**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**June 21, 2005**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2003AP2836-CR** **Cir. Ct. No. 1997CF33**

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

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JAMES TANKSLEY,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment and an order of the circuit court for Langlade County: ROBERT A. KENNEDY, SR., Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. James Tanksley, pro se, appeals a judgment of conviction, entered upon a jury's verdict, for two counts of first-degree sexual assault of a child contrary to WIS. STAT. § 948.02(1) and one count of false

imprisonment contrary to WIS. STAT. § 940.30.[1] Tanksley also appeals an order denying his postconviction motion for a new trial. He raises four arguments relating to his right to counsel, evidentiary matters, and sentencing. We reject his arguments and affirm the judgment and order.

## Background

¶2 In Langlade County Case No. 1997CF33, Tanksley was charged with sexual assault of a child and false imprisonment for events occurring in 1996 and 1997 involving victim Ryan J. In case No. 1997CF49, he was also charged with one count of sexual assault of a child for a 1996 event involving victim Josh F. The cases were tried together.

¶3 Tanksley was convicted in both cases but appealed, and we reversed and remanded for a new trial because of the erroneous admission of prejudicial evidence. *See* ***State v. Tanksley***, No. 1998AP3317-CR, unpublished slip op. (Ct. App. July 30, 1999).

¶4 Tanksley had been declared indigent and therefore eligible for public defender assistance. Following remand from this court in 1999, attorney James Connell was appointed to represent him at a bond hearing. Connell also filed an interlocutory appeal, decided adversely to Tanksley. In October 2000, Connell moved to withdraw and Tanksley sent a letter to the trial court indicating he wished to proceed pro se.

[1] Although the events underlying the charges in this case occurred in 1996 and 1997, all references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted, because their text has not substantively changed.

¶5 In April 2001, Tanksley filed a "Demand for Assistance of Standby Counsel" and the court held a hearing. Tanksley assured the court he wanted to represent himself but also wanted the assistance of standby counsel for certain things. The court confirmed Tanksley wanted to represent himself and denied the motion, stating it was not required to appoint standby counsel. The court further determined Tanksley was competent to represent himself and found that he voluntarily waived his right to counsel.

¶6 In May 2001, after Tanksley had sent multiple letters to the court asking for procedural advice and sending subpoenas to the trial court for it to serve, the court held a hearing. It advised Tanksley that the court would not act as his attorney and that if he continued to have questions, he would be wise to seek the public defender's assistance. The court then addressed Tanksley's "motion for assistance of counsel" which was denied because Tanksley was still seeking standby counsel, not actual representation.

¶7 On June 14, 2001, Tanksley filed three more motions in the court. On the same day, the public defender appointed attorney Christopher Lummis to represent Tanksley, although the parties do not explain why Lummis was appointed when Tanksley continued to insist on proceeding pro se. Ultimately, however, Lummis represented Tanksley during the trial and through sentencing.

¶8 During trial, Tanksley wanted to introduce evidence that Ryan had been previously assaulted by a cousin to demonstrate that the child's knowledge of sexual acts could have originated somewhere other than with Tanksley's alleged assault. The court denied the motion. Tanksley was convicted of the charges in case No. 1997CF33, but acquitted of the charge in case No. 1997CF49. The court sentenced him to a total of eighty-two years' imprisonment: forty years for each

of the assaults and two years for the false imprisonment charge, all to be served consecutively.[2]

¶9 Following his conviction, Tanksley moved for a new trial alleging, among other things, ineffective assistance of trial counsel and the trial court's erroneous exercise of discretion relative to the appointment of standby counsel, the evidentiary ruling and the sentencing decision. The court denied the motion. Tanksley appeals.

## Discussion

### I. Appointment of Standby Counsel

¶10 Tanksley did not want to be represented by counsel—he wanted to represent himself. He did, however, want an attorney to help him prepare his case for trial. Specifically, he wanted help subpoenaing witnesses, obtaining documentary evidence, and ensuring there was no prosecutorial misconduct.

¶11 Tanksley contends the court's declination to appoint standby counsel violates the Sixth and Fourteenth Amendments. He argues he was forced to choose between his rights to personally present a defense or confront witnesses and the right to assistance of counsel. He contends:

> [He] requested assistance of Standby Counsel and/or assistance of counsel to assist the defendant … in the preparation of his defense. …
>
> [He] was forced to barter for his rights by surrendering his personal rights up to an assistant appointed by the State.

