COURT OF APPEALS
DECISION
DATED AND RELEASED

May 21, 1997

NOTICE

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No. 96-1306-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICHARD DODSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed in part; reversed in part and cause remanded.*

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

NETTESHEIM, J. Richard Dodson appeals from a judgment of conviction for three counts of first-degree sexual assault of a child contrary to § 948.02(1), STATS. Two of the convictions are based on incidents of sexual contact between Dodson and the victim. The other conviction is based on

an incident of sexual intercourse between Dodson and the victim. The convictions followed a jury trial. Dodson additionally appeals from the trial court order denying postconviction relief.

On appeal, Dodson argues that the trial court erred by: (1) admitting "other acts" evidence; (2) excluding evidence under § 972.11, STATS. (the "rape shield" statute); (3) denying his motion for mistrial; (4) refusing to hold a ***Machner*** hearing; and (5) improperly instructing the jury. We reject all but one of Dodson's arguments. We hold that the trial court erred in denying Dodson's request to admit evidence of the victim's prior sexual conduct under the exception to the rape shield statute set forth in ***State v. Pulizzano***, 155 Wis.2d 633, 456 N.W.2d 325 (1990). Because this error denied Dodson his constitutional right to present a defense as to the sexual intercourse charge, we reverse the judgment as to that conviction, and we remand for a new trial on that charge. We affirm the other two convictions.

FACTS

On December 8, 1994, the State filed an information against Dodson alleging two counts of first-degree sexual contact with a minor and one count of first-degree sexual intercourse with a minor pursuant to § 948.02(1), STATS.[1] The

[1] Dodson was also charged with one count of exposing a child to harmful materials pursuant to § 948.11(2)(a), STATS. The jury found him not guilty of this offense.

information alleged that the acts occurred between February 29, 1992, and August 31, 1992.[2]

The matter proceeded to a jury trial on March 6, 1995. In support of the charges, the victim, Brian, testified that he was routinely dropped off at Dodson's residence in Kenosha. While there, Dodson would approach Brian and instruct him to remove his clothing. Brian testified that on multiple occasions Dodson had sexual contact and anal intercourse with him.

In addition to Brian's testimony, the State introduced two other lines of evidence. First, the State introduced other acts evidence, including the testimony of two young men who had allegedly been assaulted by Dodson in a similar manner when Dodson resided with his parents in Illinois. The State also introduced testimony from Brian that Dodson began assaulting him in Illinois by having Brian perform fellatio on him. Second, the State introduced expert medical testimony that Brian had an anal tag, a physical condition which is consistent with anal penetration and tearing. Dodson maintained throughout the trial that he did not assault Brian.

Following a five-day trial, the jury found Dodson guilty of the three counts of sexual assault. Dodson filed a motion for postconviction relief alleging ineffective assistance of counsel. The trial court denied Dodson's postconviction

[2] We note that this was the second information filed by the State against Dodson for these offenses. The first information, filed in April 1994, alleged that the sexual conduct occurred in 1991. On the morning of the first trial, the State filed a motion to amend the complaint because Dodson did not live in Wisconsin in 1991. The trial court denied the State's motion and dismissed the charges without prejudice. The State then filed the complaint alleging the 1992 dates.

motion. Dodson appeals. We will recite additional facts as we address the appellate issues.

DISCUSSION

A. *Other Acts Evidence*

In reviewing the admissibility of evidence, we determine whether the trial court exercised its discretion in accordance with accepted legal standards and the facts of record. *See* ***State v. Kuntz***, 160 Wis.2d 722, 745, 467 N.W.2d 531, 540 (1991). If there is a reasonable basis for the trial court's determination, we will uphold the ruling. *See* ***id***. at 745-46, 467 N.W.2d at 540. The admissibility of other acts evidence is controlled by a two-pronged test; the trial court must first determine whether the evidence is admissible under an exception to § 904.04(2), STATS. *See* ***Kuntz***, 160 Wis.2d at 746, 467 N.W.2d at 540. If the evidence satisfies the first prong, the trial court must then consider whether the probative value of the evidence is outweighed by its prejudicial impact. *See* ***id***.

