

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 27, 2012

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. 2011AP2206-CR

Cir. Ct. No. 2009CM13

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

KAMI L. JENNINGS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Kenosha County:
BRUCE E. SCHROEDER, Judge. *Affirmed.*

¶1 REILLY, J.¹ This case requires us to decide the propriety of the State inquiring into the defendant's belief in reincarnation during her trial. The

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

State inquiry was not proper and we thus affirm the circuit court's decision to grant a new trial.

¶2 Kami L. Jennings was charged with misdemeanor theft—party to a crime, contributing to the delinquency of a child, and receiving stolen property after she allegedly told her nine-year-old daughter Genesis to steal from her ex-husband's wife, Cynthia Troha. Cynthia gossiped to the prosecutor that she heard from Jennings' other daughter, Jade, that Jennings believed her ex-husband's family had persecuted her in previous lives and burned her at the stake. The prosecution bit on the gossip, but never disclosed it to the court or the defense before raising it three times during the trial: during cross-examination of Jennings, during recross-examination of Jennings, and during its closing argument. A jury convicted Jennings of all three counts.

¶3 The circuit court granted Jennings' postconviction motion for a new trial, ruling that the State had a duty under the discovery statute to disclose the information, that the failure to disclose was not based on good cause, and that the error was not harmless. We agree with the circuit court in all respects and also hold that information as to Jennings' belief in reincarnation is inadmissible character evidence.

BACKGROUND

¶4 Jennings and Bradley Troha divorced in 2003 after ten years of marriage. Jennings and Bradley had two children together: Jade, born in 1992, and Genesis, born in 1998. Bradley married Cynthia in 2006.

¶5 Around June 2008, Cynthia noticed money missing from her wallet and suspected that Genesis had stolen it. Genesis eventually told Cynthia that she

had been stealing from her and that Jennings was the one instructing Genesis to steal. As noted above, Jennings was charged.

¶6 At the trial, Genesis testified that Jennings encouraged her to steal from the Trohas every two weeks. Jennings denied ever telling Genesis to steal. During cross-examination, the prosecutor had the following exchange with Jennings:

[PROSECUTOR]: And isn't it true that you feel that the Trohas have [treated you unfairly] in other lives before this one?

[JENNINGS]: Are you asking me if I believe in reincarnation?

[PROSECUTOR]: I am asking that.

[JENNINGS]: I do.

[PROSECUTOR]: And you believe, and you have expressed this thought to others, haven't you, that you believe that the Trohas have been after you or out to get you or harming you in prior lives?

[JENNINGS]: No, I don't talk about the Troha family.

[PROSECUTOR]: Well, did you tell your daughter Jade that you felt that the Trohas have been persecuting you or have been after you in prior lives, in your prior lives, that the Trohas have always been there in your prior lives making your life unhappy?

[JENNINGS]: Yes.

¶7 Shortly thereafter on recross-examination, Jennings contradicted herself when the prosecution returned to the issue of reincarnation:

[PROSECUTOR]: But I'm asking you now about past lives. What do you recall or what do you believe happened in your past lives involving the Trohas?

[JENNINGS]: I don't know.

[PROSECUTOR]: You don't recall telling your daughter that you believed the Trohas were responsible for you being burned at the stake—

[JENNINGS]: No.

[PROSECUTOR]:—in a past life?

[JENNINGS]: No.

[PROSECUTOR]: Do you, in fact, believe that?

[JENNINGS]: No, I have no reason to believe that.

¶8 During the State’s closing argument, the prosecutor argued that Jennings lost all credibility when she could not give a definitive answer on whether she believed the Troha family persecuted her in a previous life. The jury found Jennings guilty on all three counts.

¶9 Jennings filed a motion for mistrial, arguing that her testimony regarding her belief in reincarnation should have been excluded under WIS. STAT. § 906.10, which states that “[e]vidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness’s credibility is impaired or enhanced.” The circuit court denied the motion, stating that Jennings’ belief that she had been persecuted in a prior life was relevant to the issue of her motive. The court withheld sentence and placed Jennings on probation.²

¶10 Jennings subsequently filed a motion for postconviction relief, arguing: (1) the evidence relating to Jennings’ belief in reincarnation violated WIS. STAT. §§ 906.10 and 904.03 (“Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.”); (2) pursuant to WIS. STAT. § 971.23(1)(b) and (7), the State was required to disclose to the defense the fact

² The receiving stolen property charge was dismissed.

that Jennings allegedly told Jade that Jennings believed the Trohas had persecuted her in past lives³; and (3) Jennings received ineffective assistance of counsel.