[2] Tanksley was sentenced under our indeterminate sentencing structure.

> … denying the defendant any form of assistance of counsel for the preparation of his defense unless he waived his personal rights violated his constitutional rights.

¶12 "Standby" counsel is a type of advisory counsel. ***Locks v. Sumner***, 703 F.2d 403, 407 n.3 (9th Cir. 1983). "The Sixth Amendment does not require a court to grant advisory counsel to a criminal defendant who chooses to exercise his right to self-representation by proceeding pro se." ***United States v. Lawrence***, 161 F.3d 250, 253 (4th Cir. 1998) (citing ***McKaskle v. Wiggins***, 465 U.S. 168, 183 (1984)). Rather, such a decision should be based on a determination that appointing standby counsel to a pro se defendant is necessary for the trial court's convenience. *See* ***State v. Cummings***, 199 Wis. 2d 721, 754, 546 N.W.2d 406 (1996); ***Douglas County v. Edwards***, 137 Wis. 2d 65, 77, 403 N.W.2d 438 (1987). This determination is left to the trial court's discretion. ***Cummings***, 199 Wis. 2d at 754.

¶13 Moreover, a defendant is free to accept or reject counsel to aid in his defense. ***State v. Albright***, 96 Wis. 2d 122, 132, 291 N.W.2d 487 (1980) (citing ***Faretta v. California***, 422 U.S. 806 (1975)). But representation by counsel and self-representation are mutually exclusive propositions. ***United States v. Traeger***, 289 F.3d 461, 475 (7th Cir. 2002); ***United States v. Mikolajczyk***, 137 F.3d 237, 246 (5th Cir. 1998). Exercise of one of the rights is a de facto waiver of the other. *See* ***Robinson v. State***, 100 Wis. 2d 152, 165, 301 N.W.2d 429 (1981); ***Albright***, 96 Wis. 2d at 132-33. Indeed, to be self-represented and represented by counsel is "hybrid representation" and is generally prohibited. *See* ***United States v. Oreye***, 263 F.3d 669, 672 (7th Cir. 2001); *but cf.* ***Locks***, 703 F.2d at 407-08 (suggesting hybrid representation should be left to court's discretion).

¶14 Tanksley was quite adamant about his desire to proceed pro se. To that end, the court was in no way required to appoint standby or advisory counsel to aid him in preparation of his defense.[3] No such constitutional right exists.

## II. Evidentiary Ruling

¶15 Ryan alleged Tanksley assaulted him on two occasions by using both his hands and his mouth to touch Ryan's penis. Tanksley wanted to present evidence that Ryan had been previously assaulted on the theory that this would show Ryan had an alternative source, other than Tanksley's alleged assault, for his knowledge of sexual acts and terminology.

¶16 Decisions to admit or exclude evidence are generally left to the trial court's discretion. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). Evidence in a sexual assault case of a complaining witness's prior sexual experience is governed and generally barred by WIS. STAT. § 972.11(2), the rape shield statute. ***State v. St. George***, 2002 WI 50, ¶¶12-13, 252 Wis. 2d 499, 643 N.W.2d 777. Sometimes, however, application of the statute to exclude evidence might "impermissibly infringe upon a defendant's rights to confrontation and compulsory process." ***Id.***, ¶15.

¶17 For a defendant to establish a constitutional right to admit evidence otherwise excluded by WIS. STAT. § 972.11(2), the defendant must satisfy a two-part inquiry. ***St. George***, 252 Wis. 2d 499, ¶18. First, the defendant must satisfy each of the following five factors "through an offer of proof that states an

[3] Alternatively, Tanksley acquiesced to Lummis's representation. This renders Tanksley's motion for standby counsel moot.

evidentiary hypothesis bolstered by a statement of fact sufficient to justify the conclusion or inference the court is asked to accept." ***Id.***, ¶19 (footnote omitted). These five factors are:

> 1) The prior act clearly occurred.
>
> 2) The act closely resembles that in the present case.
>
> 3) The prior act is clearly relevant to a material issue.
>
> 4) The evidence is necessary to the defendant's case.
>
> 5) The probative value outweighs the prejudicial effect.

