COURT OF APPEALS
DECISION
DATED AND FILED

August 15, 2001

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. 00-2576-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROGER S. WALKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: STEPHEN W. WEINKE, Judge. *Reversed and cause remanded.*

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

¶1 PER CURIAM. Roger S. Walker appeals from a judgment of conviction entered against him after a jury trial, and from the order denying his motion for postconviction relief. He argues on appeal that he received ineffective assistance of trial counsel. Because we conclude that Walker's trial counsel was

ineffective for failing to object to the admission of certain evidence and for failing to move for a mistrial, we reverse the judgment and remand for a new trial.

¶2 Walker was charged with one count of first-degree sexual assault of a child for having sodomized a young boy. The incident was alleged to have occurred between April and August 1993. Initially, Walker entered an ***Alford***[1] plea to a reduced count of second-degree sexual assault. At the time of entering the plea, Walker was represented by Attorney Wayne Fullylove-Krause. Shortly after Walker entered the plea, the court dismissed Attorney Fullylove-Krause, at his request, as Walker's counsel. Walker, acting pro se, moved to withdraw his plea before sentencing. At the hearing on Walker's motion, the trial court determined that Walker would not be entitled to another public defender to represent him because he had already received three appointments. The court, therefore, asked Attorney Fullylove-Krause to continue to represent Walker. He agreed.

¶3 The case eventually went to trial, with Attorney Fullylove-Krause representing Walker, and Walker was convicted. With new counsel, Walker subsequently brought a motion for postconviction relief asserting that the trial court had committed errors and that he had received ineffective assistance of counsel. After a hearing, the court denied the motion. Walker appeals.

¶4 Walker asserts a number of grounds for his claim of ineffective assistance of counsel. He asserts that counsel was ineffective for failing to object

[1] ***North Carolina v. Alford***, 400 U.S. 25 (1970).

to the constructive amendment of the complaint,[2] for failing to stipulate to the purposes for which certain other acts evidence could be used, for failing to object to different other acts evidence and for failing to move for a mistrial based on the admission of this evidence, for failing to request a limiting instruction on the other acts evidence, and for failing to move to dismiss the complaint for lack of specificity. Walker argues that the trial court erred by excluding certain exculpatory evidence. Finally, Walker argues that he is entitled to a new trial in the interests of justice.

¶5 To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she 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. *See* ***id.*** at 697. We review the denial of an ineffective assistance claim as a mixed question of fact and law. *See* ***id.*** at 698. We will not reverse the trial court's factual findings unless they are clearly erroneous. However, we review the two-pronged determination of trial counsel's performance independently as a question of law. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶6 Prior to trial, the State sought and received permission to introduce evidence that Walker sexually assaulted the same victim a different time. Walker argues that counsel was ineffective for failing to stipulate to the purpose for which this evidence was used under ***State v. DeKeyser***, 221 Wis. 2d 435, 585 N.W.2d

[2] Walker was charged with sexual contact. The jury instruction given by the court was for sexual intercourse. Because of our conclusion that counsel was ineffective on other grounds, this issue is moot. During the new trial, however, we trust that the trial court will instruct the jury on the crime charged.

668 (Ct. App. 1998). In ***DeKeyser***, the court addressed whether an attorney provided ineffective assistance of counsel when he failed to propose a stipulation under ***State v. Wallerman***, 203 Wis. 2d 158, 552 N.W.2d 128 (Ct. App. 1996). By using a ***Wallerman*** stipulation, a defendant may concede elements of a crime and thereby avoid the introduction of other acts evidence. ***DeKeyser***, 221 Wis. 2d at 443. In ***DeKeyser***, the court concluded that DeKeyser's counsel was ineffective for failing to request such a stipulation. ***Id.*** Walker argues that his counsel should have requested a ***Wallerman*** stipulation to have avoided the introduction of the evidence that he had previously sexually assaulted the victim. Walker's trial counsel testified at the postconviction hearing that, at trial, he was not aware of the ***DeKeyser*** case.

¶7 We conclude that counsel's failure to request a ***Wallerman*** stipulation did not constitute ineffective assistance of counsel. At trial, the identity of the person who committed the assault was at issue. Walker attempted to defend against the charge by arguing that another person actually committed the crime. The evidence that Walker had previously sexually assaulted the same victim was used by the State principally to establish Walker's identity as the one committing the assault. Since Walker's counsel could not have stipulated that Walker was the person who committed the crime, a ***Wallerman*** stipulation simply would not have helped Walker in this case. Consequently, counsel did not provide ineffective assistance of counsel on this basis.

¶8 Walker also argues that counsel was ineffective for failing to object to the introduction of different other acts evidence. He also argues that the trial court erred when it allowed the evidence in. The evidence concerned certain statements that the State alleged Walker made to a Detective Flood, the detective investigating the case. In these statements, Walker allegedly admitted to having

engaged in homosexual acts at a local wayside and admitted that he had had sexual intercourse with his niece many years previously. We agree with Walker that his counsel was ineffective for failing to object to the admission of these statements.

¶9 The State did not make a pretrial motion to allow these statements in. The court, therefore, never considered the appropriate review to determine if this other acts evidence would be admitted. *See* ***State v. Johnson***, 184 Wis. 2d 324, 336-37, 516 N.W.2d 463 (Ct. App. 1994). In its brief, the State says it did not make a pretrial motion concerning this evidence because it was not using the evidence in its case-in-chief.

¶10 Apparently at some point during trial, defense counsel became aware that these statements were going to be used. During the first day of the trial, a general discussion was held between the court and counsel for both sides concerning certain statements the State wished to introduce. During this discussion, defense counsel stated: "And then there are also statements alleging my client having sexual relations with a juvenile when he was a juvenile, a juvenile female, a cousin;[3] and then also statements regarding some alleged homosexual acts that I think are other act evidence, and I would ask not be admitted."