At trial, the State introduced the testimony of Bobby M., Tim H. and Tim H.'s mother. Both Bobby and Tim testified that Dodson had sexually abused them as young children. Bobby testified that when he was approximately seven years old, Dodson, his stepuncle, engaged in sexual contact with him at Bobby's mother's home and during visits to his grandparents' home in Zion, Illinois. Bobby estimated that he had been assaulted by Dodson on six or seven occasions. Bobby recalled that on one particular occasion, Dodson instructed him to remove his clothes and lie on a bed. Dodson then proceeded to have anal intercourse with Bobby. Bobby also recounted memories of performing fellatio on Dodson either at his mother's home or upstairs at his grandparents' home.

Tim testified regarding two occasions of sexual contact with Dodson, his uncle, which occurred when Tim visited his grandparents in Zion, Illinois. Tim testified that on the first occasion Dodson took him upstairs into Dodson's bedroom. Dodson instructed Tim to remove his clothes and lie on the bed. Dodson then straddled Tim's legs while rubbing his hands over Tim's back and buttocks. Tim "fell asleep" and woke up later with his clothes still off. Tim testified that on the second occasion Dodson again instructed him to remove his clothes and lie on the bed. Dodson laid naked on top of Tim. Tim testified that when he was ten or twelve years old, he told his mother about the incident. Tim's mother confirmed Tim's testimony, stating that Tim had informed her of the incidents.

In addition, Brian testified regarding other sexual contact between himself and Dodson which occurred prior to events alleged in the information. Specifically, Brian testified that before Dodson moved to Kenosha, Brian visited his stepgrandparents in Zion, Illinois. While there, Brian testified that on more than one occasion Dodson "stuck his penis in [Brian's] mouth."

The trial court admitted this other acts evidence, concluding that the prior acts appeared to "comply with the safeguard under 904.04, proof of motive, opportunity, intent, preparation, plan, knowledge or absence of mistake or accident …." Regarding Brian's testimony alleging other acts between himself and Dodson, the court concluded, "[T]he prior acts involving the alleged victim in this case also have greater probative value and relevance …." On appeal, Dodson makes a cursory argument that the trial court erred in admitting evidence of other alleged sexual assaults perpetrated by Dodson. We conclude, as did the trial court, that the evidence was admissible under § 904.04, STATS. We further conclude that

the probative value of the other acts evidence was not substantially outweighed by its prejudicial effect.

Dodson makes a cursory and general argument against the trial court's ruling. He contends that the other acts evidence was not admissible under § 904.04, STATS. We disagree. The other acts evidence included testimony that on prior occasions Dodson employed similar methods for perpetrating sexual assaults on the victim complainant and two other young boys. The trial court properly concluded that this testimony was admissible because it went to "proof of motive, opportunity, intent, preparation, plan, knowledge or absence of mistake or accident …."

Dodson additionally contends that the other acts evidence was unduly and unfairly prejudicial. Again, we disagree. Under § 904.03, STATS., evidence is inadmissible only if the prejudicial effect of the evidence substantially outweighs its probative value. The probative value of other acts evidence "'depends in part upon its nearness in time, place and circumstances to the alleged crime or element sought to be proved.'" *See* ***State v. Speer***, 176 Wis.2d 1101, 1114, 501 N.W.2d 429, 433 (1993) (quoted source omitted). Here, all three boys were related to Dodson either by blood or marriage. Dodson was trusted to remain alone with the boys. The boys were approximately the same age when the alleged acts occurred. Finally, the alleged acts were very similar in nature. We conclude that the other acts evidence in this case was highly probative. The prejudicial effect of such evidence does not substantially outweigh its probative value.

We additionally note that the courts employ a "'greater latitude of proof as to other like occurrences'" in cases involving sex crimes, especially cases of incest and indecent liberties with a child. *See* ***State v. Plymesser***, 172 Wis.2d

583, 597-98, 493 N.W.2d 367, 374 (1992) (quoted source omitted). We conclude that the trial court did not erroneously exercise its discretion by admitting evidence of Dodson's prior acts.