***Id.*** (footnote omitted).

¶18 If the defendant successfully satisfies these five factors, the second part of the inquiry is whether the defendant's right to present the evidence is nonetheless outweighed by the State's compelling interest in excluding it. ***Id.***, ¶20. We conclude Tanksley fails to satisfy the third element, and therefore necessarily fails to satisfy the fourth and fifth elements.

¶19 Tanksley cannot establish his proffered evidence is relevant. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence." WIS. STAT. § 904.01. Evidence of a prior assault on Ryan might be relevant if the jury would otherwise infer Ryan acquired his sexual knowledge *only* because Tanksley committed the act charged but such an inference cannot be made in this case.

¶20 In describing Tanksley's assault, Ryan testified as follows:

> Q: And what did you and Mr. Tanksley do when you got to the apartment?

A: He pulled my pants down and then touched my private part.

Q: And how did he touch you?

A: With his hands.

Q: Did he touch you with anything else?

A: And his mouth.

Q: And where did he touch you with his mouth?

A: On my private part.

Q: How long did this last?

A: 15, 20 minutes.

Q: What happened in there?

A: Then he pulled down my pants again.

Q: And what did he do?

A: Touched my private part with his mouth.

¶21 There is nothing precocious about Ryan's statements that Tanksley touched his "private part" with his hands and mouth. Ryan's testimony is neither graphic nor precise enough that a jury would infer he could only provide this account if the assault had taken place. Indeed, the court noted that Ryan used "[s]imple kid terms" as opposed to specific terms such as penis or fellatio. The sexual knowledge Ryan revealed by his testimony is simply knowledge of his own anatomy. It is not so unusual that the only inference to be made is that sexual contact with Tanksley must have taken place. Without such an inference, there is no reason for the defense to show Ryan could have developed his sexual knowledge elsewhere, and evidence of a prior assault on Ryan is irrelevant. *See* ***St. George***, 252 Wis. 2d 499, ¶¶23-26.

¶22 "Because we conclude the evidence was not relevant, factors four and five cannot be met. The evidence cannot be considered necessary to the defendant's case (factor four), and the probative value of the evidence cannot outweigh any prejudicial effect (factor five)." ***Id.***, ¶27. We thus need not consider the second part of our inquiry. Excluding evidence of a prior assault on Ryan does not infringe on any of Tanksley's rights and was an appropriate exercise of discretion by the trial court.[4]

## III. Ineffective Assistance of Counsel

¶23 Tanksley contends attorney Lummis was ineffective because he failed to: (1) object to certain remarks in the prosecutor's closing argument; (2) call the former investigator as a witness; (3) call certain alibi witnesses; and (4) inform Tanksley of changes to the witness list. We conclude Lummis was not ineffective.

¶24 To establish ineffective assistance of counsel, a defendant must prove deficient performance and prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "To prove deficient performance, a defendant must show specific acts or omissions of counsel that are 'outside the wide range of professionally competent assistance.'" ***State v. Arredondo***, 2004 WI App 7, ¶24, 269 Wis. 2d 369, 674 N.W.2d 647 (quoting ***Strickland***, 466 U.S. at 690). We strongly presume counsel acts reasonably within professional norms. ***Id.***

[4] In addition, it appears Tanksley's theory of defense was that Ryan fabricated the story of an assault in order to get revenge when Tanksley refused to buy him video games or take him to an amusement park. A prior assault on Ryan is wholly irrelevant to that defense.

¶25 To prove prejudice, the defendant must show the attorney's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.***, ¶25. That is, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694.

¶26 In reviewing an ineffective assistance of counsel claim, this court is presented with mixed questions of fact and law. ***Arredondo***, 269 Wis. 2d 369, ¶26. Findings of fact are not disturbed unless clearly erroneous, but legal conclusions as to whether counsel's performance was deficient and prejudicial are reviewed de novo. ***Id.*** Finally, if we determine the defendant fails to make a sufficient showing on one of the ***Strickland*** prongs, we need not address the other. ***Strickland***, 466 U.S. at 697.

