COURT OF APPEALS
DECISION
DATED AND RELEASED

August 20, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 96-1230-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID R. W.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed.*

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

SNYDER, P.J. David R.W. appeals from a judgment of conviction finding him guilty of two counts of incest, one count of child enticement and one count of exposing a child to harmful materials, s*ee* §§ 948.06(1), 948.07(3) and 948.11(2)(a), STATS., and from a trial court order denying postconviction relief. David claims that the trial court erred in refusing to admit into evidence "prior false accusation[s]" of sexual assault that his daughter,

M.W., had allegedly made against two other men before she accused David of assaulting her. David also argues that he was denied the effective assistance of counsel by "counsel's failure to present probative evidence in support of his motion to admit evidence of [one of M.W.'s] false accusation[s]." Because of that failure, he requests this court to order a new trial in the interests of justice.

We conclude that: (1) the first "accusation" did not fall within the meaning of the rape shield law exceptions; (2) the proof presented to the trial court as to the second accusation did not meet the "reasonable person" standard for a showing that it was untruthful and thus the trial court correctly exercised its discretion in ruling it inadmissible; and (3) although defense counsel failed to present the results of a lie detector test in support of David's contention that the second accusation was false, the ultimate question of the admissibility of this allegation still rests within the sound discretion of the trial court. We can see no error in the trial court's determination that the second allegation was inadmissible. Consequently, we affirm.

The complaining witness in this case is David's teenage daughter. The charges stem from two separate incidents; at the time of the first incident M.W. was fifteen. She testified that one afternoon in the fall of 1992 when she returned home from school, David asked her to come into his bedroom. He then asked her to undress, telling her "to close [her] eyes and pretend [he] was a boyfriend." Although she initially refused his requests that she undress, she eventually complied and David then engaged in sexual intercourse with her. Following this, her father called her into the living room where he showed her a videotape of himself and M.W.'s mother fully undressed and engaging in various sexual activities.

The second incident occurred approximately two years later when David fondled M.W.'s breasts as she lay on a couch at the family's home. It was subsequent to the second incident that M.W. told a boyfriend what had happened and two days later she called the police.

Prior to trial, David sought an order to admit into evidence prior statements that M.W. had made in which she had suggested that on two other occasions she had been sexually assaulted by two other men. Defense counsel characterized both of these alleged accusations as "evidence of prior untruthful allegations of sexual assault made by complaining witness." *See* § 972.11(2)(b)3, STATS. The one "allegation" concerned a friend of David's, Phil Zdanowicz. M.W. had told another friend of the family that she had "had sex" with Zdanowicz. The defense sought admission of this as a prior untruthful allegation and, as an offer of proof that it was false, offered a statement by Zdanowicz that he would testify that it was a completely untrue and unfounded accusation. The trial court found that this statement by M.W. was not an *allegation* within the meaning of the rape shield law and therefore concluded that it was inadmissible. *See* ***id.***

The other alleged false accusation was directed at Barry Roberts. In 1990, the district attorney had investigated allegations made by M.W. in which she claimed to have been sexually assaulted by Roberts. The district attorney declined to prosecute the case, a decision that was questioned by M.W.'s mother. In a letter responding to her concerns, the district attorney cited the following factors in reaching this decision: (1) "insufficient corroborative evidence to support [M.W.'s] claim," (2) "evidentiary considerations which … are referred to as 'rape

shield issues' which are substantial impediments to successful prosecution," and (3) "the delayed report of this incident by your daughter."[1]

The trial court denied the admission of the allegation against Roberts, finding that the district attorney's decision not to prosecute had "no bearing whatsoever on whether or not the allegation is or is not untruthful." The trial court reasoned that this evidence was extrinsic and therefore inadmissible under § 906.08(2), STATS. *See* ***State v. Rognrud,*** 156 Wis.2d 783, 787, 457 N.W.2d 573, 575 (Ct. App. 1990) (use of extrinsic evidence to impeach a witness' credibility that is collateral to the matter being tried is not allowed). The court then considered whether to permit cross-examination of M.W. about this allegation but concluded that "it would be extremely confusing for the jury even to allow inquiry into it."

