

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 11, 2001

Cornelia G. Clark
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.

No. 99-3000-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAMON SANCHEZ-DIAZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

Before Vergeront, P.J., Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Ramon Sanchez-Diaz, pro se, appeals from a judgment convicting him of first-degree intentional homicide and second-degree sexual assault. He also appeals from the trial court's order denying his motion for a new trial. He argues: (1) that the trial court improperly admitted "other acts" evidence at trial; (2) that the State withheld exculpatory evidence from the

defense; and (3) that his trial and appellate counsel ineffectively represented him. We affirm.

¶2 Sanchez-Diaz was convicted after a jury trial of first-degree intentional homicide and second-degree sexual assault in the death of Dorothy Kern, age sixty-five, who was murdered in her apartment. T. Christopher Kelly, appointed counsel for Sanchez-Diaz, filed a postconviction motion for a new trial. The trial court denied it. Kelly then filed a notice of appeal from the judgment of conviction and the order denying the motion for a new trial. After appellate proceedings had been commenced, Sanchez-Diaz was given leave to proceed pro se by this court. He moved to remand to the trial court so that he could file a motion claiming ineffective assistance of counsel. We denied the motion.

¶3 Sanchez-Diaz first argues that the trial court improperly admitted evidence that he sexually assaulted four other women between 1991 and 1993. To determine whether the trial court properly admitted this “other acts” evidence, we use a three-step analysis. First, we look to see whether the “other acts” evidence is offered for an acceptable purpose under WIS. STAT. § 904.04(2) (1999-2000),¹ such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *State v. Sullivan*, 216 Wis. 2d 768, 772, 576 N.W.2d 30 (1998). Next, we look to see whether the other acts evidence is relevant. *Id.*; see WIS. STAT. § 904.01. Third, we look to see whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

considerations of undue delay, waste of time or needless presentation of cumulative evidence. *Sullivan*, 216 Wis. 2d at 772-73; *see* WIS. STAT. § 904.03.

¶4 After reviewing the transcript of the trial court’s oral decision, we conclude that the trial court properly exercised its discretion in admitting the evidence. The trial court concluded that evidence of the prior sexual assaults was admissible to prove the defendant’s identity, a key issue in the case.² The trial court thoroughly analyzed the circumstances surrounding the other assaults and concluded that they were significantly similar in nature to the charged assault. The trial court noted that they all involved white female victims; that two of the victims were assaulted in their apartments; that the dates of the assaults were very close in time to the charged offense; that the defendant had prior contact with or knowledge of the victims; that three of the victims were assaulted in the same manner; that three of the victims were vulnerable because of mental health problems; and that all of the assaults took place in Dane County. Because the prior assaults had so many circumstances in common with the charged assault, the trial court concluded that they tended to prove the perpetrator’s identity because they bore his “imprint.” We affirm this exercise of discretion because the trial court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Sullivan*, 216 Wis. 2d at 780-81.

¶5 Sanchez-Diaz next argues that the State withheld exculpatory evidence from the defense. “[T]he defense has a constitutional right to material

² The trial court did not allow evidence of another sexual assault to be admitted, despite the State’s request that the trial court do so.

exculpatory evidence in the hands of the prosecutor.” *State v. DelReal*, 225 Wis. 2d 565, 570, 593 N.W.2d 461 (Ct. App. 1999).

¶6 In the affidavit accompanying the postconviction motion, Sanchez-Diaz’s attorney averred that he received a telephone call from Mr. Ted Heffner who told him that in July of 1997, two persons by the name of Jeff and Roberto came into his business and told Heffner that they were responsible for the murder of Dorothy Kern. Heffner also told Sanchez-Diaz’s attorney that he told Detective Rudy Jergovic the first week of July 1997 about these conversations. At the evidentiary hearing on the motion, Detective Jergovic testified that he had received a voice-mail message from Heffner in mid-July 1997, in which Heffner said that he had information concerning two unsolved homicides and an unsolved arson. The messages, however, did not say that two men had told Heffner of their involvement in one of the homicides; did not disclose the names of the two men; did not say where the homicides had occurred; did not mention the name of Dorothy Kern; did not say that one of the homicides occurred in the Town of Madison; and did not say that the homicide involved a victim being choked to death. Jergovic further testified that he did not attempt to contact Heffner in reply to this voice mail because, based on his past experience with Heffner, Jergovic had found that Heffner was “untruthful” and “delusional.” Jergovic explained that in the past Heffner had made false claims about Heffner’s wife attempting to murder Heffner with poison and having an affair, which led Jergovic to believe that Heffner needed treatment for mental problems.

¶7 The trial court made the following findings of fact: that Heffner’s voice-mail message for Detective Jergovic did not include any reference to the Kern case; that it did not include any reference to anyone confessing to Kern’s murder; and that the voice mail included nothing more than Heffner stating that he

had information about unspecific crimes. Based on the facts found by the trial court, we conclude that the State did not withhold exculpatory evidence because the State was not aware of any exculpatory evidence specifically pertaining to the current case.

¶8 Finally, Sanchez-Diaz argues that he received ineffective assistance of trial and postconviction counsel. We will not consider these issues because they are not properly before us. *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Although we chose not to delay this appeal when Sanchez-Diaz was given leave to proceed pro se in order to allow him to return to the trial court to raise the issue of ineffective assistance of counsel, as he requested, Sanchez-Diaz is not precluded from filing a motion in the trial court raising the issue of ineffective assistance of trial and postconviction counsel. *See State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 683, 556 N.W.2d 136 (Ct. App. 1996) (ineffective assistance of postconviction counsel can be a “sufficient reason” under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), for permitting an additional motion for postconviction relief under WIS. STAT. § 974.06). However, we caution Sanchez-Diaz that the motion must make specific factual and legal allegations to warrant a hearing by the trial court.

By the Court.—Judgment and order affirmed.

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