B. *Sixth Amendment Claim*

At the end of the first day of trial, Dodson's counsel requested that he be permitted to question Brian regarding a prior incident of sexual contact between Brian and Bobby. The questions were premised upon certain statements Brian allegedly made to his stepgrandmother, Delores Dodson—the defendant's mother. In support of his request, defense counsel made the following offer of proof:

> If called to testify, Delores Dodson would testify, based upon a report of May 4, 1994 … that in June or July of 1990 … [Brian] was at her home in Zion, Illinois, where she lived at that time; that [Brian] was telling her about something that had happened to him …. [Brian] told her that Bobb[y] had sexually molested him ... [Brian] told her that Bobb[y] told him to take off his clothes, and that Bobb[y] laid on top of him, and that his wiener got real big, and that he put his wiener in his butt. [Brian] said he told Bobb[y] to stop it.

Defense counsel argued that the prior sexual assault was "significant in this case … because of the fact that the scenario is identical to that which he described and attributes to [the] defendant." Defense counsel additionally argued that the evidence would refute the medical testimony that Brian's anal tag was a byproduct of a sexual assault by Dodson.

The trial court denied defense counsel's request under § 972.11, STATS., concluding that "the rape shield statute bars any inquiry of [Brian] concerning his prior sexual activity, specifically, involving [Bobby]." Dodson argues that the evidence of Brian's prior sexual contact with Bobby falls within

the exception to the rape shield statute set forth in ***Pulizzano***, 155 Wis.2d at 638-39, 456 N.W.2d at 327, and thus, the trial court erred in excluding it. We agree.

We review a trial court's evidentiary ruling with deference and will uphold the ruling if the trial court properly exercised its discretion in accordance with the facts of record and the proper legal standards. *See* ***Michael R.B. v. State***, 175 Wis.2d 713, 720, 499 N.W.2d 641, 644 (1993). However, whether the trial court's determination denied Dodson the right to present a defense is a question of constitutional proportion and, as such, involves constitutional facts which we review de novo. *See* ***id***.

The rape shield statute, § 972.11, STATS., excludes as a matter of law evidence of a victim's sexual history or past conduct. The statute provides, in relevant part:

> **(2)**(a) In this subsection, "sexual conduct" means any conduct or behavior relating to sexual activities of the complaining witness, including but not limited to prior experience of sexual intercourse or sexual contact, use of contraceptives, living arrangement and life-style.
>
> (b) If the defendant is accused of a crime under s. 940.225, 948.02, 948.025, 948.05, 948.06 or 948.095, any evidence concerning the complaining witness's prior sexual conduct or opinions of the witness's prior sexual conduct and reputation as to prior sexual conduct shall not be admitted into evidence during the course of the hearing or trial, nor shall any reference to such conduct be made in the presence of the jury ….

The rape shield statute additionally lists three exceptions to the general exclusion rule, *see* § 972.11(2)(b)1-3, which are limited to circumstances in which evidence of a complainant's prior sexual conduct is probative without being especially prejudicial. *See* ***Pulizzano***, 155 Wis.2d at 644, 456 N.W.2d at 330.

The trial court correctly concluded that evidence of Brian's past sexual conduct was inadmissible under the rape shield statute. *See* ***id***. at 643, 456 N.W.2d at 329. Dodson does not argue otherwise. Rather, Dodson argues that the evidence of Brian's prior sexual contact with Bobby falls within the ***Pulizzano*** exception to the rape shield statute and thus, the exclusion of such evidence resulted in a violation of his constitutional right to present a defense.

In ***Pulizzano***, the defendant sought the admission of evidence of a prior sexual assault of the child complainant for the purpose of establishing an alternative source of the child's sexual knowledge. *See* ***id.,*** at 638-39, 456 N.W.2d at 327. The supreme court recognized that under certain circumstances the rape shield law may impermissibly infringe upon a defendant's constitutional right to cross-examine witnesses and to present a defense. *See* ***id***. at 647-48, 456 N.W.2d at 331; *see also* ***Michael R.B.***, 175 Wis.2d at 736, 499 N.W.2d at 651. The court then set forth the standard to be met before relevant evidence, otherwise inadmissible under the rape shield statute, is admitted by the trial court.

First, the defendant must make an offer of proof establishing that: (1) the prior act clearly occurred; (2) the act closely resembles those at issue in the instant case; (3) the act is relevant to a material issue; (4) the evidence is necessary to his or her case; and (5) the probative value of the evidence outweighs its prejudicial effect. *See* ***Pulizzano***, 155 Wis.2d at 656, 456 N.W.2d at 335. If the defendant makes the requisite showing, the trial court must then determine whether the state's interests in excluding the evidence are so compelling that they nonetheless overcome the defendant's right to present it. *See* ***id***. at 656-57, 456 N.W.2d at 335.

