

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

November 15, 2000

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

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**No. 00-0624-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**THOMAS M. MILLIGAN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Washington County: ANNETTE K. ZIEGLER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Thomas M. Milligan appeals from the judgment of conviction entered against him and from the order denying his motion for postconviction relief. The issue on appeal is whether the circuit court erred when it denied Milligan's motion for postconviction discovery. Because we conclude

that Milligan was not entitled to postconviction discovery in this instance, we affirm.

¶2 Milligan was convicted after a jury trial of three counts of second-degree sexual assault, one count of second-degree sexual assault which caused injury to the victim, and one count of witness intimidation. Shortly before the trial began, the State notified the defense that the doctor who had examined the victim would not be available to testify in person at the trial. The State said that the doctor would be available to testify by telephone. The defense declined to have the doctor testify by telephone and stipulated to allowing an officer to read the portion of his report which summarized the doctor's findings. The detective read the following statement:

On 1-27-98 I received a copy of the medical report from St. Joseph's Hospital. According to Dr. Thomas Reminga, the examination was that of [the victim] where she reported to them that she had been raped. The examination showed there was a small amount of blood in the vaginal area. The report also stated that it was unclear whether there was vaginal or anal penetration. The doctor reported that the patient appeared quite upset. Noted there was also a small abrasion on the patient's neck.

¶3 During the trial, Milligan's defense was that he had not engaged in any sexual activity with the victim. At the close of trial, his counsel argued that the language quoted above suggested that the doctor was not certain whether there had been any sort of penetration. The State argued that the language meant that there had been penetration, but it just was not clear whether it was anal or vaginal. The jury convicted Milligan on all five counts.

¶4 Subsequent to his conviction and sentencing, Milligan filed a motion in the circuit court for postconviction discovery to determine whether he had a

valid claim for ineffective assistance of trial counsel. Specifically, Milligan asked to be allowed to examine Dr. Reminga. Milligan argued that the doctor's testimony would help establish that his trial counsel had been ineffective for failing to conduct a sufficient pretrial investigation to find out what Dr. Reminga really meant. Milligan also argued that the evidence would help establish that the prosecutor had engaged in misconduct by suggesting that the jury interpret Dr. Reminga's statement in a way the prosecutor knew to be false.

¶5 The circuit court denied the motion and refused to hold an evidentiary hearing, finding that Milligan had failed to establish that the issue was a consequential fact in the constitutional sense, and that discovery was unwarranted because the evidence would not create a reasonable probability of a different outcome. Milligan appeals.

¶6 A defendant has a right to postconviction discovery when the evidence is relevant to an issue of consequence. *See State v. O'Brien*, 223 Wis. 2d 303, 323, 588 N.W.2d 8 (1999). Evidence is consequential only if there is a "reasonable probability" that the "result of the proceeding would have been different." *Id.* at 320-21. Consequently, the remedy is unwarranted when "the evidence would not create a reasonable probability of a different outcome." *Id.* at 323. The burden is on the party seeking the evidence to show that evidence is consequential to an issue in the case and would have changed the result of the proceeding. *See id.* Essentially, the determination of whether the sought-after evidence would affect the outcome of the trial is a determination of whether the evidence is material. *See id.* at 322. The reviewing court will not disturb findings regarding evidentiary facts unless they are clearly erroneous. *See id.*

¶7 We agree with the circuit court's finding that the sought-after evidence was not consequential because it is not likely to have changed the outcome of the trial. First, the statement in the report that "it was unclear whether there was vaginal or anal penetration" created an ambiguity which worked to Milligan's advantage. This statement actually supported the defense theory that no sexual contact had taken place. It was certainly a reasonable trial tactic for defense counsel to allow this statement to be heard by the jury without any further explanation from the doctor. This allowed defense counsel to argue in closing that there was no evidence to support the victim's story. If defense counsel had examined the doctor, the doctor's testimony may have supported the State's interpretation of the language. The defense then would have lost this opportunity to argue that the language supported its theory of no contact.

¶8 Milligan also argues that examining the doctor would help determine whether his physical examination of the victim supported the victim's allegations. This testimony, however, would have been improper comment on the credibility of the victim as a witness. *See State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984).

¶9 Milligan asserts that Dr. Reminga's testimony would have been important to determine whether the prosecutor had engaged in prosecutorial misconduct when she argued to the jury how it should interpret the "it is unclear" statement. Milligan apparently wanted to ask the doctor if he had told the prosecutor prior to trial what was meant by the "it is unclear" statement. Milligan asserts that if Dr. Reminga had previously explained what he meant by this statement to the prosecutor, and then the prosecutor made an argument that was inconsistent with Dr. Reminga's explanation and that the prosecutor knew to be false, she would have engaged in prosecutorial misconduct. This is pure

speculation and Milligan has offered nothing whatsoever that even remotely supports this potential.

¶10 This is not a case such as *State v. Glass*, 170 Wis. 2d 146, 488 N.W.2d 432 (Ct. App. 1992), where clearly exculpatory evidence was kept from the jury. In *Glass*, defense counsel did not offer testimony which would have shown that laboratory tests for semen had been negative. *See id.* at 150. In this case, Dr. Reminga's potential testimony was not clearly exculpatory. Defense counsel did not know whether the doctor's testimony would support her theory or the State's. Given the ambiguous language in the report read by the officer, it was a reasonable trial tactic for defense counsel not to examine the doctor and instead stipulate to the report.

¶11 Moreover, the testimony of the doctor was not likely to have produced a different result. There was physical evidence which supported the victim's statement, including a condom wrapper in the location where she said the assault occurred and blood on her clothing. Further, the victim's friend overheard portions of the assault and testified to this at trial. And the victim herself testified to the incident. In short, the other corroborating evidence was so strong that we cannot conclude that the doctor's testimony would have changed the outcome of the case.

¶12 For the reasons stated, we affirm the judgment and the order of the circuit court.

*By the Court.*—Judgment and order affirmed.

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

