

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 28, 2009

David R. Schanker
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. 2008AP1547-CR

Cir. Ct. No. 2006CF515

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

ERNEST C. GARDNER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Eau Claire County:
PAUL J. LENZ, Judge. *Reversed and cause remanded.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. The State appeals an order granting Ernest Gardner's motion for a new trial. The State argues that because information about the victim's past sexual assault by another perpetrator was not exculpatory under

the facts of this case, the circuit court erred by granting Gardner a new trial. We agree and reverse the order.

BACKGROUND

¶2 The State charged Gardner with two offenses: second-degree sexual assault of a fourteen-year-old girl and bail jumping. At trial, Leeanna H. testified that Gardner was visiting the house where she was babysitting. As Leeanna lay on the couch, Gardner asked to sit by her feet. Gardner started rubbing Leeanna's feet, put his hand up her pants, and rubbed her leg. Leeanna tried to pull away when Gardner started kissing her, but allowed Gardner to remove her clothes out of fear. Gardner inserted his finger into Leeanna's vagina approximately five times and attempted to place Leeanna's hand on his penis. Gardner also tried unsuccessfully to have sexual intercourse with Leeanna. When Leeanna ultimately pulled away, Gardner cautioned her not to tell anybody what happened. The jury found Gardner guilty of both offenses.

¶3 During the presentence investigation, the PSI writer explained the sex offender registry to Leeanna, who responded "she was aware of it due to her and her sister both being sexually assaulted several years ago by a neighbor." At Gardner's sentencing, the prosecutor noted that Leeanna "had previously been victimized," and made no further reference to the previous sexual assaults. Leeanna did not speak at the sentencing hearing.

¶4 The court imposed concurrent sentences consisting of seven years' initial confinement followed by five years' extended supervision on the sexual assault conviction, and six months' jail time on the bail jumping conviction. Gardner filed postconviction motions for a new trial, claiming, in relevant part, that the State failed to disclose exculpatory information that Leeanna had been

sexually assaulted. The State subsequently informed the court that the previous assaults had been charged and the perpetrators were convicted and sentenced. The circuit court ultimately granted Gardner’s motion for a new trial and this appeal follows.

DISCUSSION

¶5 A request for a new trial is addressed to the trial court’s discretion. A court properly exercises its discretion if it relies on the relevant facts in the record and applies the proper legal standard to reach a reasonable decision. *See State v. LaCount*, 2008 WI 59, ¶76, 310 Wis. 2d 85, 750 N.W.2d 780. Thus, we will find an erroneous exercise of discretion if the trial court’s factual findings are unsupported by the evidence or if the court applied an erroneous view of the law. *See State v. Martinez*, 150 Wis. 2d 62, 71, 440 N.W.2d 783 (1989). When the trial court’s discretion is based on an error of law, its decision is not entitled to deference on review. *See State v. Givosky*, 109 Wis. 2d 446, 452, 326 N.W.2d 232 (1982). Here, the trial court’s decision to grant Gardner a new trial hinged on a question of law—specifically, whether the information was subject to disclosure. *See State v. Chu*, 2002 WI App 98, ¶30, 253 Wis. 2d 666, 643 N.W.2d 878.

¶6 Both the due process clause of the United States Constitution and WIS. STAT. § 971.23(1)(h)¹ require a prosecutor to disclose exculpatory evidence to the defense. *See State v. Harris*, 2004 WI 64, ¶12, 272 Wis. 2d 80, 680 N.W.2d 737. To be subject to disclosure, however, the evidence must be “favorable” to the accused, either because it tends to establish the defendant’s innocence or

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

because it impeaches the credibility of a prosecution witness. *Id.* In addition to being favorable, the withheld evidence must be “material”—in other words, there must be a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.*, ¶¶13-14. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*, ¶14. A prosecutor, however, is not required to share all useful information with the defendant. *Id.*, ¶16. The mere possibility that information “might have helped the defense does not establish materiality.” *Id.*

¶7 Citing *Harris*, Gardner intimates that any information that a victim has been sexually assaulted in the past is exculpatory per se. We are not persuaded. In *Harris*, the defendant was convicted of having sexual contact with a six-year-old girl. The prosecutor failed to disclose that after the charges were filed, the victim reported that her grandfather had sexual contact with her approximately two months before the charged offense was committed. *Id.*, ¶5. Although our supreme court concluded the information was exculpatory, that conclusion was not based merely on the nature of the information but, rather, on an evaluation of the circumstances of that case. *Id.*, ¶30.