In determining whether Dodson's offer of proof met the standard set forth under ***Pulizzano***, we must bear in mind that "an offer of proof need not be stated in complete precision or with unnecessary detail." *See* ***Michael R.B.***, 175 Wis.2d at 736, 499 N.W.2d at 651 (quoting ***Milenkovic v. State***, 86 Wis.2d 272, 284, 272 N.W.2d 320, 326 (Ct. App. 1978)). We conclude that Dodson's offer of proof established the five factors set forth in ***Pulizzano***. We further conclude that the State's interest in excluding the evidence does not overcome Dodson's constitutional right to present it.

Dodson's offer of proof established that Delores would testify that in 1990 Brian told her that Bobby had sexually assaulted him. Like ***Pulizzano***, the evidence proffered in this case involved statements of prior sexual acts made by a child to an adult. Therefore, we reject the State's argument that the evidence should be excluded because it is hearsay. We are satisfied that Dodson's offer of proof establishes, to the degree of certainty required under ***Pulizzano***, that the prior act clearly occurred.

The statement Brian made to Delores was specific and described an act which clearly resembles those charged in the present case. Dodson was charged with two counts of sexual contact including fondling and having "contact with [Brian's penis] … with the body and penis of the defendant …." Dodson was additionally charged with engaging in anal intercourse with Brian. The facts alleged in Dodson's offer of proof clearly describe an act of anal intercourse. The State argues that the statement does not meet the requirement that the act closely resembles those charged. The State contends that the offer of proof fails to show the circumstances of the alleged assault, specifically whether Bobby had opportunity to commit the assault and whether threat of force was used. We are unpersuaded.

Dodson requested that evidence of Brian's prior sexual contact be admitted to show an alternate source of Brian's sexual knowledge and to rebut medical testimony that Brian's anal tag resulted from anal intercourse with Dodson. The failure to provide information concerning the circumstances surrounding the alleged incident does not alter the fact that the offer of proof did contain specific evidence that Brian had previously engaged in anal intercourse.

Next, Dodson's offer of proof must establish that the evidence is relevant to a material issue and is necessary to his defense. We conclude that it did. Brian testified in detail regarding the anal intercourse and sexual contact which allegedly occurred between himself and Dodson. Like the defendant in ***Pulizzano***, Dodson sought admission of Brian's prior sexual contacts to show an alternative source of sexual knowledge. *See* ***Pulizzano***, 155 Wis.2d at 638-39, 456 N.W.2d at 327. There, the court concluded that: "Evidence of the prior sexual assault is probative of a material issue, to show an alternative source for sexual knowledge, and is necessary to rebut the logical and weighty inference that [the child] could not have gained the sexual knowledge he possessed unless the sexual assaults [the defendant] is alleged to have committed occurred." *See* ***id***. at 652, 456 N.W.2d at 333.

Here, the evidence of Brian's prior sexual assault is equally probative of a material issue and is equally necessary to Dodson's defense. In addition, the State presented evidence to the jury that Brian had an anal tag, a physical condition often resulting from anal penetration and tearing. In his offer of proof, Dodson argued that the evidence was necessary to rebut the State's position that Brian would not have an anal tag but for the acts of Dodson. We agree with Dodson that the proffered evidence is relevant and necessary to his defense on this basis as well.

Under the last requirement of ***Pulizzano***, Dodson's offer of proof must establish that the probative value of the evidence outweighs its prejudicial effect. We conclude that it does. Like the evidence in ***Pulizzano***, the risk is that Brian's prior sexual assault by Bobby may be used by the trier of fact for other impermissible purposes. *See* ***id***. at 652-53, 456 N.W.2d at 333. However, we conclude, as did the ***Pulizzano*** court, that the potential for improper use of the evidence may be negated through a limiting instruction. *See* ***id***. Given the facts of this case, we are unable to conclude that the prejudicial effect of this evidence outweighs its probative value. Therefore, we further conclude that Dodson's offer of proof has satisfied the five ***Pulizzano*** requirements.

