

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 2, 2007

David R. Schanker
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. 2006AP991-CR

Cir. Ct. No. 2004CF184

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER L. LA DOUSIER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: DAVID C. RESHESKE, Judge. *Reversed and cause remanded.*

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

¶1 PER CURIAM. Christopher La Dousier appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. He argues on appeal that he is entitled to a new trial in the

interests of justice. Because we conclude that the jury was improperly exposed to unfairly prejudicial information about La Dousier, the interests of justice require that La Dousier receive a new trial. Therefore, we reverse and remand the matter to the circuit court for a new trial.

¶2 La Dousier was convicted after a jury trial of one count of child enticement and one count of sexual assault of a child. La Dousier then brought a motion for postconviction relief alleging that he had received ineffective assistance of counsel because his counsel did not object to a statement made by a State's witness. He also argued that he was entitled to a new trial in the interests of justice. The circuit court found that counsel had not performed deficiently by failing to anticipate the offending testimony. The court also found that there was no prejudice because the issue was one mainly of witness credibility, and the one statement was not so prejudicial that a new trial would obtain a different result. The court denied the motion.

¶3 On appeal, La Dousier argues that his trial was tainted when a police officer testified that La Dousier invoked his right to counsel when he was being interrogated. The underlying relevant facts are as follows. The victim in the case alleged that La Dousier had penis to vagina intercourse with her in the basement of the house where La Dousier lived with his girlfriend. In the report that the police took at the time of the incident, the victim stated that La Dousier pulled off her clothing, forced her vagina open with his hands, and forced his penis into her "riding me fast & hard." She then stated that she pushed him off of her, grabbed her clothes and put them on as she was going upstairs.

¶4 The police subsequently interrogated La Dousier. The report from the interrogation states that the police officer read La Dousier his *Miranda* rights.¹ The report further states that La Dousier said that he had a drinking problem, and in the past he had become intoxicated to the point that he could not remember events. The report then states that La Dousier would not answer any more questions and wanted an attorney.

¶5 At trial, the victim testified about the sexual assault. She stated that after the assault, she picked up her clothes and walked up the stairs. She said that her vagina was “all gooey,” and that she went into the bathroom, urinated, and wiped the area with tissue. She said that then she put her clothes on. On cross-examination, she admitted that before learning the results of the crime lab examination of the evidence, she had told the police that she put her clothes on before she went upstairs.

¶6 A crime lab scientist testified that the lab had examined evidence from the victim’s body, her clothing, and the mattress covering on which the victim said the assault took place. The scientist said that there was semen on the mattress top but that it did not match La Dousier’s DNA. She also testified that they did not find La Dousier’s semen on the victim’s cervical swabs, vaginal swabs, or tissues used during the hospital examination, and that they did not find semen on the victim’s underwear, boxer shorts, or sweatpants. She testified that there were various reasons for this including that there may not have been any ejaculate.

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¶7 The nurse who examined the victim also testified. The nurse said that there was no evidence of trauma to the hymen or cervix, but there was some slight swelling. She further testified that the vagina is self-cleaning and that the condition of the vagina would have changed from the time the assault was alleged to have occurred. The examination happened two days after the assault.

¶8 The testimony at issue in this appeal came from the officer who took La Dousier's statement. While questioning the officer, the State showed him a copy of the report that he had written, and then the following colloquy took place:

Q: Does your report indicate whether you asked the defendant any specific questions? To assist you I would direct to you page 7.

A: He told me that he had a drinking problem, and in the past had become intoxicated to such an extent that he could not recall events – events. And had lapses in time.

Q: And when you were – did he state anything further?

A: It was at that time that he had kind of a surprised look on his face. He invoked his right to an attorney at that point and was declining to answer any questions further.

La Dousier's counsel did not object to this statement.

¶9 Shortly afterwards when the jury was not present, the court noted that the statement was objectionable. Defense counsel stated that he had not objected to it because he did not want to draw attention to it. The defense did not move for a mistrial or ask for a curative instruction. During her closing statement, the prosecutor referred to La Dousier's statement saying that La Dousier attempted to "excuse it, blame it on alcohol." During their deliberations, the jury asked for La Dousier's statement to the police. They also asked for the dates and time that La Dousier had made the statement to the police.

¶10 La Dousier argues on appeal both that he is entitled to a new trial in the interests of justice and that he received ineffective assistance of counsel. First, we agree with the circuit court that he did not receive ineffective assistance of counsel. To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. If this court concludes that the defendant has failed to prove one prong, we need not address the other prong. *Id.* at 697. We agree with the circuit court's finding that under the circumstances as they were at trial, counsel was not ineffective when he chose not to object to the officer's statement.

¶11 We conclude, however, that La Dousier is entitled to a new trial in the interests of justice. Under WIS. STAT. § 752.35 (2005-06), we may exercise our discretion and reverse the judgment of conviction "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." Our power of discretionary reversal should only be exercised in exceptional cases. *Vollmer v. Luety*, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990). The Wisconsin Supreme Court has reversed cases because the real controversy was not fully tried when evidence was inappropriately excluded or allowed. *Id.* at 19-20; *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996).

¶12 In this case, the parties do not dispute that the answer given by the police officer at trial violated La Dousier's constitutional right. The State argues that there was no prejudice because the question and answer had nothing to do with the core issue in this case—the victim's credibility. We reject this argument.

¶13 We agree that the core issue was one of credibility because there was no physical evidence of DNA linking the defendant to the crime. But it is for this reason that we conclude the interests of justice require a new trial. First, there was some question about the victim's credibility. The statement she gave to the police immediately after the incident differed from her testimony at trial after the crime lab reports had been completed. More importantly, however, if the jury hears that a defendant has suddenly invoked the right to remain silent in the middle of a police interrogation and right after telling the police that he has a history of drinking to the point of not recalling events, then that statement will discredit the defendant's credibility to the benefit of the victim.

¶14 Further, the events at trial suggest that the jury may have been influenced by the objectionable statement. The jury asked to see the police report that contained the officer's statement that the defendant had invoked his right to remain silent. Although the court had redacted the offending portion of the report, the jury still saw that the defendant had said he suffered memory lapses after drinking. The jury's request for the report, at a minimum, indicates that the jury was considering the officer's testimony. And the jury could reasonably infer that, after describing his memory lapses to the officer, the defendant invoked his right to remain silent because he had been drinking on the night of the incident and saw his statement about his memory losses as incriminating. The State then referred to La Dousier's statement about his memory lapses in the closing argument.

¶15 We conclude that the jury was improperly exposed to unfairly prejudicial information about La Dousier's decision to invoke his constitutional right to have an attorney represent him. Because of this, our confidence in the outcome of the trial is shaken. We reverse the judgment and order of the circuit court, and remand the matter for a new trial.

By the Court.—Judgment and order reversed and cause remanded.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2005-06).