In presenting the evidence to show that the accusation against Roberts was false, defense counsel did not inform the court that after the accusation was made Roberts offered to take a polygraph test, and that after he passed a second test,[2] the district attorney declined to prosecute the case. This information was not presented because of counsel's belief that polygraph test results were inadmissible.

[1] The content of a letter from the district attorney's office also suggests that at the time its office was investigating the allegations against Roberts, the Department of Social Services was also investigating another individual as a potential perpetrator of sexual abuse against M.W.

[2] The results of the first test were inconclusive. On appeal, there is a dispute as to whether there actually was a second polygraph test. However, when deciding the motion, the trial court accepted as true the allegations in David's postconviction motion. For purposes of the appeal, we accept as true that the second polygraph test occurred as stated by David.

David was convicted after a jury trial. He filed a postconviction motion seeking a ***Machner***[3] hearing on his claim of ineffective assistance of counsel. The claim was based on defense counsel's "deficient performance in litigating the issue of whether the prior false allegation … was admissible." After determining that "the facts from the record speak for themselves," the trial court found that the question of whether David's trial counsel was ineffective was a legal question. The trial court considered the legal arguments from both sides before finding that David was not denied his right to effective assistance of counsel. The court found the fact that defense counsel failed to present the results of a polygraph test that Roberts had taken "[did] not demonstrate any prejudice to the defendant" and also noted that "[t]he analysis by the court at the time would not have changed based on this proffered evidence." The trial court denied David's motion for postconviction relief and he appeals.

Admissibility of Prior Allegations

The admissibility of evidence lies within the sound discretion of the trial court. *See* ***State v. Evans,*** 187 Wis.2d 66, 77, 522 N.W.2d 554, 557 (Ct. App. 1994). When this court reviews a trial court's exercise of discretion, the question presented is whether that discretion was exercised "according to accepted legal standards and if it is in accordance with the facts on the record." ***Id.***

Section 972.11(2), STATS., generally precludes the admission of evidence of a sexual assault complainant's prior sexual conduct. This statutory section, also called the "rape shield law," expresses the legislature's determination that this kind of evidence "has low probative value and a highly prejudicial

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

effect." ***State v. DeSantis,*** 155 Wis.2d 774, 784-85, 456 N.W.2d 600, 605 (1990). However, one exception to this bar allows for the admission of "[e]vidence of prior untruthful allegations of sexual assault made by the complaining witness." Section 972.11(2)(b)3.

In ***DeSantis,*** the supreme court laid out the test that is to be applied by a trial court when it is presented with such an admissibility question. The supreme court concluded that the trial court must determine whether: (1) the evidence fits within § 972.11(2)(b)3, STATS.; (2) the evidence is material to a fact at issue; and (3) the evidence is of sufficient probative value to outweigh its inflammatory and prejudicial nature. *See* ***DeSantis,*** 155 Wis.2d at 785, 456 N.W.2d at 605; *see also* § 971.31(11), STATS. At the threshold of this analysis is the court's determination that "the defendant has established a sufficient factual basis for allowing the jury to hear the evidence." ***DeSantis,*** 155 Wis.2d at 786, 456 N.W.2d at 605-06. The ***DeSantis*** court concluded that "the defendant should produce evidence at the pre-trial hearing *sufficient to support a reasonable person's finding that the complainant made prior untruthful allegations*." ***Id.*** at 787-88, 456 N.W.2d at 606 (emphasis added).[4]

[4] In a subsequent case, ***State v. Rognrud,*** 156 Wis.2d 783, 457 N.W.2d 573 (Ct. App. 1990), this court harmonized the supreme court's construction of the rape shield law in ***DeSantis*** with another statutory section, § 906.08(2), STATS. The ***Rognrud*** court determined that because § 906.08(2) "unambiguously permits cross-examination about prior specific instances of conduct 'subject to sec. 972.11(2),'" the two must be construed in relation to each other. ***Rognrud,*** 156 Wis.2d at 788, 457 N.W.2d at 575. The ***Rognrud*** court concluded that when read together, §§ 906.08(2) and 972.11(2), STATS., not only exclude extrinsic evidence of a witness' prior conduct, but also prohibit cross-examination of the complaining witness unless the following three conditions are satisfied:

> (1) the "matter of inquiry" falls within one of the three exceptions to the rape shield law;
> (2) the trial court holds a pretrial hearing to determine whether the matter under discussion is material to a fact at issue and

(continued)

The Zdanowicz Statement

We now consider the proffered evidence in light of the above standards. The first incident which David claims he should have been able to introduce was evidence which he alleges showed that M.W. had made false accusations of sexual assault against Zdanowicz. The trial court found that this incident failed to come in under the rape shield law exceptions and thus was inadmissible. We agree.

