COURT OF APPEALS
DECISION
DATED AND FILED

June 30, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1533-CR **Cir. Ct. No. 1993CF678**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMIE DEAN JARDINE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Douglas County: MICHAEL T. LUCCI, Judge. *Affirmed*.

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

¶1 PER CURIAM. Jamie Jardine appeals an order denying his postconviction motion in which he requested a new trial or resentencing based on newly discovered evidence. A jury convicted Jardine of attempted first-degree intentional homicide and four counts of first-degree sexual assault of a masseuse

in a massage parlor. The alleged newly discovered evidence consists of DNA tests on bedding and towels showing other men's DNA and no DNA on Jardine's gun, and a medical record indicating the victim showed no sign of "sexual trauma." Because the new evidence would not have created a reasonable doubt as to Jardine's guilt, we affirm the order.

¶2 At trial, the victim testified regarding her partial memory of the incident. She testified that Jardine showed her a handgun, handcuffed her, tore her clothes off and repeatedly sexually assaulted her. He then removed the handcuffs, asked her where the money was kept, and led her down a hallway at gunpoint. He forced her to kneel, facing away from him and placed a towel over her head. She believed he was going to kill her. She then attempted to grab the gun. During the struggle, her skull was partially crushed. She does not know how that occurred. She was also shot in the leg.

¶3 Jardine admitted he showed the victim a gun and handcuffed her, but claimed the sexual contact was consensual. He testified he worked the handgun slide to show that he meant no harm by locking the action open. The victim grabbed the gun and a struggle ensued that led to the victim's gunshot wound. Jardine panicked and left the massage parlor. Jardine admitted he lied to police when initially questioned about his presence at the massage parlor. He offered no explanation for the victim's fractured skull.

¶4 A request for a new trial based on newly discovered evidence requires a defendant to prove that the evidence was discovered after conviction, he was not negligent in seeking the evidence, the evidence is material to an issue in the case and not merely cumulative, and a reasonable probability exists that had the jury heard the newly discovered evidence, it would have had a reasonable

doubt as to his guilt. *See* ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). A decision to grant or deny a new trial based on newly discovered evidence is within the trial court's discretion. ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42. This court must consider whether the evidence would have had sufficient impact on the jury to cast reasonable doubt on Jardine's guilt. ***Id.***, ¶33.

¶5 Evidence showing other men's DNA on towels and bedding would not create a reasonable doubt as to Jardine's guilt. Jardine's own testimony eliminates any issue regarding identity of the perpetrator. Jardine contends the DNA evidence shows that other men sexually assaulted the victim. He does not explain why the evidence would not be consistent with consensual sexual activity. The victim's consensual sexual activity with other men does not show her consent to sexual activity with Jardine. The evidence of other sexual activity is inadmissible under the Rape Shield Law, WIS. STAT. § 972.11(2),[1] because it is irrelevant. Jardine does not establish any applicable exception under ***State v. Pulizzano***, 155 Wis. 2d 633, 656, 456 N.W.2d 325 (1990), because he did not make an offer of proof that the other sexual acts closely resemble the acts described by the victim here, particularly use of handcuffs and a gun.

¶6 Jardine argues the victim's credibility would be impeached by proof that prostitution activities occurred at the massage parlor. That argument is based on a mischaracterization of the victim's testimony. When asked whether Jardine ever said anything about sex, the victim replied "He asked, how much for sex, and I said no, I don't do that." The victim did not testify there was no prostitution

[1] All references to the Wisconsin Statutes are to the 2007-08 version.

activity at the massage parlor. She only testified that she told Jardine she did not do that. To the extent DNA evidence would support Jardine's claim that prostitution occurred, the evidence would not impeach the victim's testimony.

¶7 Another witness testified that no prostitution activity occurred at the massage parlor. Her testimony was not essential to the State's case. Evidence of collateral facts offered for the sole purpose of impeaching a witness is not admissible. *See* WIS. STAT. § 906.08(2); ***State v. Gulrud***, 140 Wis. 2d 721, 733, 412 N.W.2d 139 (Ct. App. 1987). The DNA evidence would not have been admissible solely for the purpose of impeaching the witness's credibility.

¶8 The absence of the victim's DNA on Jardine's gun would not establish a reasonable doubt as to his guilt. A doctor testified that the victim's skull fracture was consistent with being pistol whipped. Jardine was not immediately apprehended. He had ample opportunity to remove any DNA traces from the gun.

¶9 The medical records showing the victim had no vaginal trauma would not establish a reasonable doubt because the sex acts the victim described would not necessarily result in vaginal trauma. She described no injury until the sex acts were completed and the only injuries she described were a fractured skull and a gunshot to the leg.

¶10 Finally, Jardine raises numerous issues on appeal that are not properly before this court. Some of the issues have nothing to do with newly discovered evidence and are barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), because Jardine offers no explanation for his failure to have raised the issues in earlier postconviction proceedings. He also seeks to raise issues for the first time on appeal and for the first time in his reply

brief. The court will not consider those issues. *See* ***State v. Lipke***, 186 Wis. 2d 358, 369 n.3, 521 N.W.2d 444 (Ct. App. 1984); ***Northwest Wholesale Lumber v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995). Other arguments impermissibly relate to facts outside the record. *See* ***Dieck v. Antigo Sch. Dist.***, 157 Wis. 2d 134, 148 n.9, 458 N.W.2d 565 (Ct. App. 1991). None of these issues will be addressed.

By the Court.—Order affirmed.

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