

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 24, 2006

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 2005AP2854-CR

Cir. Ct. No. 2001CF44

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

CHARLES F.G.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Barron County:
EUGENE D. HARRINGTON, Judge. *Affirmed.*

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

¶1 PER CURIAM. The State appeals an order granting Charles G.'s WIS. STAT. § 974.06 postconviction motion for a new trial. The trial court concluded that it and Charles's trial counsel misread *State v. Sorenson*, 152 Wis. 2d 471, 449 N.W.2d 280 (Ct. App. 1989), when they allowed the State to

introduce a videotaped interview with a three-year-old alleged sexual assault victim even though she was available to testify. The State argues that: (1) Charles's motion was barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), because the issue was not raised in his previous postconviction motion and appeal; (2) relief under § 974.06 is not available for a mere evidentiary error; (3) Charles's trial and postconviction counsel were not ineffective for failing to raise the issue because trial counsel strategically chose to allow introduction of the videotape rather than take a chance on the victim's testimony; and (4) counsel's strategic decision bars application of the plain error doctrine. We reject these arguments and affirm the order.

¶2 Although Charles failed to raise the denial of his right to confront witnesses in his initial postconviction motion and appeal, the trial court had discretion to not apply the procedural bar set out in *Escalona-Naranjo*. See *State v. Tillman*, 2005 WI App 71, ¶20, 281 Wis. 2d 157, 696 N.W.2d 574. In this case, the trial court properly exercised its discretion because its error and the error of Charles's trial counsel forfeited Charles's constitutional right to confront witnesses. *Escalona-Naranjo* does not prohibit the trial court from granting a new trial to remedy an injustice created by its own plain error and the ineffective assistance of trial and initial postconviction counsel.

¶3 The issue involves Charles's constitutional right to confront witnesses and his right to effective assistance of counsel. WISCONSIN STAT. § 974.06 is available to remedy these constitutional defects.

¶4 The State's arguments that trial counsel's strategic choice defeats claims of ineffective assistance of counsel and plain error fails because the decision was made without a correct understanding of the law. In *Strickland v.*

Washington, 466 U.S. 668, 690-91 (1984), the Court held that strategic decisions made by counsel who is fully aware of the facts and law are virtually unchallengeable. Here, counsel misread *Sorenson*, believing that a videotaped interview was admissible even if the witness was available. That was not the holding in *Sorenson* and was not the law at the time counsel failed to challenge admissibility of the videotape. Trial counsel was ineffective for making a strategic decision while completely misconstruing the applicable law.

¶5 The State argues that Charles has not established prejudice from his counsel's failure to protect his right to confront his accuser. It notes that it is impossible to determine what would have transpired if the videotape had been excluded and the child had testified. The State argues that Charles cannot prove prejudice without establishing what the child would have said had she testified. We disagree. The prejudice arises from the admission of Charles's accuser's statement without an opportunity for cross-examination. This error undermines our confidence in the outcome of the trial and therefore constitutes sufficient prejudice to establish ineffective assistance of trial counsel. *Strickland*, 466 U.S. at 694.

¶6 In addition, as the trial court tacitly concluded, it committed plain error by allowing admission of the videotape without any showing that the child was unavailable. "Plain error" is an error that affects a substantial right and can be remedied by postconviction procedures even though the error was not brought to the trial court's attention. See WIS. STAT. § 901.03(4). The State cites *State v. Williquette*, 180 Wis. 2d 589, 603, 510 N.W.2d 708 (Ct. App. 1993), for the proposition that the trial court is not required to continually monitor a defense counsel's strategy because that places too great a burden on the trial court and risk unwanted interference with the defendant's case and may raise an inference that

the judge is representing the defendant. In *Williquette*, the defendant affirmatively asked that the evidence be admitted. *Id.* Here, believing the case law allowed admissibility of the videotape, trial counsel did not object to the State's use of the evidence. The plain error doctrine applies when the court should *sua sponte* intercede to protect a defendant's right to confrontation to ascertain whether counsel understands the law when making a decision to forfeit his client's right to confront his accuser.

By the Court.—Order affirmed.

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