¶8 The *Harris* court held the information was favorable to the accused because it related to the credibility of the young victim since it raised an inference that she might be projecting the assaults committed by her grandfather onto Harris. *Id.*, ¶¶28-30. The court also concluded that by providing an alternate source for the victim’s knowledge of sexual matters, the information could be used to impeach any expert witness called to establish that the charged assault was the source of the victim’s sexual knowledge and reactive behaviors.

¶9 In the present case, the information related to a sexual assault or assaults that were reported and prosecuted before the instant assault occurred. Gardner nevertheless argues that had the information been disclosed, he could have explored a “possible bias or interest” on Leeanna’s part in testifying falsely to punish Gardner. As noted above, the mere possibility that information “might have helped the defense does not establish materiality.” *Id.*, ¶16. Here, the record does not support a claim that any trauma from the prior assault motivated an accusation against Gardner in the present case. Leeanna never mentioned the prior assault to the prosecutor and only referred to it in order to explain to the PSI writer why she knew about the sex offender registry. Further, in her interview with the PSI writer, Leeanna attributed any distress she was experiencing at the time to the assault by Gardner. The record does not support an inference that Leeanna might be projecting the past assault onto Gardner.

¶10 Further, no expert testified that the instant assault was the source of Leeanna’s sexual knowledge. Therefore, the information was not relevant to impeach the credibility of an expert witness. Reasonably commensurate with the knowledge of most fourteen-year-olds, Leeanna’s testimony exhibited awareness of the male and female sexual organs and their functions. Moreover, Gardner’s acts could not be misinterpreted regardless of Leeanna’s prior sexual experience. We conclude that under the circumstances of this case, information about Leeanna’s past assault was neither favorable nor material to Gardner’s defense.

Because the information was not exculpatory, the prosecutor had no duty to disclose it.²

¶11 To the extent Gardner claims the trial court properly granted a new trial based on newly-discovered evidence, it does not appear that this argument was raised below and it was not the basis for the trial court's decision to grant the new trial. Further, Gardner fails to adequately develop this argument on appeal. We may decline to review issues inadequately briefed. *See State v. S.H.*, 159 Wis. 2d 730, 738, 465 N.W.2d 238, 241 (Ct. App. 1990). In any event, to warrant a new trial in this case, the new evidence must be material and there must be a reasonable probability that it would create a reasonable doubt about Gardner's guilt. *See State v. Plude*, 2008 WI 58, 310 Wis. 2d 28, 750 N.W.2d 42. As noted above, the new evidence was not material and does not create a reasonable doubt about Gardner's guilt.

¶12 Finally, Gardner asserts that a new trial is warranted in the interest of justice. Gardner again fails to adequately develop this claim. Even on the merits, this claim would fail. A new trial may be granted in the interest of justice if it appears that the real controversy has not been fully tried, or that it is probable justice has for any reason miscarried. *See WIS. STAT. § 752.35*. In order to establish that the real controversy has not been fully tried, Gardner must convince us "that the jury was precluded from considering important testimony that bore on

² Because we conclude the information was not exculpatory, we need not address whether the information, had it been disclosed, would have been excluded under the Rape Shield Law. *See Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (only dispositive issues need be addressed).

an important issue or that certain evidence which was improperly received clouded a crucial issue in the case.” *State v. Darcy N.K.*, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (internal quotations omitted). To establish a miscarriage of justice, Gardner “must convince us there is a substantial degree of probability that a new trial would produce a different result.” *Id.* An appellate court will exercise its discretion to grant a new trial in the interest of justice “only in exceptional cases.” *State v. Cuyler*, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983). Because Gardner has failed to show that the real controversy has not been fully tried or that justice has for any reason miscarried, we decline to exercise our discretionary authority to grant Gardner a new trial.

By the Court.—Order reversed and cause remanded.

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

