To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he was

prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. *Id.* at 697. We review the denial of an ineffective assistance claim as a mixed question of fact and law. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). We will not reverse the circuit court's factual findings unless they are clearly erroneous. *Id.* However, we review the two-pronged determination of trial counsel's performance independently as a question of law. *Id.* at 128. If the law is unsettled, then counsel is not ineffective for failing to challenge it. *State v. McMahon*, 186 Wis. 2d 68, 84, 519 N.W.2d 621 (Ct. App. 1994). Further, counsel is not ineffective for failing to make meritless arguments. *State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

¶6 We conclude that, as Lor admits, there is no published law in Wisconsin establishing the defense of a cultural marriage in a sexual assault case. Trial counsel, therefore, was not ineffective for failing to raise a defense that has not been recognized by this State. For the reasons stated, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2007-08).