Next, ***Pulizzano*** requires that the trial court determine whether the State's interest in prohibiting the evidence outweighs Dodson's right to present the evidence. *See* ***id***. at 654-55, 456 N.W.2d at 334. While recognizing that the state has a great interest in prohibiting evidence under the rape shield statute, we must nevertheless conclude that the State's interest does not outweigh Dodson's constitutional right to present the evidence. Under certain circumstances, evidence of a victim's prior sexual conduct may be admissible to establish an alternative source of sexual knowledge. *See* ***id***. at 653, 456 N.W.2d at 334.

We are satisfied that this case involves such circumstances. Most importantly, we conclude that the evidence was necessary in order for Dodson to rebut the inference that Brian's anal tag resulted from anal intercourse with Dodson. During opening argument, the State referred to the expert medical testimony, linking Brian's anal tag to Dodson's sexual assault. During closing arguments, the State made the following remarks regarding the medical testimony of Dr. Gary Zaid which established the "concrete physical evidence" of Brian's anal tag:

> [W]ho do you believe? We have, on the one hand, Mr. Dodson saying it never happened, I never did this. And, on the other hand, Dr. Zaid coming in and offering concrete physical evidence that the allegations that Brian [] made happened. Who do you believe?
>
> …. Mr. Dodson … put his penis in Brian's butt, and we know that is corroborated by concrete physical evidence. That doesn't lie.

The State then insisted that the jury disregard Dodson's attempts to "suggest that these injuries that Brian has to his anus are caused by something else."

Thus, the State used the evidence of Brian's anal tag not only to establish that Dodson had sexually assaulted Brian but also to denigrate Dodson's admittedly weak argument that the anal tag was due to "something else." But the argument was weak because the State had successfully objected to the admission of Dodson's proffered evidence which would have made the argument considerably stronger. Given the prominence and interpretation which the State placed on the anal tag evidence, Dodson was constitutionally entitled to present the disputed evidence to rebut the State's claim. That right outweighed the State's interest in excluding the evidence under the rape shield statute. Because the harmless error rule cannot be applied in such a case, we must reverse the court's ruling on this issue and remand this case for a new trial on the sexual intercourse charge. *See* ***id***. at 654-55, 456 N.W.2d at 334-35.[3]

[3] This holding renders moot two of Dodson's further appellate issues: (1) the trial court should have granted Dodson's attorney's request for a mistrial based on counsel's admitted failure to bring a pretrial ***Pulizzano*** motion; and (2) counsel was ineffective on this same basis. The court correctly noted that such motions should be brought in advance of trial. But the court did not deny the motion on this basis. Instead, the court addressed the motion on its merits during the trial. Thus, despite counsel's failure to bring the motion prior to trial, Dodson was not prejudiced because he received a substantive ruling on the issue at the trial.

Our reversal, however, does not extend to the sexual contact convictions. Those convictions were based on other discrete incidents in which Dodson would take Brian's penis and rub it against his own penis and body. The supreme court has held that touching the private parts of another does not "so closely resemble sexual intercourse as to satisfy the ***Pulizzano*** test." *See* ***Michael R.B.***, 175 Wis.2d at 736, 499 N.W.2d at 651. The excluded evidence in this case does not survive this factor under the ***Pulizzano*** test.

The State reads Dodson's brief to raise an additional rape shield issue—whether the trial court properly barred Dodson from cross-examining Brian about his viewing of X-rated films at a birthday party.[4] The State contends that the trial court's ruling was correct because such viewing constitutes "conduct or behavior" under the rape shield law.

However, we do not share the State's reading of Dodson's brief. Dodson merely alludes to the trial court's ruling and then launches into his rape shield argument about the episode between Brian and Bobby. Dodson makes no argument against the trial court's ruling regarding the X-rated film.

Moreover, Dodson made no offer of proof regarding the content of this film. Even if this kind of conduct is covered by the rape shield law, we nonetheless would need to know the content of the film to determine whether a ***Pulizzano*** situation existed.

[4] Since Dodson was not present at the birthday party and did not provide the X-rated films, this episode does not concern the additional charge against Dodson of which he was acquitted—exposing a minor to harmful materials.

Much as we would like to assist the trial court on this issue for purposes of the retrial on the sexual intercourse count, we cannot in good conscience do so because we do not have any argument which responds to the State's position and we do not know the substantive content of the evidence at issue.

