

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 15, 2002**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

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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.

**Appeal No. 01-2361-CR  
STATE OF WISCONSIN**

**Cir. Ct. No. 98-CF-2584**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CHARLES L. STEWART,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Rock County: MICHAEL J. BYRON, Judge. *Affirmed.*

Before Dykman, Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Charles Stewart appeals from a judgment convicting him of being party to the crime of armed robbery and being a felon in possession of a firearm, and from an order denying his motion for postconviction relief. He claims the trial court erred in admitting certain testimony and trial

counsel was ineffective for failing to object to other lines of testimony. We disagree and affirm for the reasons explained below.

## **BACKGROUND**

¶2 The charges in this case arose from allegations that Stewart and two other men had pushed their way into the residence of Craig and Angela Halstead to look for Craig, who had stolen some cocaine from Stewart earlier in the day. Two of the three brandished guns while searching for Craig, and when they left, Stewart's companions took a Sony Play Station and a CD boom box, over the objections of Michael Webb, Craig's half-brother, who also lived in the house. Angela and Webb both identified Stewart as one of the men with guns. Craig's daughter, Tiffany, testified that she had seen the three men entering the house, heard yelling, and saw them leaving with her boom box and Play Station. Three other witnesses from across the street saw a trio of men leaving the Halstead's house with what looked to be a speaker or stereo equipment.

¶3 Prior to trial, defense counsel moved to exclude evidence of any drug use or drug dealing by Stewart other than the cocaine-stealing incident alleged to have motivated the armed robbery. The trial court ruled that any drug-related interactions between Stewart and the Halsteads would be admissible to show how the Halsteads knew and could identify Stewart, but that any of Stewart's drug dealings not involving the Halsteads would be excluded.

¶4 During opening argument, defense counsel indicated that the evidence would show that Craig had fabricated the accusations against Stewart because Stewart had been having an affair with Craig's wife, Angela. On direct examination by the State, Angela testified that she had had sex with Stewart in exchange for crack cocaine about a month before the robbery.

¶5 Craig testified that he and his wife were cocaine addicts and that Stewart was one of their dealers who had been at his house on prior occasions to sell him cocaine. Craig said that he learned about three weeks prior to the armed robbery that his wife had exchanged sex for cocaine and he was upset about it. He also said he paid Stewart the money for the cocaine he had stolen and bought more cocaine a couple of days after the armed robbery. Craig further testified that he lost his painting business due to his cocaine addiction, but that he and his wife had been cocaine free since shortly after the armed robbery.

¶6 Stewart contends that the trial court erroneously exercised its discretion by admitting testimony that Stewart and the Halsteads had drug dealings both before and after the date of the alleged offenses, and that trial counsel was ineffective for failing to specifically object to the testimony relating to Stewart giving Angela cocaine for sex and the testimony relating to the Halsteads' cocaine addiction and recovery efforts.

### STANDARD OF REVIEW

¶7 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 (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, 478 N.W.2d 37 (Ct. App. 1991). Thus, we will not overturn a discretionary determination merely because we would have reached a different result. *Id.* 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.* (internal quotations omitted).

¶8 Claims of ineffective assistance of counsel present mixed questions of law and fact. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). We will not set aside the circuit court’s findings about counsel’s actions and the reasons for them, unless they are clearly erroneous. WIS. STAT. § 805.17(2) (1999-2000);<sup>1</sup> *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel’s conduct violated the defendant’s constitutional right to the effective assistance of counsel is ultimately a legal determination, which this court decides de novo. *Pitsch*, 124 Wis. 2d at 634.

## ANALYSIS

### *Evidence of Other Drug Dealings*

¶9 The parties agree that evidence that Stewart sold cocaine to Craig on occasions other than the date of the charged crimes falls within the category of other acts evidence. Under WIS. STAT. § 904.04(2), evidence of other crimes or acts may be admissible when offered for the purpose of establishing identity or showing a plan or motive that reduces the possibility that the charged conduct was innocent. However, the evidence still must be relevant under WIS. STAT. §§ 904.01 and 904.02 in that it relates to a fact or proposition of consequence to the determination of the action, and its probative value must not be substantially outweighed by the danger of unfair prejudice or confusion of issues under WIS. STAT. § 904.03. *State v. Sullivan*, 216 Wis. 2d 768, 785-89, 576 N.W.2d 30 (1998).

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

¶10 Here, the trial court initially ruled that testimony of other drug transactions would be admissible to show how Craig knew Stewart, and later added that the evidence was admissible to put the charged offenses into context. Stewart claims the ruling was improper because identity was not an issue for trial—that is, Stewart’s defense was that either the incident itself or Stewart’s participation was fabricated, not that the victims had identified the wrong person. However, the supreme court has recently reaffirmed that evidence relevant to an element of the crime is admissible, even if the defendant does not dispute the element. *State v. Veatch*, 2002 WI 110, ¶62, No. 98-2387-CR. Therefore, the trial court could reasonably determine that the prior drug dealings between Stewart and Craig were offered for the proper purpose of proving identity, as well as for the purpose of showing why Stewart might have felt confident in openly robbing the Halsteads with little fear of reprisal. The trial court could also reasonably conclude that the probative value of the evidence was not substantially outweighed by the danger of undue prejudice, given that the jury would already be aware of Stewart’s drug involvement from the otherwise admissible, motive-providing fact that Craig had stolen cocaine from him. Similarly, even if the subsequent drug transaction between Craig and Stewart should have been excluded, we are satisfied that the admission was harmless error because the jury would already have been aware that Stewart was one of the Halstead’s drug dealers.

### *Sex-for-Cocaine Evidence*

¶11 Stewart contends that counsel was ineffective for failing to challenge testimony that Angela had exchanged sex for cocaine with Stewart. The test for ineffective assistance of counsel has two prongs: (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.” *Id.* The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To satisfy the prejudice prong, the defendant 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 697.

¶12 Here, we are satisfied that counsel did not perform deficiently by failing to object to the sex-for-cocaine evidence. In the first place, the evidence would have been admissible to show how Angela knew and could have identified Stewart, as discussed above. Moreover, counsel explained that the defense strategy was to show that Craig was motivated to fabricate the allegation against Stewart because he was upset about Stewart’s having had sex with Angela. Since Stewart did not take the stand himself, it was reasonable for counsel to allow Angela’s testimony that she had indeed had sex with Stewart about a month before the robbery. Once the sexual encounter was brought up, the circumstances surrounding it became relevant to assessing Craig’s motivation. Furthermore, the fact that Angela’s testimony established that the sex was more in the nature of a quid pro quo rather than a romantic affair did not materially affect defense counsel’s ability to argue that Craig was upset about the sexual incident.

*Evidence of the Halsteads' Cocaine Addiction and Recovery*

¶13 Stewart contends that evidence that the Halsteads were recovering cocaine addicts, and that Craig had lost his painting business due to his addiction, should have been excluded as irrelevant and prejudicial to the extent it could evoke sympathy for the victims. The State appears to concede that the evidence should have been excluded. We will therefore assume, without deciding, that counsel performed deficiently by failing to object to the evidence. We are satisfied however, that the testimony could not reasonably have affected the outcome at trial. There was ample evidence to show that the Halsteads had been regular drug users. That their respective addictions had lead Angela to exchange cocaine for sex and Craig to lose his business could have made them appear less sympathetic as easily as more. Moreover, their self-serving statements that they were no longer using drugs by the time of trial were unlikely to have any influence on the jury's resolution of the key dispute—whether Stewart's assertion that the charge against him was fabricated could hold up against the two witnesses who directly identified him and the additional witnesses who had observed various portions of the incident.

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

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