### A. The Prosecutor's Closing Argument

¶27 In his closing argument, the prosecutor said to the jury:

> Do you recall the testimony of Josh and the first thing that we asked him. We asked him if he knew what it was to tell the truth and how important it was to tell the truth and Josh said he did and then that testimony which was read to you was given by Josh.
>
> You didn't have an opportunity to see all the reviews and reports and discussions that were had previously with Josh, but you did hear Officer Novy when he spoke to Ryan J[.] and again what was the first thing that Officer Novy started with? The truth. The truth.

¶28 Tanksley argues this was an impermissible attempt by the prosecutor to bolster the credibility of Ryan and Josh and was a means for the jury to infer

that both boys were telling the truth. Thus, he believes that Lummis should have objected. We are not persuaded.

¶29 At the ***Machner*** hearing,[5] Lummis testified that he did not recall those remarks from the prosecutor. However, based on his review of the transcript, he testified that he would not have objected in order to avoid drawing attention to the remark. Indeed, the remark was fleeting in the context of a multi-day trial. It would be a reasonable trial strategy to avoid highlighting the statement, and reasonable trial strategy is virtually unassailable. *See* ***State v. Nielsen***, 2001 WI App 192, ¶44, 247 Wis. 2d 466, 634 N.W.2d 325.

¶30 Moreover, the reference was directed more at the credibility of Josh, in case No. 1997CF49.[6] Tanksley was acquitted on that charge. As such, he cannot demonstrate prejudice. *See* ***State v. Elm***, 201 Wis. 2d 452, 463, 549 N.W.2d 471 (Ct. App. 1996) (no prejudice to defendant from incomplete questioning of victim because defendant was acquitted). If there is no prejudice, counsel was not ineffective.[7]

### B. Failure to Call SPD Investigator

¶31 Tanksley thought Lummis should have called John W. Johnson, Jr., who had investigated the case initially for the public defender's office. Johnson

---

[5] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[6] Josh died before the second trial. Thus, his testimony from the first trial was read to the jury.

[7] Tanksley raises, as a separate argument, a due process claim related to the prosecutor's statement. For the same reason counsel was not ineffective—Tanksley was acquitted on the referenced charge—Tanksley's due process argument fails.

evidently had documented interviews with several witnesses, including Jenny B. and Josh S., who had difficulty recalling events at the retrial.[8] Tanksley asserts that Johnson would have produced his copies of the initial witness statements to compensate for the witnesses' memory loss.

¶32 Tanksley does not tell us what information is in these statements, except to vaguely assert that they would corroborate his alibi. According to the State, Jenny's statement evidently would have been used to identify a date when Tanksley was at her home. But Jenny's statement only referenced an event occurring "several weeks" before May 2, 1997. Jenny's mother, Debra, testified at the retrial and pinpointed the exact date, making Jenny's statement merely cumulative of her mother's testimony. Also, while Jenny's statement is in the record, Josh S.'s is not. Without it, Tanksley cannot demonstrate how the trial would have ended differently. *See* ***Strickland***, 466 U.S. at 694. Thus, we cannot conclude Tanksley was prejudiced by the failure to call Johnson.

### C. Failure to Call Alibi Witnesses

¶33 Tanksley believes Richard and Jared O.[9] should have been called as alibi witnesses. Lummis testified he did not call Jared, because Lummis "did not think his testimony was going to be helpful in the slightest." Lummis did not call Richard because "it was potentially fatal to our case."

---

[8] The initial statements had been given in 1997 so at the time of retrial, four years had passed. Also, although there is no indication of Josh S.'s age at the time, Jenny was only eight years old when she gave her first statement.

We have used first names and last initials to protect those we believe or know to be minor witnesses.

[9] Only Jared is a minor; Richard is his father.

¶34 Counsel's decision to exclude damaging witnesses is reasonable strategy. Even Tanksley acknowledged that Richard might be "untruthful" on the stand. We therefore see no prejudice in declining to call Richard.[10] As far as Jared, as is the case with Josh S., we have no idea what Jared would have contributed to the trial. Tanksley did not call him at the ***Machner*** hearing, produce an affidavit stating what Jared would have said, or otherwise explain Jared's necessity. Tanksley was not prejudiced by Lummis's decision not to call Jared.