¶11 The State responded that the matter had been discussed in chambers and argued that the statements were not other acts evidence. The State also argued that if it was other acts evidence, it fell within one of the exceptions to the rule excluding its admission. The prosecutor argued that the statements helped to establish Walker's identity, one element at issue in this case.

[3] Apparently it was Walker's niece although she was also referred to as his cousin.

¶12 The court then asked if the defense would have to put Walker's character in issue first by having Walker take the stand. The State responded, "I suppose so," if the objection was character. Defense counsel then responded:

> I agree with the court. I think, you know, it would certainly be more relevant and more probative once my client testifies if the State wants to introduce that. I mean, I guess I would still have an objection to some of the statements, but I think the statements themselves, I think—I don't know would be admissible at this point without my client testifying first.

The court then stated:

> I don't have any summary of what the statements are, so I mean you kind of have me dancing on 100 different pebbles here, something about homosexual acts .... We're really only interested in 1993 and what happened to [the victim] and I'd suggest that you narrow your focus to what brings Mr. Walker here is a specific incident, and that's what this jury wants to hear testimony on. If he testifies and opens the door to what I would term character testimony, then we can—look at it then.
>
> If these are statements given to Detective Flood—At least the impression I have, if these statements were given in regard to this specific incident in which he was gone in for questioning, not kind of his whole life history as to other homosexual acts or heterosexual acts, whatever, *I'd be inclined to grant the objection to bringing that kind of evidence in at this juncture*. (Emphasis added.)

¶13 During trial, Walker did testify on his own behalf. During cross-examination, after Walker denied that he had had anal intercourse with the victim, the State asked: "Did you ever have anal intercourse with anybody else?" Walker responded, "Never." The State then asked: "Did you ever tell anyone that you had anal intercourse with anybody else?" and "You never told Detective Flood that you had anal intercourse with another male individual at a wayside near Princeton when you were kicked out of the house?" Walker responded in the negative. Defense counsel did not object.

¶14 The State went on to ask if Walker had told Detective Flood "that you also engaged in homosexual activity?" and if he had ever "sexually molested a minor?" and identified his niece. After questioning Walker about the age difference between him and his niece, the State asked, "Did you ever tell Detective Flood that you had been screwing her just as her brother had been?" Again, there was no objection from defense counsel.

¶15 Later on in the trial, Detective Flood testified himself. He spoke of the question he had asked Walker about his sexual behavior. When the State began to question him about what Walker had said about his niece and homosexual behavior, defense counsel objected on the grounds of other acts evidence. The court overruled the objection on the grounds that the door had been opened during direct examination and Flood was testifying as rebuttal. Flood went on to testify in great detail about other sexual contacts Walker had had with males and with his niece.

¶16 At the hearing on the postconviction motion, defense counsel testified that he had not been given any notice prior to trial that the State intended to introduce this evidence. Counsel also testified that he did not move for a mistrial based on the admission of this evidence, and that he probably should have done so.

¶17 We conclude that this evidence was other acts evidence inadmissible under WIS. STAT. § 904.04 (1999-2000).[4] "The general policy of § 904.04(2) is one of exclusion; the rule precludes proof of other crimes, acts or wrongs for

[4] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

purposes of showing that a person acted in conformity with a particular disposition on the occasion in question." ***Johnson***, 184 Wis. 2d at 336. While the State argued that the evidence was offered to show Walker's identity, the only connection to his "identity" this established was his tendency to act "in conformity with a particular disposition." This is the type of evidence which is expressly prohibited by the statute. Sec. 904.04.

¶18 We conclude, therefore, that counsel's performance was deficient for failing to object to this evidence. Although trial counsel offered a general objection on the first day of trial, counsel did not offer a specific basis for the court to exclude the evidence. And despite the hint given by the court when the issue first arose that it would grant an objection to this evidence, when the State questioned Walker on this testimony, counsel did not object at all. When counsel finally did object, it was too late. Counsel also failed to move for a mistrial.

¶19 Further, the evidence was highly inflammatory. We conclude that Walker was prejudiced by its admission. Since counsel erred by not objecting and the error was prejudicial, we must conclude that Walker received ineffective assistance of trial counsel. We further conclude that the trial court erred when it allowed the testimony. Because Walker received ineffective assistance of trial counsel, and because the court erred by admitting this evidence, we remand the matter for a new trial.

¶20 Walker raises another issue which we will address because it may reoccur at the new trial. Walker argues that the trial court erred when it rejected his offer of proof for testimony from Shawn Hannah. Hannah apparently would have testified that Ricky Feathers, a potential witness who the defense could not locate, told him that he had committed the crime for which Walker was in jail.

Hannah also apparently would have testified that Feathers threatened him if he told anyone about his confession.

¶21 The trial court rejected this offer of proof because there was no evidence that established that Feathers was anywhere near the place where the incident charged occurred. When a declarant is unavailable and a statement is offered to exculpate the accused, the statement must be corroborated. WIS. STAT. § 908.045(4). Since there was no corroborating evidence, the court rejected the offer of proof.

¶22 "A trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has 'a reasonable basis' and was made 'in accordance with accepted legal standards and in accordance with the facts of record.'" ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992) (citations omitted). We conclude that based on the record before us, the trial court did not erroneously exercise its discretion when it excluded this evidence. We add the caveat, however, that if the evidentiary record changes at the new trial, the court may reconsider its decision.

¶23 The other issues raised by Walker in this appeal are rendered moot by our decision to remand for a new trial, and we need not address them. The matter is reversed and remanded for a new trial.

By the Court.—Judgment reversed and cause remanded.

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