

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**October 11, 2005**

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. 2004AP3295-CR**

Cir. Ct. No. 2001CF5274

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**REINALDO C. ACOSTA,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL B. BRENNAN, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Reinaldo Acosta appeals a judgment of conviction entered upon a jury's verdict. Acosta contends the court erred by allowing the victim, Anthony Howell, to identify him at trial due to flaws in Howell's prior identifications. He also argues the court erred by not allowing him to present

evidence of Denise Collins's prior convictions for prostitution and drugs to impeach her after she accused him of sexual assault. Because Howell had an independent source for the identification and the court properly applied the rape shield law, we affirm.

### **Background**

¶2 On September 27, 2001, two males armed with guns forcefully entered a Milwaukee residence and robbed four people, including Howell and Collins. Collins was also sexually assaulted by one of the men, whom she later identified as Acosta. Before leaving the scene, one of the men shot Howell in the leg.

¶3 Acosta was arrested and charged with various counts of armed robbery, sexual assault, and kidnapping.<sup>1</sup> On November 13, a preliminary hearing was held. Acosta was present at the hearing, and Howell identified him as the man that shot him. After the preliminary hearing, a lineup was held, and Howell again identified Acosta. Acosta's attorney was not present at that lineup.

¶4 On September 8, 2003, Acosta moved to suppress Howell's in-court identification. The State conceded that the identification at the lineup was improper due to Acosta's counsel's absence. The court ruled, however, that Howell's in-court identification was admissible because it was based on an "independent source." The court also ruled that Acosta could not present evidence

---

<sup>1</sup> More specifically, Acosta was charged with two counts of armed robbery while concealing identity, one count of first-degree sexual assault while concealing identity, one count of kidnapping while concealing identity and possessing a dangerous weapon; and, one count of first-degree recklessly endangering safety while concealing identity and possessing a dangerous weapon, on all counts as a party to a crime.

of Collins's drug and prostitution related convictions. At trial, a jury found Acosta guilty, the court entered judgment, and he was sentenced.

## Discussion

### Identification at Trial

¶5 Acosta first contends that the court erroneously allowed Howell to identify him at trial. Acosta argues the trial identification was inadmissible because too great a period of time lapsed between the robbery and Howell's initial identification of Acosta at a preliminary hearing to make the identification reliable. Acosta next argues that Howell's identification of Acosta at the preliminary hearing was tainted when Howell saw Acosta at the hearing in jail clothes where he was identified as the defendant. Subsequent to the preliminary hearing, as the state concedes, an improper lineup took place where Acosta's counsel was not present. The court concluded, and we agree, that Howell had an independent source to identify Acosta under *United States v. Wade*, 388 U.S. 218 (1967), and therefore, the court properly determined that Howell could identify Acosta at trial.

¶6 Whether an independent source exists for an in-court identification is a question of constitutional fact. *State v. McMorris*, 213 Wis. 2d 156, 164-65, 570 N.W.2d 384 (1997). This presents us with a mixed question of law and fact. *Id.* at 165. This court defers to the trial court's factual findings and reverses them only if it finds them clearly erroneous. *Id.* Applying the constitutional standards to the facts is a question of law we review without deference but benefiting from the trial court's analysis. *Id.*

¶7 Criminal defendants have a Sixth Amendment right to have counsel notified of and be present at a lineup. Any identification resulting from a lineup without the defendant's counsel present must be excluded from the trial. *See Wade*, 388 U.S. at 237-39. However, a courtroom identification subsequent to a constitutionally improper lineup is not per se inadmissible. *See id.*; *McMorris*, 213 Wis. 2d at 167. An in-court identification is admissible if the State shows by clear and convincing evidence that the identification has an independent source. *Wade*, 388 U.S. at 241 (quoting *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)). A court considers the following factors to determine if an in-court identification has an independent source:

(1) the prior opportunity the witness had to observe the alleged criminal activity; (2) the existence of any discrepancy between any pre-lineup description and the accused's actual description; (3) any identification of another person prior to the lineup; (4) any identification by picture of the accused prior to the lineup; (5) failure to identify the accused on a prior occasion; (6) the lapse of time between the alleged crime and the lineup identification; and (7) the facts disclosed concerning the conduct of the lineup.

*McMorris*, 213 Wis. 2d at 168 (citing *Wade*, 388 U.S. at 241).

¶8 We agree with the trial court that Howell had an independent source for identifying Acosta. Specifically, Howell had the opportunity to observe Acosta extensively during the crime. Applying the factors, first, Howell had the opportunity to clearly view Acosta during the robbery. Second, Howell's description of Acosta was consistent with his physical characteristics. The court correctly determined that the third, fourth and fifth factors do not apply. Next, the lapse of time between the robbery and the identification was not so great as to render the identification unreliable. Finally, nothing in the record renders the identification untenable.

