COURT OF APPEALS
DECISION
DATED AND FILED

March 17, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0789-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VERNON DANSAND,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed.*

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

PER CURIAM. Vernon Dansand appeals from an order denying his postconviction motion for a new trial. We affirm.

As a preliminary matter, we address the manner in which Dansand sought postconviction relief. Dansand captioned his postconviction motion as one

brought under RULE 809.30, STATS. The State objected because Dansand had previously filed a § 973.19, STATS., sentence modification motion[1] which waived postconviction relief under RULE 809.30. *See* § 973.19(5). The circuit court agreed that Dansand had waived his RULE 809.30 appeal but concluded that the motion could proceed under § 974.06, STATS., because there was a sufficient reason to proceed under § 974.06 given the procedural history of the postconviction portion of the case.

We affirm the court's determination of a sufficient reason to treat the motion as having been brought under § 974.06, STATS. A defendant who does not order transcripts may proceed under § 973.19, STATS., to seek sentence modification. *See* § 973.19(1)(a). Here, there was a several month delay in ordering transcripts due to Dansand's attempts to establish that he met the financial criteria for appointed counsel. In the interim, retained counsel filed a § 973.19 motion. Given the rather confused state of postconviction proceedings, we affirm the circuit court's determination that Dansand had a sufficient reason for raising issues in a § 974.06 motion which could have been raised in a prior postconviction proceeding under RULE 809.30, STATS. *See* § 974.06(4).

We now turn to Dansand's substantive arguments on appeal relating to the admission of other acts evidence and alleged ineffectiveness of trial counsel. Our analysis is grounded in the context in which trial counsel acted, i.e., the "innocent dupe" defense upon which Dansand insisted and Dansand's active

[1] Although Dansand timely filed a notice of intent to pursue postconviction relief, *see* RULE 809.30(2)(b), STATS., there was a delay in appointing counsel and ordering transcripts while Dansand's wife attempted to compile financial information relating to Dansand's eligibility for appointed counsel. Ultimately, Dansand did not receive appointed counsel. Retained counsel (who was not counsel on this appeal) filed the § 973.19, STATS., sentence modification motion.

participation in his trial. Dansand went to trial on charges of theft contrary to § 943.20(1)(a) and (3)(b), STATS. (intentional carrying away of property valued between $1000 and $2500) and burglary contrary to § 943.10(1)(a), STATS. (intentional entry of a place without consent with intent to steal). The theft and burglary occurred in January 1995. Both charges contain the element of intent.

Dansand's theory of defense was that he was the "innocent dupe" of his employer, Kenneth McIntosh. McIntosh enlisted Dansand to help him move construction materials from a house under construction because they had been delivered too early and could not be stored on site without a risk of theft. Dansand agreed to store the items at his house, not knowing that McIntosh actually intended to steal the materials from the site rather than safeguard them. Dansand did not have the requisite intent to be convicted of burglary and theft because he was merely complying with his employer's request for assistance. We now turn to Dansand's specific appellate arguments.

Dansand challenges the trial court's discretionary decision to admit evidence in the State's rebuttal case that he stored items stolen from construction sites in his house on another occasion. During the defense's case, Dansand's wife, Susan, testified that she believed Dansand brought materials home in January 1995 to safeguard them from the elements and theft at the construction site. She understood that the items were to be returned to the site by her husband and McIntosh. Susan then volunteered that McIntosh brought items to their house to be stored in November 1994.[2] The Dansands assisted McIntosh in selling these items and purchased some themselves at a discount. Susan did not know that the

[2] McIntosh stated that he was terminating a business relationship and needed to store the items.

items were stolen and believed that they were merely collecting a nominal fee for storing the items for McIntosh. When police came to her house to investigate the January 1995 theft and burglary, Susan showed police the items which turned out to be stolen.

Before cross-examination, the State noted that Susan had alluded to the presence in her house of items stolen in November 1994. The court ruled that discovery of other stolen items in the house was relevant to Dansand's knowledge that the January 1995 items were stolen. The State proposed to cross-examine Susan regarding other stolen items found in the house and to present the testimony of a detective that items removed from the house were stolen in previous construction site burglaries. The court permitted the State to proceed.

On cross-examination, Susan testified that a washer, dryer, refrigerator and other items were removed from the house in conjunction with the investigation of the January 1995 burglary and theft. She did not know the other items were stolen and contended that she and Dansand had purchased them from McIntosh at a discount because McIntosh wanted to dispose of them when his business partnership had terminated. The Dansands assisted McIntosh in disposing of the rest of the items by including them in a classified advertisement they were running to sell their car.

After that testimony, the court expanded on its previous ruling, stating that the evidence of other stolen material was relevant and more probative than prejudicial.

