

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 23, 2005**

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. 2004AP3364-CR**

**Cir. Ct. No. 2003CF6154**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JEFFREY DONALD LEISER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed.*

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

¶1 PER CURIAM. Jeffrey Donald Leiser appeals from a judgment of conviction of first-degree sexual assault of a child and an order denying his postconviction motion. He claims that he should have been afforded an evidentiary hearing on his motion alleging that trial counsel was ineffective for not

objecting to evidence that Leiser was a registered sex offender. We conclude that the trial court's evidentiary ruling was correct and, therefore, Leiser was not prejudiced by trial counsel's failure to make an objection. It was proper to deny the postconviction motion without an evidentiary hearing. We affirm the judgment and order.

¶2 Leiser was charged with having had sexual contact with his girlfriend's eight-year-old granddaughter. The victim revealed the assault when her mother asked her two daughters, ages eight and nine, whether Leiser had ever touched them in their private parts. The victim's mother was prompted to question her daughters after the mother's three aunts revealed and confirmed that Leiser was on the Wisconsin Sex Offender Registry. While the charge was pending regarding the eight-year-old victim, her nine-year-old sister reported that Leiser had also touched her. Leiser was charged with a second count of first-degree sexual assault of a child.

¶3 Before trial the prosecution moved to admit other acts evidence under WIS. STAT. § 904.04(2) (2003-04),<sup>1</sup> regarding Leiser's 1996 conviction for second-degree sexual assault following a multi-year sexual relationship with a girl. That relationship began when the girl was twelve-years-old and resulted in the girl becoming pregnant at age fourteen. The prosecution argued that the evidence was relevant to show Leiser's intent to ingratiate himself into a family to gain access to children or to gain sexual stimulation from having a young girl sit on his lap. The trial court found that although the evidence was relevant for the permissible purposes of motive, intent, or absence of mistake or accident, its probative value

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

was outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. *See State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998) (the admission of other acts evidence is a three-step analysis: the evidence must be relevant to one of the exceptions listed in § 904.04(2), the evidence must be relevant considering the two facets of relevance set forth in WIS. STAT. § 904.01, and the evidence must be shown to be more probative than prejudicial). The trial court denied the prosecution's motion.

¶4 The prosecution then questioned whether the trial court was precluding evidence of the circumstances of the girls' disclosure that Leiser had sexually assaulted them. Specifically, the prosecution wanted to show that the mother was stunned to learn that Leiser was a registered sex offender and that it prompted her to question her daughters. Defense counsel, conceding that there had to be a context for how the sexual assault allegations came to light, only expressed concern over the wording that would be used to explain how the mother came to know that Leiser was a registered sex offender. The trial court found that the evidence was relevant and that the probative value was not outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. It recognized a limiting instruction would be necessary and ruled the evidence admissible.<sup>2</sup>

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<sup>2</sup> The trial court noted that defense counsel did not specifically object:

[T]here will have to be some limiting language there such that the jury not conclude impermissibly that because Mr. Leiser was convicted of a sex crime in the past, that must mean, therefore, he is guilty of these sex crimes. That would be the forbidden inference, but I'm going to overrule any defense objection and [defense counsel] concedes that, as well. He is not placing an objection on the record and I'm going to allow the state to elicit that testimony.

¶5 The evidence at trial included the testimony of the three aunts. The first testified about her knowledge of Leiser's status as a sex offender and passing that information on to a sister. That sister testified about the anguish and ambivalence she felt about whether to pass the information on and about telling the victims' mother. The third aunt testified about the research she did on the internet to find Leiser on the sex offender registry and confirming that with the victims' mother. The victims' mother testified about how shocked she was in learning that Leiser was a sex offender and when and how she asked her daughters if Leiser had ever touched them. The jury instructions included the cautionary instruction that evidence that Leiser was on the sex offender registry was received only on the issue of context and could not be used to conclude that Leiser is a bad person and for that reason guilty of the offenses. The jury convicted Leiser of assaulting the eight-year-old victim and acquitted him of the charge involving her nine-year-old sister.

¶6 Leiser's postconviction motion alleged that trial counsel was ineffective for not objecting to evidence that Leiser was a registered sex offender. The trial court denied the motion without a *Machner*<sup>3</sup> hearing. If the record conclusively demonstrates that the defendant is not entitled to relief on the grounds stated in his or her postconviction motion, the trial court has the discretion to grant or deny a hearing. *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. We review a discretionary decision under the deferential erroneous exercise of discretion standard. *Id.*

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<sup>3</sup> A *Machner* hearing addresses a defendant's ineffective assistance of counsel claim. See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶7 In order to establish that trial counsel was ineffective, the defendant must show that counsel's representation was deficient and prejudicial. *State v. Thiel*, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. Here, the trial court concluded that Leiser was not prejudiced by trial counsel's failure to object to the evidence that he was a registered sex offender as other acts evidence.<sup>4</sup> We agree that the record conclusively shows that the evidence was admissible.

