COURT OF APPEALS
DECISION
DATED AND RELEASED

May 29, 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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2266-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

REGENIAL F. HOSKINS,

DEFENDANT-APPELLANT.

Appeal from a judgment and order of Dane County circuit court: Judge Michael B. Torphy, Jr. *Affirmed.*

Before Eich, C. J., Vergeront and Roggensack, J. J.

ROGGENSACK, J. Regenial F. Hoskins appeals his conviction for first degree sexual assault and the order denying him post-conviction relief. He asks this court to grant him a new trial in the interest of justice, contending that the real issue was not tried. He asserts trial counsel's failure to present testimony by the defendant's sister that the victim had admitted that her allegations were a lie

should result in a new trial. However, counsel testified at a post-conviction hearing that his decision was a tactical one, based on the fact that prior credibility attacks on the victim had not gone well. We conclude that a strategic decision of that nature did not keep the real controversy from being tried, and does not warrant the exercise of our discretionary reversal power under § 752.35, STATS. Therefore, the judgment and order of the trial court are affirmed.

BACKGROUND

On December 11, 1994, Spenser Breithaupt drove his girlfriend, Narelle Timm, to Hoskins' mother's apartment to pick up Timm's two-year-old daughter, Ayshia, from her father, Hoskins. Timm went inside to collect the child while Breithaupt waited in the car. Inside the apartment, Timm began collecting Ayshia's things, some of which were in Hoskins' bedroom. According to Timm, Hoskins followed her into his bedroom and told her they needed to talk. He accused Timm of having cheated on him with Breithaupt during Hoskins and Timm's prior relationship, and blocked her way out of the bedroom. Hoskins then picked up a gun, and pointed it at Timm, who was holding their daughter on her hip. Hoskins told Timm to sit on the bed and to take her pants off, and when she refused, he pushed her down on the bed and pulled her pants off. He got on top of her and began fondling and squeezing her breasts under her bra, first pointing the gun at her cheek and telling her to shut up, then pointing the gun inside her thigh, telling her to spread her legs. Timm refused. Hoskins got up and turned on the television, then tried to force her to perform fellatio on him. Timm continued to resist and scream until Hoskins finally showed her that the gun was not loaded and told her it was all a joke, making her promise not to tell the police. Timm then took the child and ran down to the car where Breithaupt was waiting. Breithaupt testified that both Timm and Ayshia were crying as she told him what Hoskins had

done. Breithaupt drove Timm to a convenience store, where she called the police to report the incident and where she said she saw Hoskins drive by in his sister's car.

The police attempted to contact Hoskins by telephone, but whoever answered said he was not there and hung up. Upon arriving at the apartment, the police observed Hoskins leaving barefoot, with his pants unzipped, holding his shoes, jacket and keys in his arms. Hoskin's mother retrieved a gun for the police from his sister's car. Hoskins denied that he had pulled a gun on Timm or sexually assaulted her, claiming that Timm was very upset about their break-up. However, he was arrested and charged with one count of first degree sexual assault by use of a dangerous weapon, contrary to § 940.225(1)(b), STATS. An amended information added another count of attempted first degree sexual assault, contrary to § 940.225(1)(b) and § 939.32, STATS., for the fellatio demands.

At trial, defense counsel cross-examined Timm about a telephone conversation which Timm had with Hoskin's sister Sheila approximately ten days after the incident. He asked whether Timm told Sheila that she had lied about the assault; that she would see Hoskins in prison or a cemetery before giving him up; and that she would not have lied about the assault had she known that Hoskins had been planning to enter the military full time. Timm denied making any of those statements. Defense counsel subsequently called Sheila with the intention of impeaching Timm. However, the prosecution objected under § 906.08(2), STATS., when defense counsel asked Sheila what Timm had said during their telephone conversation. After an unrecorded sidebar conversation, the trial court sustained the objection. Defense counsel did not rephrase or pursue that line of questioning, and did not make an offer of proof regarding Sheila's version of the telephone conversation.

The jury found Hoskins guilty of first degree sexual assault, but was unable to reach a verdict on the attempt charge. Hoskins moved for post-conviction relief on three grounds: (1) that the trial court had erroneously excluded Sheila's testimony about the phone conversation, (2) that defense counsel had provided ineffective assistance by failing to make an offer of proof or offer the proper grounds for the admission of Sheila's testimony, and (3) that the real controversy was not fully tried because of the failure to present evidence which would have impeached Timm's credibility.

At the post-conviction hearing, Sheila testified that Timm had admitted lying during their telephone conversation. However, trial counsel testified:

> I decided before Sheila Hoskins' testimony that we were not going to get anywhere by jumping on Narelle Timm. We had tried it with Linda Hoskins. It was not working. We were not getting a good response from the jury. So I just decided to go another way, and that way was to finish with Sheila Hoskins and call Reggie Hoskins.

The trial court denied Hoskins' motion for a new trial, ruling (1) that there was no evidentiary error because the question which counsel asked Sheila was not specifically tailored to the foundational questions asked of Timm; (2) that counsel's performance was a reasonable exercise of trial strategy, given his evaluation of Sheila's testimony and its affect on the jury; and (3) the interests of justice were served by a reasonable verdict after Timm's allegations and Hoskins' denials were put to the jury.

