COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 1999

Marilyn L. Graves
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 § 808.10 and RULE 809.62, STATS.

No. 98-3473-CR
98-3474-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KRISTOFFER A. ASHMORE,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

Before Eich, Vergeront and Roggensack, JJ

¶1 PER CURIAM. Kristoffer A. Ashmore appeals from two judgments convicting him of multiple counts of second-degree sexual assault of a child and exposing a child to harmful materials, and one count of intimidation of a victim, as well as from an order denying his postconviction motion for a new trial.

He claims he was prejudiced by the erroneous admission of other acts evidence, and that he was denied the effective assistance of counsel in several respects. However, we are satisfied, based on our review of the record, that the trial court's evidentiary ruling was a rational exercise of discretion and that counsel's performance was not ineffective. Accordingly, we affirm.

BACKGROUND

¶2 The charges against Ashmore were based on allegations that he had continuing relationships involving oral and anal sex and digital manipulation with several teenaged boys over an extended period of time. The boys claimed that they allowed Ashmore to have sexual contact with them in exchange for money, alcohol, clothing or other gifts, and excursions. They also said that Ashmore showed them pornographic movies, and one boy claimed that Ashmore had threatened to kill him if he did not withdraw his allegations. Ashmore's defense theory was that the boys were fabricating the allegations against him.

¶3 In addition to the testimony of the victims of the charged crimes, the State presented testimony by a second-grade boy, Laine J., that Ashmore had sucked Laine's penis and had Laine suck Ashmore's penis. Laine said Ashmore had given him gum and candy and had taken him to restaurants and golf courses and to ride horses, but he could not remember if the gifts had occurred on the same occasions as the sexual contacts. Ashmore objected to Laine's testimony as impermissible other acts evidence.

¶4 Following his conviction, the trial court sentenced Ashmore to a total of seventy-three years in prison. Ashmore renewed his objection to Laine's testimony, and also claimed that counsel had been ineffective in a number of

respects, which will be more fully discussed below.[1] The trial court denied Ashmore's postconviction motions, and he appeals.

STANDARD OF REVIEW

¶5 We review the trial court's admission of other acts evidence under the erroneous exercise of discretion standard. ***State v. Sullivan***, 216 Wis.2d 768, 780, 576 N.W.2d 30, 36 (1998). A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion. ***Burkes v. Hales***, 165 Wis.2d 585, 590-91, 478 N.W.2d 37, 39 (Ct. App. 1991). Thus, we will not overturn a discretionary determination merely because we would have reached a different result. Rather, "[b]ecause the exercise of discretion is so essential to the trial court's functioning, we generally look for reasons to sustain discretionary decisions." ***Id.*** at 591, 478 N.W.2d at 39.

¶6 Whether counsel's actions were deficient or prejudicial is a mixed question of law and fact. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). The circuit court's findings of fact will not be reversed, unless they are clearly erroneous. Section 805.17(2), STATS; ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985). However, whether counsel's conduct violated the defendant's right to effective assistance of counsel is a legal determination, which this court decides *de novo*. ***Id***. at 634, 369 N.W.2d at 715.

[1] Ashmore also asked for a new trial on the basis of newly discovered evidence, but has not raised that claim on appeal.

ANALYSIS

Other Acts Evidence

¶7 Under § 904.04(2), STATS., evidence of other crimes or acts may be admissible when offered for the purpose of establishing a plan or motive that reduces the possibility that the charged conduct was innocent. However, the evidence still must be relevant under §§ 904.01 and 904.02, STATS., in that it relates to a fact or proposition of consequence to the determination of the action, and its probative value must substantially outweigh the danger of unfair prejudice or confusion of issues under § 904.03, STATS. ***Sullivan***, 216 Wis.2d at 772-75, 576 N.W.2d at 32-33.

¶8 The trial court properly determined that Laine's testimony was offered to show Ashmore had a plan or motive to groom juveniles for sexual contact and relevant to that issue. *See* ***State v. Fishnick***, 127 Wis.2d 247, 260-61, 378 N.W.2d 272, 279 (1985). The question, then, was whether the probative value of the evidence was outweighed by the danger of an unfair prejudicial effect, namely that the jury would be inclined to convict Ashmore solely on the basis that he was a bad person for molesting such a young child, or that he had a propensity for molesting young boys.