M.W.'s statement to a third party that she had "had sex" with Zdanowicz was a nonspecific, general statement; exactly what she meant by such a statement is unclear. The trial court correctly found that this was not admissible as an exception to the rape shield statute, but rather was extrinsic evidence barred by § 906.08(2), STATS. The trial court further found that this evidence was related to a remote, confusing collateral matter, and that the resulting prejudice would far outweigh its probative value. We conclude that the trial court properly exercised its discretion in finding that the statement was inadmissible.

The Roberts Accusation

The next issue David raises pertains to the admissibility of an allegation of sexual assault that M.W. made against Roberts which the district attorney declined to prosecute. The trial court held a hearing as to this statement's admissibility and ultimately concluded that the "fact that a person may have said it happened, the other [person] says it didn't" was not particularly probative of

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its probative value outweighs its inflammatory and prejudicial nature; and

(3) the trial court determines that the matter of inquiry is indeed probative of the truthfulness or untruthfulness of the witness and that it is not too remote in time.

See ***Rognrud,*** 156 Wis.2d at 788, 457 N.W.2d at 575-76.

whether it occurred. The trial court further determined that it would be "extremely confusing" to even allow inquiry into it, and then ruled that the evidence concerning the Roberts accusation was inadmissible.

David now contests this ruling, arguing that "[t]he trial court erroneously exercised its discretion when it concluded that the defendant had not produced sufficient evidence to allow a reasonably [sic] person to conclude the accusation against Barry Roberts was false." David directs this court to the following information, which he argues supports his contention that M.W.'s statement was a "prior false accusation": (1) Roberts denied that it ever happened, and (2) the district attorney's office declined to prosecute because "there was a likelihood that the jury would not believe [M.W.'s] accusation against [Roberts]. In other words, the prosecutor believed that jurors may believe that [M.W.'s] accusation against [Roberts] was false."

We agree with defense counsel's position, which was elucidated at oral argument, that when David brought his pretrial motion to admit the Roberts accusation, the trial court had a duty to consider it under § 901.04, STATS. This subsection provides in relevant part:

> **Preliminary questions. (1)** QUESTIONS OF ADMISSIBILITY GENERALLY. Preliminary questions concerning … the admissibility of evidence shall be determined by the judge, subject to … ss. 971.31(11) and 972.11(2).

The specific "preliminary question" that the trial court must answer is whether there is sufficient evidence that the victim made an "untruthful allegation[] of sexual assault." Section 972.11(2)(b)3, STATS. Under ***DeSantis,*** the proffered evidence must support "a reasonable person's finding that the complainant made

prior untruthful allegations." ***DeSantis,*** 155 Wis.2d at 788, 456 N.W.2d at 606-07.

At a hearing conducted pursuant to § 901.04, STATS., the basic rules of evidence do not apply. *See* § 901.04(1). The moving party is free to present all of the evidence that he or she has to show that the victim made a "false allegation." In essence, a "mini-trial" is held to measure the alleged false statement for purposes of determining whether it is admissible as an exception to the rape shield law. *See* § 972.11(2)(b)3, STATS. The trial court does not make an ultimate finding of whether the allegation was untruthful, but rather measures whether *a reasonable person could conclude that the victim made such an allegation.*

In this case, the trial court concluded that based on the evidence it had before it, which included the letter from the district attorney's office declining to prosecute, "there is no reasonable basis for making a determination that that is an untruthful allegation." The fact that the district attorney did not believe that the State could prove its case beyond a reasonable doubt has "no bearing whatsoever on whether or not the allegation is or is not untruthful."

