

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 2, 2004

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. 04-0677-CR
STATE OF WISCONSIN**

Cir. Ct. No. 02CF000036

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DORIAN WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waushara County: RICHARD O. WRIGHT, Judge. *Affirmed.*

Before Deininger, P.J., Dykman and Higginbotham, JJ.

¶1 PER CURIAM. Dorian Williams appeals from a judgment convicting him on two counts of second-degree sexual assault by threat of force. He also appeals from an order denying postconviction relief. The issue is whether the trial court properly denied Williams' claim of ineffective assistance of counsel without holding an evidentiary hearing on that claim. We affirm.

¶2 The State charged Williams with sexually assaulting his cellmate at Redgranite Correctional Institution, on two separate occasions. The State had no physical evidence of the assaults, and the jury trial was essentially a credibility contest between the victim and Williams. The latter admitted the sexual contacts with the victim, but claimed that they were consensual.

¶3 When the victim testified, he described how Williams said that he had people or “his guys” all over the prison system, who would retaliate if the victim reported the assaults. A Redgranite Correctional officer testified that Williams admitted his membership in the Gangster Disciples gang. Another officer testified that Williams claimed to be a high-ranking Gangster Disciple, with considerable influence in the prison. The officer added that he believed this to be true. In his own testimony, Williams admitted to once belonging to the gang, but denied that he was still a member or that he had ever held high rank. Defense counsel did not object to this or other testimony and argument concerning Williams’ gang status, nor did he request a cautionary instruction.

¶4 Also testifying without objection was the psychological supervisor at Redgranite, Dr. Barbara Seldin, who appeared as an expert on human reaction to sexual assault. She had not seen the victim and offered no testimony specific to him, but testified generally to the behaviors and emotions associated with rape trauma syndrome.

¶5 After conviction, Williams brought a postconviction motion alleging that trial counsel was ineffective because he failed to object to the testimony and argument concerning Williams’ gang affiliation, or to request a cautionary instruction, and because he failed to object to Dr. Seldin’s testimony. In his view, evidence of his gang membership was inadmissible and highly prejudicial other-

acts evidence, and Dr. Seldin's testimony was irrelevant because the defense never made an issue of the victim's post-assault behavior. This appeal results from the trial court's decision to deny the motion without a hearing.

¶6 To prove ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient, and that counsel's errors or omissions prejudiced the defense. *State v. Pitsch*, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). Deficient performance falls outside the range of professionally competent representation and is measured by an objective standard of reasonably competent professional judgment. *Id.* at 636-37. Prejudice results when counsel's error deprives the defendant of a fair trial without a reliable result. *Id.* at 640-41. Whether counsel's behavior was deficient and whether it was prejudicial to the defendant are questions of law. *Id.* at 634.

¶7 A trial court must hold an evidentiary hearing on an ineffective assistance of counsel claim if the defendant alleges facts that, if true, would entitle him or her to relief. *See State v. Bentley*, 201 Wis. 2d 303, 309, 548 N.W.2d 50 (1996). However, the trial court may deny the motion without a hearing if the record conclusively demonstrates that the defendant is not entitled to relief on the ineffectiveness claim. *Id.* at 309-10.

¶8 Here, the record conclusively demonstrates that evidence of Williams' gang affiliation was admissible, such that counsel's failure to object to it was not prejudicial. Other-acts evidence, here Williams' gang leadership, is not admissible to prove bad character. WIS. STAT. § 904.04(2) (2001-02).¹ However,

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

it is admissible to establish context, and to explain or corroborate other evidence of the crime. *State v. Hunt*, 2003 WI 81, ¶¶58-59, 263 Wis. 2d 1, 666 N.W.2d 771. In this case, the victim reported Williams' boast that "his guys" were spread throughout the prison system and would retaliate on his behalf. The gang evidence was admissible to place that threat in context, and to corroborate the victim's testimony that Williams uttered it.

¶9 Counsel's failure to seek a cautionary instruction for the use of the gang testimony was not unreasonable. Counsel's testimony as to his motive is unnecessary, because we judge counsel's omission by the objective standard of what a reasonably prudent attorney would do in the same circumstances. *Pitsch*, 124 Wis. 2d at 636-37. In this case a reasonably prudent attorney could determine that a cautionary instruction would do little besides call more attention to the testimony.

¶10 The record also conclusively shows no prejudicial performance by counsel regarding Dr. Seldin's testimony. First, counsel did, in fact, object to her testimony during pretrial motions, and received a ruling that the testimony was admissible under *State v. Jensen*, 147 Wis. 2d 240, 251, 432 N.W.2d 913 (1988). Second, the trial court properly admitted the evidence in any event. Williams contends that *Jensen* allows expert testimony on the behavior of sexual assault victims only in rebuttal when the defendant uses the victim's post-assault behavior as a defense. Although that was the purpose for which the court allowed the testimony in *Jensen*, the holding as to its use is more expansive. "[A]n expert may inform jurors about the reactive behavior of crime victims in order to disabuse the jurors of common misconceptions about the behavior of crime victims." *Id.* at 252. Such was the permitted use of Dr. Seldin's testimony here.

By the Court.—Judgment and order affirmed.

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