¶9 Ashmore challenges the probative value of the other acts evidence on grounds that his contact with Laine was dissimilar to the charged crimes because Laine was significantly younger than Matthew and Eric, and Laine did not specifically associate the gifts and inducements Ashmore provided him as a *quid quo pro* for sexual contact, as the older boys did. However, the trial court found the other acts evidence highly probative because, just like the incidents with the older boys, the incidents with Laine involved grooming and mouth-to-penis

contact, they occurred during the same time frame and in Ashmore's bedroom, and they included Ashmore showing pornographic material to a juvenile. The trial court further noted that it would limit the danger of prejudicial effect by giving the jury an instruction on the limited use of Laine's testimony. We are satisfied that the trial court's evaluation of the probative value and prejudicial effect of the other acts evidence represents a rational determination made on the facts of record, and was not a misuse of discretion.

Assistance of Counsel

¶10 Ashmore claims counsel was ineffective: (1) for failing to advise the jury of Laine's prior denials of sexual abuse by Ashmore; (2) for failing to show that Laine had been the victim of prior sexual abuse which could explain his sexual knowledge; (3) for failing to impeach Laine's testimony with prior inconsistent statements; (4) for failing to bring out the fact that Laine's behavior became noticeably more sexually appropriate after his placement with Ashmore's mother; (5) for failing to investigate and bring out at trial the possibility that the boys had fabricated their testimony under pressure from another man, Schwartz, who had abused at least one of the boys and sought to divert blame from himself by framing someone else; (6) for failing to file a discovery demand and impeach the victims with their prior inconsistent statements and adjudications; (7) for failing to interview another boy, Robbie A., who was present on the Great America excursion and who would have testified that he saw no sexual activity occurring; and (8) for failing to present an expert witness to rebut the State's expert's testimony on grooming and the low statistical incidence of false sexual allegations by children.

¶11 The test for ineffective assistance of counsel has two elements: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. ***Strickland***, 466 U.S. at 687. To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990). The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. ***Id.*** at 127, 449 N.W.2d at 848. To satisfy the prejudice element, the defendant usually must show that "counsel's errors were serious enough to render the resulting conviction unreliable." ***Strickland***, 466 U.S. at 687. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. ***Strickland***, 466 U.S. at 688.

¶12 Some of the evidence which Ashmore believes supports his claim for ineffective assistance of counsel was ruled inadmissible by the trial court, and preserved by offers of proof. Because we determine that the evidence contained in the offers of proof, combined with the other evidence at the postconviction hearing, would still be insufficient to support Ashmore's claim of ineffective assistance, we need not determine its admissibility.

¶13 Counsel testified in considerable detail about his reasons for not taking the actions which Ashmore claims he should have. In particular, counsel testified that: (1) Laine had not made any prior denials of abuse by Ashmore; (2) he feared that going into more detail about Laine's prior sexual knowledge could elicit additional acts allegedly committed by Ashmore and reemphasize the child's direct testimony; (3) in his experience, attempting to cast child victims as liars tends to alienate the jury; (4) he did not want to get into Laine's inappropriate

sexual conduct for fear that it might be attributed to Ashmore; (5) he did investigate Schwartz, but concluded that Schwartz had no connection with two of the victims, and that testimony that Schwartz and Ashmore had been fighting for the attentions of one of the other victims would have been more harmful than helpful; (6) that he did attempt to impeach the victims to a limited extent, but did not want to overdo it and lose the jury while reemphasizing unfavorable facts, or to allow the State to bring out more recent consistent statements on redirect; (7) he learned through third parties that Robbie would actually have corroborated the victims and did not want to lead the State to him; and (8) he did not want to call an expert witness to rebut the State's witness because he felt he had effectively cross-examined the State's expert and focusing on whether Laine was likely to be truthful or not would have unduly emphasized Laine's testimony.

¶14 We conclude, as did the trial court, that the reasons offered by counsel for his action represent sound strategic decisions, and cannot be categorized as deficient performance. Moreover, we are not persuaded by Ashmore's conclusory claims of prejudice that the outcome of the trial would have been any different had counsel acted differently, given the overwhelming evidence against him.

By the Court.—Judgments and order affirmed.

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