

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

June 27, 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. 00-2059-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DARNIAL C. CRAIG,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Kenosha County: MICHAEL S. FISHER, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Darnial C. Craig appeals from the judgment of conviction entered against him, and the order denying his motion for postconviction relief. He argues on appeal that he was denied due process of law because the prosecutor referred to a sexual assault committed by his co-actor

during the course of the burglary, because the trial court erroneously exercised its discretion when it allowed testimony about the sexual assault, and because he was denied effective assistance of counsel. We conclude that the evidence referred to was admissible, the prosecutor did not err by referring to it, and the court did not err by allowing it. We also conclude that counsel was not ineffective. Therefore, we affirm.

¶2 A jury found Craig guilty of masked, armed burglary as a party to a crime. Craig had enlisted the help of Lebor Keys in committing the crime. During the burglary, Keys sexually assaulted one of the residents of the home. Craig did not participate in the sexual assault nor was it part of their plan. At Craig's trial, the State presented evidence of the sexual assault through the testimony of Keys and the victim. Although the court allowed the testimony, the court limited the testimony.

¶3 Craig first argues that he was denied due process of law because the prosecutor referred to the sexual assault during opening and closing arguments, and during the examination of witnesses. The State responds that Craig has waived this argument because defense counsel did not preserve an objection on the record. We conclude that the objection was preserved.

¶4 During the State's opening statement, the prosecutor referred to the fact that Keys raped one of the people in the house during the burglary. Defense counsel objected and the court held a sidebar conference off the record. After the conference, the prosecutor continued his opening argument. Later, after the jury had been excused, the court explained its ruling. The court stated:

To complete the record, during the course of the State's opening statement [the Prosecutor] referred to a sexual assault that occurred during the course of the burglary. An

objection was made by [the defense]. We had a short conference from the bench, and I acknowledged the objection was made. I indicated to [the defense] and both counsel that as an explanation of the events this reference to a sexual assault was not improper. The witnesses will be testifying to what occurred. I would ask the State to discuss and forewarn his witnesses not to go into details concerning any sexual assault that occurred at the hands of Mr. Lebor Keys because, as you indicated, Mr. Darnial Craig had no knowledge of that, had no part in that; and it is only of some value to describe the events that took place, and it should be kept to an absolute minimum. If possible, avoid it altogether.

¶5 It is clear from the court's explanation that counsel objected to the reference to the sexual assault as improper. The court stated that the reference to the sexual assault was not improper and that it was allowing the evidence to describe the events which took place. We can fairly infer from these statements that Craig objected to the admissibility of this line of evidence. We conclude that Craig preserved this issue.<sup>1</sup>

¶6 We agree with the State, however, that the admission of this evidence did not violate Craig's due process rights nor constitute an erroneous exercise of discretion. "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). Evidence is admissible to complete the story of the crime on trial, even if the evidence involves other crimes. *Cf. State v. Bettinger*, 100 Wis. 2d 691, 697, 303 N.W.2d 585 (1981) (other crimes evidence admissible to complete the story by proving its immediate context

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<sup>1</sup> The court notes that under SCR 71.01 and 71.02 (1999-2000), all court proceedings must be recorded. This includes a sidebar conference such as the one at issue here.

of happenings in time and place). “[A]ny fact which tends to prove a material issue is relevant, even though it is only a link in the chain of facts which must be proved to make the proposition at issue appear more or less probable.” *State v. Pharr*, 115 Wis. 2d 334, 346, 340 N.W.2d 498 (1983) (citation omitted).

¶7 We conclude that the trial court did not err by allowing the evidence of the sexual assault. The sexual assault was part of the burglary. In order for the prosecutor’s witnesses to reasonably explain the events, they had to be able to mention the sexual assault. To eliminate the potential for prejudice to Craig, the prosecutor put this evidence in its proper context. He told the jury that Craig was not involved in any way in the sexual assault. The sexual assault was one of the links in the chain which established the facts of the burglary.

¶8 Further, it was important that the jury believe Keys’ testimony. In most instances, the testimony of an accomplice must be corroborated. *See* WIS JI—CRIMINAL 245.<sup>2</sup> The prosecutor used the evidence of the sexual assault to corroborate Keys’ testimony about the other events. We conclude that the court did not err by admitting this evidence and that the prosecutor did not err by referring to it.

¶9 Craig also argues that trial counsel was ineffective because he did not request WIS JI—CRIMINAL 245. To establish an ineffective assistance of

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<sup>2</sup> WISCONSIN JI—CRIMINAL - 245 TESTIMONY OF ACCOMPLICES.

You have heard testimony from (name accomplice) who stated that (he) (she) was involved in the crime charged against the defendant. You should consider this testimony with caution and great care, giving it the weight you believe it is entitled to receive. You should not base a verdict of guilty upon it alone, unless after consideration of all the evidence you are satisfied beyond a reasonable doubt that the defendant is guilty.

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. *Id.* at 697. We will not "second-guess a trial attorney's 'considered selection of trial tactics or the exercise of professional judgment in the face of alternatives that have been weighed by trial counsel.' A strategic decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." *State v. Elm*, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) (citations omitted).

¶10 In this case, defense counsel testified that he did not ask for the accomplice instruction because he felt it drew too much attention to the connection between Craig and Keys. Craig asserts that this means counsel was afraid the jury might not follow the instruction. Craig is probably correct, but that still does not establish ineffectiveness. A curative instruction may not always accomplish its purpose, and counsel may choose not to ask for it. Just because an instruction exists to cover a particular issue does not mean counsel is ineffective for not requesting it. Counsel's decision not to ask for the instruction was a strategic decision, reasonably based on the facts and the law. Craig has not established that he was deprived of the effective assistance of counsel.

*By the Court.*—Judgment and order affirmed.

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