In the State's rebuttal case, the detective testified that he located goods stolen in 1994 in the Dansand home. Counsel inquired whether there was any evidence that Dansand had worked at these same sites. The detective

responded that Dansand had worked at all four sites that he investigated for 1994 thefts involving McIntosh. Dansand declined to testify.

On appeal, Dansand argues that the trial court erroneously admitted evidence that property stolen from other construction sites was found in his home. Section 904.04(2), STATS., specifically excludes evidence of other crimes or acts when such evidence is offered "to prove the character of a person in order to show that he [or she] acted in conformity therewith." ***State v. Shillcutt,*** 116 Wis.2d 227, 236, 341 N.W.2d 716, 720 (Ct. App. 1983), *aff'd*, 119 Wis.2d 788, 350 N.W.2d 686 (1984). However, the statute does not bar evidence which is "offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Section 904.04(2).

The admission of evidence is within the trial court's discretion, and we will affirm that exercise of discretion if the court's decision evidences application of accepted legal standards to the facts of record. *See* ***State v. Wallerman,*** 203 Wis.2d 158, 162, 552 N.W.2d 128, 130 (Ct. App. 1996). To determine the admissibility of other acts evidence, the court must consider whether the evidence is offered for a permissible purpose under § 904.04(2), STATS., whether the evidence is relevant under § 904.01, STATS., and whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice or other considerations set forth in § 904.03, STATS. *See* ***State v. Sullivan,*** 216 Wis.2d 768, 772-73, 576 N.W.2d 30, 32-33 (1998). We conclude that the court performed the ***Sullivan*** analysis.

The evidence was offered to demonstrate Dansand's knowledge that the goods he stored in January 1995 were stolen and his intent to carry away or steal,

which are elements of burglary and theft. The evidence was offered for a permissible purpose.

The court also determined that the evidence was relevant. Under ***Sullivan,*** relevant evidence is evidence which "relates to a fact or proposition that is of consequence to the determination of the action" and has a "tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence." ***Id.*** at 772, 576 N.W.2d at 33. Evidence that other stolen goods, acquired under similar circumstances from McIntosh, were found in the Dansand home related to a fact of consequence to determination of the action, i.e., Dansand's knowledge and intent regarding the origin of the January 1995 goods. The 1994 incident was sufficiently near in time, place and circumstance to the alleged crime. *See* ***id.*** at 786, 576 N.W.2d at 38. Evidence that Dansand possessed stolen goods from McIntosh in 1994 makes Dansand's knowledge that the 1995 goods were stolen and intent to carry away and steal more probable. *See* ***State v. Roberson,*** 157 Wis.2d 447, 454-55, 459 N.W.2d 611, 613 (Ct. App. 1990).

The court also considered whether the probative value of the other acts evidence was substantially outweighed by the danger of unfair prejudice. We conclude that the court did not misuse its discretion in admitting evidence that Dansand's home contained property stolen in 1994.

We now turn to Dansand's claim that his trial counsel was ineffective. There are two components to a claim of ineffective trial counsel: counsel's performance was deficient, and the deficient performance prejudiced the defendant. *See* ***State v. Smith***, 207 Wis.2d 258, 273, 558 N.W.2d 379, 386 (1997). The question of whether there has been ineffective assistance of counsel is a mixed

question of law and fact. *See* ***State ex rel. Flores v. State,*** 183 Wis.2d 587, 609, 516 N.W.2d 362, 368-69 (1994). An appellate court will not overturn a trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy unless the findings are clearly erroneous. *See* ***State v. Knight***, 168 Wis.2d 509, 514 n.2, 484 N.W.2d 540, 541 (1992). However, the final determinations of whether counsel's performance was deficient and prejudiced the defense are questions of law which this court decides without deference to the trial court. *See* ***id.***

On the performance prong, we determine whether trial counsel's performance fell below objective standards of reasonableness. *See* ***State v. McMahon***, 186 Wis.2d 68, 80, 519 N.W.2d 621, 626 (Ct. App. 1994). This standard encompasses a wide range of professionally competent assistance. *See* ***id.*** We presume that counsel's performance was satisfactory; we do not look to what would have been ideal, but rather to what amounts to reasonably effective representation. *See* ***id.***

As with the circumstances surrounding the admission of the other acts evidence, we analyze Dansand's ineffectiveness claim in the context of his "innocent dupe" defense and trial counsel's strategies in implementing that defense.

Dansand argues that trial counsel did not adequately prepare his wife for direct examination, which led to the admission of evidence of other stolen property found at their residence. At the postconviction motion hearing, trial counsel testified that she spoke with Susan frequently prior to trial. Counsel specifically warned Susan not to

> talk about other crimes, acts, wrongs, those kinds of things. We talked specifically about the fact that the district attorney could bring that up, that Mr. Dansand had a

> history, and unfortunately his criminal record was replete with these as well as other types of crimes. So we had to be very careful about staying away from opening up that door.

