

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 16, 1997

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.

NOTICE

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No. 96-2742-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHNNY L. WHITE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed.*

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

PER CURIAM. Johnny L. White appeals from a judgment of conviction of three counts of sexual assault by use or threat of the use of a dangerous weapon. He argues that the trial court erred in excluding evidence that the victim had a sexually transmittable condition and that semen collections found on the victim's bed sheets were not from White. We conclude that the trial court

properly exercised its discretion in excluding the evidence. We affirm the judgment.

The sexual assault victim identified White, a resident of the same apartment complex, as having entered her bedroom in the early morning hours. She indicated that White held a knife to her throat and ordered her to remove her clothing or he would kill her. The victim did not report the assault until late in the afternoon that day.

When tested after the assault, the victim tested positive for the presence of chlamydia, a sexually transmittable condition. Apparently White did not test positive for chlamydia.¹ Numerous semen collections found on the victim's bedsheets were tested. Of the twenty-one spots tested, it was determined that as to only two spots "[a]ssuming a single source of semen ... White is included in that portion of the population which could have contributed the semen." The remaining stains tested were not caused by either White or the victim's bodily fluids.

Before trial, the prosecution sought an order excluding from evidence at trial any mention that the victim had chlamydia at the time of the assault and that semen stains present in the victim's apartment did not belong to White (the bedsheet evidence). White sought admission of the evidence. The trial court excluded the evidence. White argues that exclusion deprives him of his constitutional right to present a defense.²

¹ The test results for White are not of record. Neither party disputes that White did not have chlamydia.

² The parties agree that the evidence is not admissible under § 972.11, STATS., the rape shield law.

“Evidentiary rulings generally are reviewed with deference to determine whether the circuit court properly exercised discretion in accord with the facts of record and with accepted legal standards.” *In re Michael R.B.*, 175 Wis.2d 713, 720, 499 N.W.2d 641, 644 (1993). Whether a defendant’s right to present a defense has been improperly denied by the trial court is a question of constitutional fact which we review de novo. *See id.*

The constitutional right to present evidence is limited to the presentation of “relevant evidence not substantially outweighed by its prejudicial effect.” *State v. Pulizzano*, 155 Wis.2d 633, 646, 456 N.W.2d 325, 330 (1990). Excluding highly prejudicial evidence which has minimal, if any, probative value does not violate the principles of evidentiary or constitutional law. *See State v. DeSantis*, 155 Wis.2d 774, 793-94, 456 N.W.2d 600, 609 (1990). Indeed, in order to establish a constitutional right to present otherwise excluded evidence, a defendant’s offer of proof must show that the probative value of the evidence outweighs its prejudicial effect. *See Pulizzano*, 155 Wis.2d at 656, 456 N.W.2d at 335. Whether evidence should be excluded on the basis of its prejudicial potential ““goes to the trial court’s discretion to weigh the probative value of the evidence against the possibility of prejudice or other factors which might impede the orderly and expeditious disposition of the issues at trial.”” *State v. Hinz*, 121 Wis.2d 282, 285, 360 N.W.2d 56, 59 (Ct. App. 1984) (quoted source omitted).

White claims that the evidence that the victim had chlamydia supports his testimony that while he previously had consensual intercourse with the victim, he was not intimate with her since three weeks before the assault because he was afraid the victim would give him a sexually transmitted disease. He also argues that the evidence was relevant because the victim told police that in an effort to dissuade White from assaulting her, she told White that she had

chlamydia.³ As the trial court noted, whether the victim actually had a sexually transmittable disease was not relevant or probative. White's defense that he would not engage in intercourse with the victim was dependent only on his subjective fear of disease and not whether in fact he could have contracted chlamydia.⁴ Moreover, the trial court recognized that the inference of promiscuity that arises from the presence of a sexually transmitted disease is highly prejudicial. The trial court considered the relevant factors and properly exercised its discretion.

White sought to admit the bed sheet evidence to show that the semen found could have come from someone else.⁵ The possibility that the victim had intercourse with another man was irrelevant to the charges against White. "Evidence going to prove one sexual encounter does not assist the trier of fact in determining whether a separate sexual encounter also occurred—the two events are not mutually exclusive." *Michael R.B.*, 175 Wis.2d at 726, 499 N.W.2d at 647. That the bed sheet evidence had little probative value is particularly true here where there was no evidence as to the time when the semen deposits were made. The evidence could not have established that at the time of the assault the victim was with another man. The evidence was inconclusive and had little probative value.

³ The victim did not testify at trial that she told White that she had chlamydia in order to prevent the assault. Upon learning that the probability of chlamydia transmission from one act of intercourse was only 10 to 20%, White abandoned his claim that the chlamydia evidence was probative that no intercourse had occurred.

⁴ White's theory of defense at trial was that the victim had falsely accused him because he had a hand in a drug deal that went bad and resulted in the victim losing money.

⁵ The prosecution did not offer any evidence about semen stains found on the victim's bed sheets.

As with the chlamydia evidence, the trial court found that the bed sheet evidence was highly prejudicial in giving rise to an inference of promiscuity. The “very real danger” of such prejudice is recognized and forms a proper basis for excluding evidence of little probative value. *See State v. Gulrud*, 140 Wis.2d 721, 736, 412 N.W.2d 139, 145 (Ct. App. 1987). The trial court properly determined that the minimal probative value of the bed sheet evidence was outweighed by the potential for prejudice.⁶

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

⁶ In concluding that the trial court properly exercised its discretion in excluding evidence, we note that the trial court also denied the prosecution’s motion to introduce other acts evidence. The trial court exercised its discretion on both sides of the evidentiary contest to ensure a fair trial.