C. *Jury Instructions*

Dodson contends that the trial court erred by instructing the jury pursuant to a modified version of WIS J I—CRIMINAL 255.[5] The court instructed the jury as follows:

> If you find that the offense charged was committed by the defendant, it is not necessary that the State shall have proved that the offenses were committed between the precise dates alleged in the Information. If the evidence shows beyond a reasonable doubt that the offenses were committed on a date during the time period alleged in the Information, that is sufficient.

Dodson argues that the court's ruling in ***Jensen v. State***, 36 Wis.2d 598, 153 N.W.2d 566, 154 N.W.2d 769 (1967), supports his position that the court's use of WIS J I—CRIMINAL 255 constituted reversible error. Because ***Jensen*** is distinguishable from this case, we reject Dodson's argument.

Jensen was charged with three counts of sexual intercourse with a minor, his daughter. *See* ***Jensen,*** 36 Wis.2d at 601, 153 N.W.2d at 567. The criminal complaint alleged the incidents occurred "on or about" three specific dates. *See* ***id***. at 603, 153 N.W.2d at 568. Jensen's theory of defense as to two of the counts was that he could not have committed the assaults because he was with his girlfriend on the dates alleged in the complaint. *See* ***id***. Over objection from the defense, the court used WIS J I—CRIMINAL 255 to instruct the jury as to the

[5] The actual text of WIS J I—CRIMINAL 255 is as follows:

> If you find that the offense charged was committed by the defendant, it is not necessary that the State shall have proved that the offense was committed on the precise date alleged in the (information) (complaint). If the evidence shows beyond a reasonable doubt that the offense was committed on a date near the date alleged, that is sufficient.

state's burden of proving the dates alleged in the complaint. In considering the trial court's use of WIS J I—CRIMINAL 255, the ***Jensen*** court stated:

> We think that because there were two offenses in question which occurred very close to each other in time and since there was general testimony to the effect that these acts of intercourse occurred several times, this instruction was error for it allowed the jury to dispel any doubts it may have had believing that at some time defendant had sexual relations with his daughter on three occasions. Thus the practical effect of such an instruction would render the alibi defense ineffectual from the beginning. We think the instruction in question was designed for a fact situation in which one offense only is alleged, or where, if there are multiple offenses, there is absolutely no confusion in anyone's mind as to their separateness in time.

See ***Jensen***, 36 Wis.2d at 604-05, 153 N.W.2d at 569.

Dodson argues that the ***Jensen*** analysis is directly on point in this case. We disagree. ***Jensen*** is distinguishable for two reasons. First, the court in ***Jensen*** was concerned that the use of WIS J I—CRIMINAL 255 would render Jensen's alibi defense "ineffectual." In affirming Jensen's conviction, the court observed that "the error in the instructions only affects … two charges because no alibi was presented for the [third charge]." *See* ***Jensen***, 36 Wis.2d at 606, 153 N.W.2d at 570. Here, Dodson does not claim, nor did he at trial, that he has an alibi for the time period alleged in the information.

Second, the ***Jensen*** court was concerned that the jury may experience confusion regarding the separateness of the offenses. We do not share the same concerns in this case. Jensen was charged with committing the same offense, sexual intercourse, three times on three specific dates. Here, the information alleged that Dodson committed three counts of sexual assault, involving three different types of contact, at some time between February 29, 1992, and August 31, 1992. Because the types of conduct alleged were different,

and only one count of each type of conduct was charged, there is less risk of confusion as to the separateness of the offenses. We are not persuaded that the court's use of WIS J I—CRIMINAL 255 would confuse the jury as to whether Dodson committed one offense of each type of conduct during a six-month window of time.[6]

D. *Ineffective Assistance of Counsel*

Following his conviction, Dodson filed a postconviction motion for relief alleging ineffective assistance of counsel. He alleged that his counsel was ineffective for failing to object to the admission of other acts evidence and for failing to poll the jury.[7] The trial court denied Dodson's postconviction motion without a hearing, concluding that Dodson failed to supply a sufficient factual basis to justify a ***Machner*** hearing. Dodson challenges this ruling.