Hoskins does not raise the issues of evidentiary error or ineffective assistance of counsel on appeal. He simply claims that trial counsel's decision not

to introduce evidence that the victim had admitted lying kept the real controversy from being fully tried.

DISCUSSION

Standard of Review.

The trial court's decision to deny Hoskins a new trial was a discretionary determination.[1] Section 805.15(1), STATS.; ***State v. Harp***, 161 Wis.2d 773, 775, 469 N.W.2d 210, 211 (Ct. App. 1991) (Harp II). However, rather than asking this court to review the trial court's use of its discretion, Hoskins asks us to exercise our own discretionary reversal power under § 752.35, STATS. [2] Therefore, we will independently consider the record to determine whether Hoskins is entitled to a new trial.

Discretionary Reversal.

Section § 752.35, STATS. allows this court to reverse a judgment by the trial court "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." There are separate criteria for analysis under each of these two grounds for reversal. ***State v. Wyss***, 124 Wis.2d 681, 732, 370 N.W.2d 745, 770 (1985). We may conclude that the controversy has not been fully tried either when the jury was not given the opportunity to hear testimony relating to an important issue in the case,

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[1] A trial court may order a new trial in a criminal case in the interest of justice under § 805.15(1), STATS. ***State v. Harp***, 150 Wis.2d 861, 879, 443 N.W.2d 38, 45 (Ct. App. 1989) (Harp I) (overruled on other grounds).

[2] Therefore, although the notice of appeal challenges both the conviction and the order denying Hoskins post-conviction relief, we conclude that Hoskins has abandoned his appeal of the order.

or when the jury had before it improperly admitted evidence which confused a crucial issue. ***Id***. at 735, 370 N.W.2d at 770-71. The miscarriage of justice standard[3] requires a showing that a different result would be substantially probable upon retrial. ***Id***. at 741, 370 N.W.2d at 773. In either case, however, we will exercise our discretionary reversal power only sparingly. ***Vollmer v. Luety***, 156 Wis.2d 1, 11, 456 N.W.2d 797, 802 (1990).

Hoskins argues that the real controversy in his case was not fully tried[4] because credibility was an important issue at trial and the jury never had the opportunity to hear exculpatory evidence, *e.g.,* that the victim had lied. He maintains it is irrelevant whether or not his sister's testimony was kept from the jury by an evidentiary ruling of the trial court, because in ***Garcia v. State***, 73 Wis.2d 651, 245 N.W.2d 654 (1976), a defendant was granted a new trial in order to present exculpatory evidence which he had never offered, although he had known about it at the time of the first trial.

However, there is no indication that the defendant's attorney in ***Garcia*** was aware of the information which his client had withheld in order to protect a friend. In fact, in ***Garcia*** the supreme court specifically noted that "the record [did] not reveal [that the defendant's failure to present evidence] was an intentional strategic maneuver by his counsel." In contrast, here, the trial court made a specific factual finding that the decision not to question Hoskins' sister

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[3] This standard is sometimes termed, "in the interest of justice". ***State v. Wyss***, 124 Wis.2d 681, 733, 370 N.W.2d 745, 770 (1985).

[4] Although Hoskins asserts a new trial is warranted under both the interest of justice standard and because the real controversy has not been fully tried, his brief argues only the later standard for a new trial. Therefore, we address only the contention which has been developed by appellate argument. *See* ***State v. Pettit***, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992).

about the truthfulness of Timm's story *was* an intentional strategic maneuver by counsel. This distinction is important because one of the reasons that this court generally refuses to examine issues not raised before the trial court is to preclude attorneys from being, "induced to build in an error to ensure access to the appellate court, notwithstanding their deficient performance at trial." ***Vollmer***, 156 Wis.2d at 11, 456 N.W.2d at 802. Under Hoskins' theory, a defense attorney could intentionally decide not to offer certain critical evidence, and then, should the jury return an adverse verdict, claim that the defendant is entitled to a new trial because the jury was deprived of the opportunity to hear that evidence. Nothing in ***Garcia*** supports such a result.

We do not mean to suggest that a criminal defendant whose counsel refuses to present exculpatory evidence on his behalf has no recourse. Such behavior by an advocate could well rise to the level of ineffective assistance of counsel, warranting a new trial. However, in this case, the trial court held a ***Machner***[5] hearing and, after listening to both the sister's testimony and trial counsel's explanation for his decision not to present the testimony, ruled that counsel's action was a reasonable strategic decision based upon his evaluation of the witness's credibility and the possibility of alienating the jury. The trial court's determination of the soundness of counsel's performance has not been challenged on appeal, and we do not disturb it. If counsel acted reasonably in refusing to present certain testimony, then we cannot say that the controversy was not fully tried.

[5] ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979) (requiring testimony of trial counsel before finding counsel ineffective).

CONCLUSION

We decline to exercise our discretionary reversal power to second guess a tactical decision by counsel, which was reviewed by the trial court and the effectiveness of which is not before us on appeal.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.