COURT OF APPEALS
DECISION
DATED AND FILED

September 28, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 99-2962

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HERMAN L. RICHARDSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed.*

Before Eich, Roggensack and Dillon, JJ.[1]

[1] Circuit Judge Daniel T. Dillon is sitting by special assignment pursuant to the Judicial Exchange Program.

¶1 PER CURIAM. Herman Richardson appeals from an order denying his postconviction motion brought under WIS. STAT. § 974.06 (1997-98).[2] The issue is whether his trial counsel was ineffective in advising Richardson about the risks of testifying at his trial. We conclude counsel was not ineffective.

¶2 Richardson was convicted after a jury trial of two types of sexual assault, with both convictions arising from the same act. To protect the confidentiality of the victim, we will not describe the facts of the crime in this opinion.

¶3 Before trial, Richardson's counsel moved in limine to block the State from offering certain "other acts" evidence, which we also will not describe. The prosecutor conceded that the evidence did not meet one of the exceptions for admissibility under WIS. STAT. § 904.04(2). However, the prosecutor further said that this was true only as to the State's case-in-chief, because rebuttal "may be another issue" and "we have to see how that postures itself." The trial court granted the motion as to the case-in-chief, but added: "If Mr. Richardson does testify and you wish to proceed into that area, you will have to request permission first and then, depending upon what that testimony is, you can again request the Court to permit any further inquiry." Richardson did not testify.

¶4 At the hearing on Richardson's current postconviction motion, trial counsel and Richardson described their conversations about whether Richardson should testify at trial. Trial counsel had been concerned that the other-acts

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

evidence might be admitted if Richardson testified and that Richardson's testimony would not add substantially to the favorable evidence already presented.

¶5 On appeal, Richardson argues that his trial counsel was ineffective for advising him that it would be better not to testify. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The test for deficient performance is whether counsel's conduct was within the range of competence demanded of attorneys in criminal cases. *See* ***id.*** This test is an objective standard of reasonableness. *See* ***id.*** at 688. We need not address both components of the analysis if the defendant makes an inadequate showing on one. *See* ***id.*** at 697. We affirm the trial court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the trial court. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985).

¶6 Specifically, Richardson's argument is that his attorney's performance was deficient because his attorney was wrong in believing that the other-acts evidence might be admitted if he testified. Richardson argues that the prohibition in WIS. STAT. § 904.04(2) on other-acts evidence would still apply, even in rebuttal to his testimony. He also asserts that the evidence would not be admissible as extrinsic evidence to attack his credibility. *See* WIS. STAT. § 906.08(2). To show prejudice, Richardson argues that if his attorney's advice had not been deficient, he would have testified and there is a reasonable possibility his testimony would have prevented the conviction.

¶7 In response, the State suggests several ways that the other-acts evidence might have been admitted in rebuttal, depending on what Richardson's testimony would have been. We again decline to describe those possibilities, but they go to the substance of the case or to evidence of Richardson's character and not merely to Richardson's credibility. The State argues that under these circumstances it was reasonable for counsel to believe there was some risk that the other-acts evidence could be admitted and that it was reasonable to so advise Richardson.

¶8 In his reply brief, Richardson does not directly dispute the State's possible scenarios as to how the other-acts evidence might have been admitted. Instead, he replies that: (1) counsel did not actually make a reasonable decision because counsel thought that the very act of testifying would necessarily open the door, and (2) counsel did not actually base his advice on any of those possible scenarios.

¶9 We conclude that counsel's advice was reasonable. It was reasonable to believe there was some risk that the other-acts evidence might be admitted. The State's suggested scenarios are ones in which the other-acts evidence would probably be admissible, especially in light of what Richardson said that his testimony at trial would have been. Richardson argues that his attorney did not make a reasonable decision because he erroneously thought that if Richardson testified, then by that act alone the evidence would be admissible. We reject this argument for two reasons. First, Richardson provides no citation to the record to demonstrate that counsel believed the other-acts evidence would be admissible simply because Richardson testified. We have reviewed the postconviction hearing transcript, and we find no testimony by counsel or Richardson that supports Richardson's current description of his counsel's

opinion. In fact, counsel testified that he told Richardson the evidence would not be admissible "unless he made some statement that would open the door to that potentially coming in." Richardson testified that counsel told him that if he testified there "would be a great possibility" for the evidence to be used.

¶10 More importantly, however, it is immaterial what particular thought process Richardson's counsel used to arrive at his advice. As we stated above, the test is an objective one, of what a reasonable lawyer would do under the circumstances. Even if counsel did hold an erroneous view, or merely flipped a coin, the actual advice given to Richardson was advice that a reasonable lawyer could have given under the circumstances.

¶11 Richardson also argues that his attorney did not base his advice on any of the State's possible scenarios. This is essentially a variation on the preceding argument. Again, counsel's actual thought process is not relevant. And even if it were, counsel was never asked at the postconviction hearing to provide a detailed legal explanation for his belief that the other-acts evidence might have been admitted. As a result, even if counsel's mental process were relevant, we have no record of whether counsel did indeed consider the possibilities the State suggests.

¶12 In addition to making his argument in terms of ineffective assistance of counsel, Richardson also frames the issue in terms of whether his waiver of his Fifth Amendment right to testify was knowing and voluntary. He argues that it was not because of his attorney's erroneous advice about whether he should testify. We have already concluded that his attorney's advice complied with the standards established to determine sufficient performance for Sixth Amendment purposes. Richardson does not argue that we should apply any different standard

to determine whether his attorney's advice was sufficiently flawed to render the waiver of his right to testify involuntary. Accordingly, we consider this issue to be disposed of by our earlier analysis.

By the Court.—Order affirmed.

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