Counsel conceded that she did not specifically direct Susan to refrain from referring to the property found in the house from the 1994 thefts and burglaries. In asking Susan about her husband's association with McIntosh prior to January 1995, counsel intended to highlight that association which supported Dansand's claim that he complied with his employer's request to temporarily store items. However, when Susan responded by referring to a 1994 incident in which they stored property for McIntosh, counsel attempted to establish that this only happened for a week in November 1994 and that the Dansands had not stored any other items for McIntosh before January 1995.

In ruling on Dansand's ineffectiveness claim, the circuit court did not discern any prejudice from Susan's reference to other items stored at the residence in 1994 because the testimony was consistent with the defense that Dansand did not know these or the 1995 items were stolen when he permitted McIntosh, with whom he had an employment relationship, to store them at his home.

Dansand argues on appeal that trial counsel did not adequately prepare Susan to testify. We need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the grounds of lack of prejudice. *See* ***State v. Moats,*** 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990). While there was a dispute at the postconviction motion hearing between counsel and Susan regarding preparation for trial, we agree with the trial court that Dansand was not prejudiced. Although the testimony permitted an inference that Dansand knew the property he stored for McIntosh in 1995 was stolen, it also

permitted an inference that Dansand was an "innocent dupe" when he stored goods for McIntosh.[3]

Dansand next complains about counsel's cross-examination of the detective in the State's rebuttal case. On direct examination, the detective testified that while searching Dansand's home relating to the 1995 theft and burglary, police recovered property stolen in 1994. On cross-examination, Dansand's trial counsel inquired whether in the course of investigating thefts from job sites at which McIntosh worked, the detective had any indication that Dansand also worked at those sites. The detective responded that he could link Dansand to all four sites from which materials had been stolen in 1994.

At the close of evidence, trial counsel made a record as to the reason for this question. She stated that Dansand insisted that she ask the detective about his involvement with the 1994 stolen property. Dansand did not believe that there was any evidence of his involvement in the 1994 thefts and "wanted to in fact clear his name of these things and prove that this officer was a liar on that basis." Counsel advised Dansand that this line of inquiry was not part of his trial and that "it would dramatically hurt his case."

We do not discern any prejudice to Dansand. Evidence that property stolen in 1994 was found in his home was already of record in the detective's direct testimony in the State's rebuttal case as was Dansand's "innocent dupe"

[3] We agree with the State that even if Susan had not mentioned that Dansand stored materials for McIntosh in 1994, evidence of the 1994 materials would have been admissible in rebuttal because Susan testified that neither she nor Dansand had any knowledge that the 1995 materials were stolen.

explanation for its presence. Dansand did not deny holding goods for McIntosh in 1994 which turned out to be stolen.

Dansand alleges that he was prejudiced because trial counsel failed to call James Bogacki as a witness.[4] At the postconviction motion hearing, counsel testified that she concluded that Bogacki did not have anything to add to the case. Counsel and Bogacki disagreed as to whether counsel interviewed him prior to trial to learn the substance of his testimony. Bogacki testified that had he testified at trial, he would have stated that he saw McIntosh and Dansand together at a construction site, that Dansand worked for McIntosh, and that Dansand removed lumber from the site in McIntosh's presence and at McIntosh's direction on three or four occasions. Bogacki also admitted to having three to five criminal convictions. The circuit court found that Bogacki's testimony would have been cumulative to other testimony that McIntosh and Dansand had a business relationship. We agree.

Dansand argues that trial counsel failed to determine, by a § 906.09, STATS., hearing or other investigation, how many convictions Dansand would have had to acknowledge if he testified at trial. Dansand claims that this information was crucial to his decision whether to testify at trial. Counsel testified at the postconviction hearing that she believed Dansand had thirty or more prior convictions which would have to be disclosed to the jury if he testified, torpedoing his credibility.

[4] Bogacki was arrested at the courthouse on an outstanding warrant before he could testify.

The circuit court found that Dansand knowingly waived his right to testify. The court found that trial counsel discussed the right to testify with Dansand, and the decision not to testify was a reasonable tactical decision in light of Dansand's lengthy criminal history and numerous prior convictions, regardless of the exact number (conceded to be between nine and thirty). The court's finding is supported by the record of the court's colloquy with Dansand at trial regarding his decision not to testify.

Dansand argues that trial counsel was ineffective in the manner in which she investigated the case, prepared other witnesses for trial and examined those witnesses at trial. We are persuaded by the State's response to these arguments and we will not address them individually. *See* ***State v. Waste Management of Wis., Inc.,*** 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

We conclude that even if we accept Dansand's numerous assertions of trial counsel error, Dansand was not prejudiced because there is no reasonable probability that, but for counsel's errors, the result of the trial would have been different. *See* ***State v. Johnson,*** 153 Wis.2d 121, 129, 449 N.W.2d 845, 848 (1990).

By the Court.—Order affirmed.

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