¶9 Acosta argues that the court's decision was erroneous because six weeks elapsed between the robbery and Howell's identification of Acosta at the preliminary hearing. He contends that too much time passed for an effective identification. The lapse of time is just one of the factors in the *Wade* test that the court examined when determining whether there was an independent source for the identification. As we consider the lapse of time with the other *Wade* factors, we are satisfied an independent source existed. *See c.f. Neil v. Biggers*, 409 U.S. 188, 202-04 (1972) (lapse of seven months between crime and identification did not make identification unreliable when considered with the other factors). As the court noted, Howell had an adequate opportunity to observe Acosta during the robbery, and he later gave an accurate description of Acosta to the police. Thus, it is evident the lapse of time between the robbery and the lineup does not disqualify Howell's identification of Acosta at trial.

¶10 Acosta next argues the trial identification was improper because Howell saw Acosta at the preliminary hearing in jail clothes where he was identified as the defendant. Acosta has not shown how the identification was tainted in such a way that Howell should have been prevented from identifying him at trial. Because Howell's identification of Acosta at trial was based on an independent source, we affirm the court's ruling.

### **Rape Shield Law**

¶11 Acosta next argues the trial court incorrectly denied him the opportunity to impeach Collins with her previous convictions for prostitution and drugs. Acosta alleges that Collins falsely accused him of sexual assault because he failed to compensate her sufficiently with money or drugs for a previous consensual, sexual encounter. The trial court reasoned that, pursuant to the rape

shield law, WIS. STAT. § 972.11(2)(b),<sup>2</sup> any references to these convictions for prostitution and drugs were inadmissible. Both the State and Acosta address only the issue of whether the rape shield statute applies to the admission of these convictions. Thus, our analysis is also based on the rape shield statute.

¶12 A question of whether applying the rape shield statute deprives the defendant of his constitutional right to present a defense is an issue of constitutional fact that this court examines independently of the lower court, but benefiting from its analysis. *State v. St. George*, 2002 WI 50, ¶16, 252 Wis. 2d 499, 643 N.W.2d 777.

¶13 Wisconsin's rape shield law exists "to counteract outdated beliefs that a complainant's sexual past could shed light on the truthfulness of the sexual assault allegations." *State v. Dunlap*, 2002 WI 19, ¶19, 250 Wis. 2d 466, 640 N.W.2d 112 (quoting *Michael R.B. v. State*, 175 Wis. 2d 713, 727, 499 N.W.2d 641(1993)). Pursuant to WIS. STAT. § 972.11(2)(b), evidence concerning the accusing victim's prior sexual conduct shall not be admitted into evidence at trial, unless it is admissible under a statutory or judicial exception. *Dunlap*, 250 Wis. 2d 466, ¶17. However, a judicial exception permits the defendant to present evidence of the victim's prior sexual conduct that would otherwise be inadmissible to protect the defendant's constitutional right to present evidence in his defense. *State v. Pulizzano*, 155 Wis. 2d 633, 645-48, 456 N.W.2d 325 (1990); *St. George*, 252 Wis. 2d 499, ¶¶13, 18-20.

---

<sup>2</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶14 For a defendant to demonstrate that he has a constitutional right to admit evidence that is otherwise excluded by the rape shield statute, the defendant must satisfy a two party inquiry. *St. George*, 252 Wis. 2d 499, ¶18. First, the defendant must meet five factors through an “offer of proof that states an evidentiary hypothesis bolstered by a statement of fact sufficient to justify the conclusion or inference the court is asked to accept.” *Id.*, ¶19. The five factors are as follows:

- (1) the prior act clearly occurred;
- (2) the act closely resembles that in the present case;
- (3) the prior act is clearly relevant to a material issue;
- (4) the evidence is necessary to the defendant’s case;
- (5) the probative value outweighs the prejudicial effect.

*Pulizzano*, 155 Wis. 2d at 656. Next, if the defendant satisfies the first *Pulizzano* prong, the court examines whether the State’s interests in excluding the evidence are so compelling that they overcome the defendant’s right to present it. *Id.* at 657.

¶15 We agree with the trial court’s conclusion that Acosta did not satisfy the *Pulizzano* inquiry. Applying the test, Acosta satisfied the first of the five factors of the first prong because Collins’s prior convictions for prostitution and drugs “clearly occurred.” Next, Acosta failed to satisfy the second factor. Acosta claimed that Collins falsely accused him of sexual assault because he failed to sufficiently compensate her for sex with money or drugs. The only thing that Collins’s prior convictions for prostitution and Acosta’s claims have in common is that they both concern prostitution and drugs. The prior convictions do not show that Collins had ever falsely accused someone of sexual assault for not compensating her, which is Acosta’s “evidentiary hypothesis.” Thus, Acosta failed to demonstrate that the convictions “closely resemble” his claim.

¶16 For similar reasoning, Collins’s convictions were not “relevant to a material issue” at the trial. WISCONSIN STAT. § 904.01 states that evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” The fact that Collins has been convicted for prostitution and drugs does not make it “more probable” that she would falsely accuse Acosta of sexual assault. Thus, the lack of connection between the convictions and Acosta’s allegation hardly makes them “necessary” for Acosta’s defense. Finally, as we have discussed, the probative value of the convictions is suspect, and therefore they do not outweigh the prejudicial value.

¶17 Since Acosta has failed to satisfy the first prong of the *Pulizzano* inquiry, it is unnecessary to apply the second. *Id.* at 657. We are satisfied that the court correctly excluded Collins’s prior convictions under the rape shield law.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.