¶11 At a hearing on the postconviction motion, Jennings' trial attorney testified that the Kenosha County District Attorney's Office has an "open file" policy and that nothing in the State's file disclosed what Jennings allegedly said to her daughter Jade about reincarnation. He stated that if he had been provided with the information he would have brought a motion in limine and may have advised Jennings not to testify. The trial attorney stated that he did not object when the prosecution brought this information to light in its cross-examination of Jennings because "it didn't register with me at the time."

¶12 The circuit court granted the postconviction motion and ruled that the State had a duty to disclose the information about Jennings believing the Trohas had persecuted her and burned her at the stake in a previous life. The court found that the State's failure to disclose was not based on good cause and that the error was not harmless, as the State's possession of Jennings' alleged comments was "like a little storehouse of dynamite" and that "the outcome could well have been influenced by that testimony." While the court stated that it would have

³ WISCONSIN STAT. § 971.23 governs discovery in criminal trials. Section 971.23(1)(b) provides that a district attorney, upon demand by the defendant, must disclose to the defendant "[a] written summary of all oral statements of the defendant which the district attorney plans to use in the course of the trial and the names of witnesses to the defendant's oral statements." Section 971.23(7) states that if "a party discovers additional material or the names of additional witnesses requested which are subject to discovery, inspection or production under this section, the party shall promptly notify the other party of the existence of the additional material or names." Any materials not disclosed in violation of the statute are to be excluded from evidence at trial unless the party whose duty it was to disclose the material can show good cause for failing to do so. Sec. 971.23(7m).

admitted the evidence had the State disclosed it up front, the State's failure to disclose affected Jennings' defense strategy. Additionally, the court ruled that Jennings' trial counsel was not ineffective, as he "was not in the position to deal with the issue, given the manner in which it occurred."

¶13 The circuit court ordered a new trial and the State appeals.

DISCUSSION

¶14 The State argues that as Jennings' trial counsel did not object when the prosecutor raised the issue of Jennings' belief in reincarnation, Jennings has forfeited her ability to challenge the admission of that evidence. Failure to object normally forfeits a party's right to appellate review. *See State v. Ndina*, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612. The forfeiture rule, though, is a rule of judicial administration, and whether we apply it is a matter within our discretion. *State v. Kaczmariski*, 2009 WI App 117, ¶7, 320 Wis. 2d 811, 772 N.W.2d 702. The circuit court stated it was "stunned" when the prosecutor brought up Jennings' belief in reincarnation. The court also stated that Jennings' trial attorney handled the matter "magnificent[ly]." We decline to apply the forfeiture rule given the facts of this case.

¶15 While the parties did not brief the issue, we hold that Jennings' testimony should have been excluded as inadmissible character evidence under WIS. STAT. § 904.04(1). *See State v. Earl*, 2009 WI App 99, ¶18 n.8, 320 Wis. 2d 639, 770 N.W.2d 755 (we may affirm on different grounds than those relied upon by the circuit court). Section 904.04(1) provides that "[e]vidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion" The exception, as it pertains to an accused, is when an accused offers evidence of

his or her character, or when the prosecution offers evidence in rebuttal. § 904.04(1)(a). The prosecution may not lead with evidence about the accused's character. *See* 7 DANIEL D. BLINKA, WISCONSIN PRACTICE, WISCONSIN EVIDENCE § 404.4, at 160, 164 (3d ed. 2008). That is what happened here. The State argues that it needed to elicit Jennings' belief in reincarnation as a way to explain her "bias against Mr. Troha and his family" after Jennings testified that Bradley was controlling and abusive during their marriage. Evidence of Jennings' belief in reincarnation, though, is irrelevant to the crimes charged against her. Furthermore, Jennings' marriage to Bradley was not on trial. As Jennings never raised the issue of her belief in reincarnation on direct examination, the State was not permitted to elicit this highly prejudicial gossip during cross-examination.⁴

CONCLUSION

¶16 We hold that the State elicited inadmissible character evidence when it raised the issue of Jennings' belief in reincarnation. While Jennings' attorney did not object, we decline to apply the forfeiture rule given the facts of this case. As we hold that Jennings is entitled to a new trial on WIS. STAT. § 904.04(1) grounds, we need not address the other valid issues raised, namely whether there were violations of WIS. STAT. § 904.03 (prejudice), WIS. STAT. § 906.10 (religious beliefs), or WIS. STAT. § 971.23(1)(b) and (7) (duty to disclose), or whether Jennings received ineffective assistance of counsel. The order of the circuit court granting Jennings' postconviction motion is affirmed.

⁴ While both Cynthia and Jade testified prior to Jennings, the State never asked them about Jennings' reincarnation comments.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)4.