### D. Failure to Notify Tanksley of a Witness List Change

¶35 Tanksley contends it was ineffective assistance when Lummis failed to consult him about changes to the witness list—specifically, the decision to not call Richard. Tanksley provides us with absolutely no legal authority for the proposition that counsel must confer with a defendant about changes to the witness list to be effective. We do not consider arguments unsupported by reference to legal authority. ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). Tanksley appears to have been willing to take his chances with Richard's testimony, but Lummis's decision to exclude Richard was a reasonable strategy.

[10] Tanksley contends that after Lummis failed to call Richard, he fired the attorney, who nonetheless continued to represent Tanksley. To the extent Tanksley complains about this, once an attorney is appointed to represent a defendant, only the court can relieve the attorney of his obligation and even then, it must be for cause. ***State v. Cummings***, 199 Wis. 2d 721, 748-49, 546 N.W.2d 406 (1996).

## IV. Sentencing

¶36 Tanksley argues that although his sentences are within the statutory maximums for his convictions, it is clear that the court also meant to punish him for the charge of which he was acquitted. We disagree.

¶37 "Sentencing is vested in the trial court's discretion, and a defendant who challenges a sentence has the burden to show that it was unreasonable; it is presumed that the trial court acted reasonably." ***Arredondo***, 269 Wis. 2d 369, ¶52. There is a strong public policy against interfering with the court's sentencing discretion. ***Id.*** There are three primary factors for the trial court to consider when handing down a sentence: the gravity of the offense, the character of the defendant, and the need to protect the public. ***Id.***, ¶53.

¶38 The court, when it began its sentencing decision, briefly noted the circumstances surrounding the alleged assault on Josh, chastising Tanksley. Tanksley contends this demonstrates the court also intended to sentence him for that charge despite his acquittal. But it is "well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted." *See* ***id.***, ¶54 (citing ***United States v. Watts***, 519 U.S. 148, 152 (1997) (per curiam)). The court here acknowledged the jury's acquittal, but was entitled to consider the facts in Josh's case as reflective of Tanksley's character. *See* ***Arredondo***, 269 Wis. 2d 369, ¶55; *see also* ***State v. Leitner***, 2001 WI App 172, ¶44, 247 Wis. 2d 195, 633 N.W.2d 207.

¶39 Moreover, even absent the references to Josh, the court more than adequately detailed why the maximum eighty-two year sentence was appropriate. The court explained:

> [B]oth juries … they both thought the defendant was guilty of these acts. I heard the testimony in the second trial. And I'm of the opinion the jury was correct ….
>
> ….
>
> Ryan … will be suffering emotional damage from your misconduct for a long long time. Maybe the rest of his life. Ryan has difficult[y] sleeping. He is an angry boy. Goes to the bathroom a lot. He exhibits angry temper outbursts. Is terrorized in the night time. He has a compulsion to bathe in the bathtub often and his mother points out he's an entirely different child as a result of Mr. Tanksley['s] conduct.
>
> ….
>
> Now, you were an absconder on probation when you had it in Nevada and therefore I'm not going to consider probation in this case any further than that. It's inappropriate.
>
> You do have a substantial criminal and substantial and significant criminal record….
>
> You do, Mr. Tanksley, show signs of having quite a high degree of intelligence. … So one wonders why, as an intelligent person, you would be charged with a new sexual offense between the time of the jury verdict and time of sentencing. That was not very smart.
>
> If the judge had any doubt but what you were a sexual predator, that doubt was dispelled during that time interval. That's a bad time to be doing something like that. That tells me that you have a terrible, uncontrollable affliction for sexual activity with young boys. …
>
> … Character is bad. You're going to have to be taken out of society for a long time. The reason is the court wants to protect the young boys in this area and other areas … because there isn't any question in my mind next time you get a chance, you're going to commit another offense against a young boy. The only place to stop that is to put you in prison.

¶40 In short, the court considered that Tanksley's assault on Ryan, Tanksley's criminal record, and the alleged commission of a new sexual crime while awaiting sentencing revealed a malevolent character. The court further

determined the public needed to be protected from Tanksley's predation. It also determined that Tanksley's crimes against Ryan adversely impacted him and were possibly so severe so as to impact him for life. These are all appropriate considerations to justify a sentence within statutory maximums. There was no sentencing error.[11]

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

Not recommended for publication in the official reports.

[11] Because we determine there were no errors, Tanksley is not entitled to a new trial in the interests of justice and the order denying his motion for a new trial was appropriately denied.