Before a trial court is required to hold an evidentiary hearing on a claim of ineffective assistance of counsel, the defendant must raise factual allegations sufficient to raise a question of fact for the court. *See* ***State v. Washington***, 176 Wis.2d 205, 214-15, 500 N.W.2d 331, 335-36 (Ct. App. 1993). We review the defendant's motion de novo to determine whether it alleges facts sufficient to demand a ***Machner*** hearing. *See* ***State v. Tatum***, 191 Wis.2d 547, 551, 530 N.W.2d 407, 408 (Ct. App. 1995). However, if the motion fails to allege

[6] Although we have upheld the trial court's delivery of the modified instruction, we observe that the delivery of this instruction at the new trial remains a matter committed to the trial court's discretion. *See* ***State v. Lindvig***, 205 Wis.2d 100, 104, 555 N.W.2d 197, 199 (Ct. App. 1996). Thus, our holding on this issue for purposes of reviewing the first trial in this case is not ironclad as to the new trial. If the new trial establishes a ***Jensen*** situation, then the trial court should exercise its discretion in keeping with the supreme court's holding in that case.

[7] We have previously noted that Dodson's additional claim of ineffective assistance of counsel based on the failure to bring a pretrial ***Pulizzano*** motion is moot because of our previous ruling on that issue. *See supra* n.3.

sufficient facts, the trial court has the discretion to deny the postconviction motion without an evidentiary hearing. *See* ***State v. Bentley***, 201 Wis.2d 303, 310-11, 548 N.W.2d 50, 53 (1996). Thus, we will not reverse the trial court's ruling unless it is an erroneous exercise of discretion. *See* ***id***. at 311, 548 N.W.2d at 53.

Dodson's first claim of ineffective assistance of counsel is based on trial counsel's alleged failure to object to the State's failure to bring a formal motion seeking admission of the other acts evidence in this case. He also contends that counsel was ineffective for failing to object to the evidence.

However, this issue was fully litigated and decided against Dodson by Judge Barbara Kluka in the first action, which was later dismissed without prejudice. *See supra* n.2. When the State refiled the charges in their present form in this case, it asked Judge S. Michael Wilk, the trial judge in this case, to confirm Judge Kluka's prior ruling and to expand it to include certain additional acts alleged by Tim and Brian. After reviewing the alleged prior acts and the prior proceeding before Judge Kluka, Judge Wilk granted the State's request.

We reject Dodson's contention that his counsel's failure to object to the State's failure to file a formal ***Whitty*** motion was ineffective performance. The obvious purpose of such a motion is to provide the defense with notice of the intent to use such evidence. Here, not only did the prior proceedings before Judge Kluka provide such notice, but Dodson's counsel expressly acknowledged to Judge Wilk that he was not surprised by the State's intent to use the evidence in the trial of this case. Nor do we agree with Dodson that counsel did not object to the evidence. Counsel expressly told Judge Wilk that he had a continuing objection to the admission of any other acts evidence. In the face of this history known to Judge Wilk, not only were Dodson's allegations as to counsel's failings

incorrect, they also clearly failed to demonstrate any prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We see no error in Judge Wilk's decision to deny a ***Machner*** hearing as to these claims.

Finally, Dodson contends that his counsel was ineffective for failing to ask that the jury be polled. However, Dodson's motion failed to assert any facts unique to this case or any law which holds that such a failing constitutes ineffective assistance of counsel. In fact, the law is to the contrary. *See* ***State v. Yang***, 201 Wis.2d 725, 745, 549 N.W.2d 769, 776-77 (Ct. App. 1996). As such, Dodson's allegation against trial counsel is conclusory. "A conclusory allegation of ineffective assistance of counsel, unsupported by any factual assertions, is legally insufficient and does not require the trial court to conduct an evidentiary hearing." *See* ***State v. Toliver***, 187 Wis.2d 346, 360, 523 N.W.2d 113, 118 (Ct. App. 1994).

Based on the above, we conclude that the postconviction motion failed to allege facts sufficient to support a claim of ineffective assistance of counsel. We further conclude that the trial court did not erroneously exercise its discretion in denying Dodson's request for a ***Machner*** hearing.

CONCLUSION

We reject all of Dodson's challenges save the ***Pulizzano*** issue. On that issue, we reverse the trial court's evidentiary ruling. We reverse the judgment as to the sexual intercourse conviction, and we remand for a new trial on that count. We affirm the balance of the judgment.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded.

Not recommended for publication in the official reports.