¶8 We first agree with the trial courts' assessments that evidence of Leiser's status as a sex offender was not classic other acts evidence.<sup>5</sup> As illustrated in *State v. Johnson*, 184 Wis. 2d 324, 350, 516 N.W.2d 463 (Ct. App. 1994) (Anderson, P.J., concurring), the "criminal act cannot be viewed frame-by-frame if the finder of fact is to arrive at the truth." That Leiser's name was found on the sex offender registry is part of the "panorama of evidence" that directly bears on the reporting of the crimes. *Id.* at 349. *See also State v. Seefeldt*, 2002 WI App 149, ¶23, 256 Wis. 2d 410, 647 N.W.2d 894 (reference to outstanding warrants of the driver with whom the defendant was riding was not classic other acts evidence invoking the WIS. STAT. § 904.04(2) analysis as it provided another explanation for the driver engaging the police in a high-speed chase), *aff'd*, 2003 WI 47, 261 Wis. 2d 383, 661 N.W.2d 822. Not only did the evidence explain how and why the crimes were reported, it also dovetailed with the expert witness's testimony about why children delay in reporting sexual assault.

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<sup>4</sup> The trial court found that the evidence was not other acts evidence because it was evidence only of a certain status and did not reveal information about any prior acts. It also found that had the objection been made, it would not have been sustained. Finally, it concluded that the limiting instruction had the intended curative effect.

<sup>5</sup> The evidentiary rulings were made by the Honorable Michael B. Brennan who presided over the trial. The Honorable Mary M. Kuhnmuensch presided at sentencing and made the postconviction ruling.

¶9 Even if we deem evidence of Leiser’s status as a sex offender to be other acts evidence, it was properly admitted under the three-step analysis set forth in *Sullivan*, 216 Wis. 2d at 772-73. The trial court’s ruling was tantamount to the three-part *Sullivan* analysis for the admission of other acts evidence.<sup>6</sup> To the extent its analysis may be wanting in detail, we fill in the gap by an independent review of the record to determine the existence of a reasonable basis for the trial court’s discretionary decision. *State v. Hunt*, 2003 WI 81, ¶44, 263 Wis. 2d 1, 666 N.W.2d 771.

¶10 The trial court found that the evidence was relevant to show the context of the crimes. “Other-acts evidence is permissible to show the context of the crime and to provide a complete explanation of the case.” *Id.*, ¶58. It also found that the evidence satisfied the two facets of relevance set forth in WIS. STAT. § 904.01. Leiser does not challenge these conclusions.

¶11 Leiser argues that the evidence should have been excluded and would have been excluded if trial counsel had made a vigorous argument on the third step of the *Sullivan* analysis—that the probative value of the evidence was outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. He contends that because the trial court excluded evidence of the prior sexual assault conviction, evidence that he was a registered sex offender should also have been excluded because his status as a sex offender was based on the prior conviction. The purpose for which the evidence was offered is an important distinction between the two types of other acts evidence. Evidence of the prior conviction was offered for the usual purposes of intent and motive.

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<sup>6</sup> This was not a case where the trial court simply admitted the evidence because there was no objection.

Evidence of Leiser's status as a sex offender was offered only for context. Evidence of the prior conviction involved details of sexual conduct. Evidence of his sex offender status did not. It does not follow that because evidence of the prior conviction was unfairly prejudicial, evidence of the sex offender status was equally unfairly prejudicial. The same prejudice assessment cannot be used for both.

¶12 Leiser argues that the evidence of his status as a sex offender was unfairly prejudicial because it let the jury know that he was convicted of a sex crime. "Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case." *Sullivan*, 216 Wis. 2d at 789-90. The mere fact that Leiser was a registered sex offender would not appeal to the jury's sympathies, arouse a sense of horror, or invoke an instinct to punish. This is not a case like *State v. Kourtidias*, 206 Wis. 2d 574, 586, 557 N.W.2d 858 (Ct. App. 1996), where this court held that evidence of the defendant's status as a parolee was inadmissible. In *Kourtidias* the status evidence included the parole officer's testimony that Kourtidias, a convicted sex offender on trial for child enticement, was classified as a high risk parolee and that a condition of parole was that Kourtidias have no contact with minors. *Id.* at 584. Here, there was no detail as to why Leiser was on the sex offender registry. Further, the trial court properly recognized that a cautionary instruction was necessary and would serve to mitigate any unfair prejudice that might otherwise result. *See Hunt*, 263 Wis. 2d 1, ¶¶72-73. We conclude that the trial court did not erroneously exercise its discretion in

determining that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

¶13 Finally, we note that the State urges this court to adopt the holding in *United States v. Banks*, 405 F.3d 559, 568 (7th Cir. 2005), that in a case where, like here, counsel has succeeded in having his or her client acquitted of at least one of the charges brought, it is very difficult to rebut the strong presumption that counsel was effective. We decline to do so since it is not necessary to decide the appeal. We conclude that the evidence was admissible and, therefore, Leiser was not prejudiced by trial counsel's failure to make an objection.

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

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