Based on the record the trial court had before it when addressing this issue, we conclude that there was nothing improper in the trial court's discretionary determination that David did not meet the "reasonable person" standard that is required by ***DeSantis.*** *See* ***DeSantis,*** 155 Wis.2d at 787-88, 456 N.W.2d at 606-07. A trial court possesses wide discretion in determining whether evidence is admissible or should be excluded. *See* ***State v. Evans,*** 187 Wis.2d 66, 77, 522 N.W.2d 554, 557 (Ct. App. 1994). The trial court's exercise of discretion is upheld.

However, David argues that despite the foregoing analysis there was additional evidence which supports his contention that the accusation against Roberts was false, and that his trial counsel performed deficiently when he failed to offer this probative evidence to the court. David's trial counsel had evidence that Roberts had offered to take a lie detector test in order to establish his innocence. Believing that the results of polygraph examinations are "inadmissible in court for all purposes," defense counsel did not offer the polygraph results in support of the motion to admit the evidence of M.W.'s allegations that Roberts had sexually assaulted her. David now raises an ineffective assistance of counsel argument based on defense counsel's failure to offer the evidence.

We begin by noting that ***State v. Hoffman,*** 106 Wis.2d 185, 217, 316 N.W.2d 143, 160 (Ct. App. 1982), suggests that "[a]lthough a polygraph test result might itself be inadmissible, an offer to take a polygraph examination is relevant to an assessment of the offeror's credibility and may be admissible for that purpose." (Footnote omitted.) Based on this, David argues that his trial counsel was ineffective in that he failed to present to the court the evidence that Roberts had submitted to two polygraph tests, the second of which he "passed … with flying colors." He claims that had this information been presented, "[t]he trial court, properly exercising its discretion, would have ruled that the prior false accusation against Barry Roberts was admissible."

While we concur with David that the polygraph evidence could have been presented to the trial court at the pretrial hearing, even without that evidence the essential issues of the Roberts allegation were raised and argued to the trial court. In its ruling on the postconviction claim of ineffective assistance of counsel based on the failure to present this evidence, the trial court stated:

> These arguments, even if factually true, do not demonstrate any prejudice to the defendant, nor would a failure to present this additional information to the court in light of the information which was in fact presented, be so serious to make counsel's performance ineffective.
>
> The court, in denying the motion to present evidence of claimed prior untruthful allegations, based its decision in large part that such evidence would be impeachment on a collateral matter. And further, that such evidence, including the polygraph involving Mr. Roberts, would be confusing to the jury. *The analysis by the court at the time would not have changed based on this proffered evidence.* [Emphasis added.]

We conclude that the essential information contesting M.W.'s credibility was presented to the trial court. It exercised its discretion in making its determination that under the "reasonable person" test, the information was not admissible. *See* ***DeSantis,*** 155 Wis.2d at 787-88, 456 N.W.2d at 606-07. David was given a hearing as to the admissibility of the prior allegations and presented the essential evidence concerning M.W.'s credibility.[5] The trial court found that even if it had had the polygraph information presented to it, it still would have determined that the Roberts allegation was inadmissible. The trial court exercised its discretion in denying David's request to cross-examine M.W. regarding the allegations. Based on this, the trial court's denial of the ineffective assistance of counsel claim was proper.

[5] The trial court also noted that an affidavit by Roberts stated that he had taken two polygraph tests and that after the second one he was told by an assistant district attorney that he had passed and that M.W. was apparently a "compulsive liar." Although this was later countered by the State's affidavit in opposition to the motion in which it denied that there was any record of a second polygraph test, the trial court expressly noted that it accepted as true the affidavit evidence in support of David's postconviction motion. *See supra* note 2.

Request for a New Trial in the Interests of Justice

As a final issue, David requests a new trial based on his claim that "the real controversy was not fully and fairly tried." He argues that because the jury's determination hinged upon "[M.W.'s] word against [David's]," the jury should have heard "every piece of relevant evidence to assist it in its difficult determination of credibility." As underpinned by our analysis of the issues surrounding the admissibility of the proffered evidence, we conclude that there is no merit to this final request. As stated in § 904.03, STATS., "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." The trial court properly exercised its discretion in making this determination.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.