

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 20, 2021**

Sheila T. Reiff  
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. 2019AP362-CR  
STATE OF WISCONSIN**

Cir. Ct. No. 2017CF2894

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TEMYIER L. TUCKER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County:  
JEFFREY A. CONEN, Judge. *Affirmed.*

Before Brash, P.J, Donald and White, JJ.

**Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

¶1 PER CURIAM. Temyier L. Tucker appeals a judgment convicting him of second-degree sexual assault of child under the age of sixteen years old. He argues that: (1) the circuit court erred when it denied his motion to introduce evidence of what he characterizes as N.S.’s prior untruthful allegation of sexual assault under WIS. STAT. § 972.11 (2019-20);<sup>1</sup> and (2) his constitutional rights were violated by the circuit court’s evidentiary ruling. Upon review, we affirm.

¶2 After a jury trial, Tucker was found guilty of second-degree sexual assault of a child, N.S., who was fifteen years old at the time the assault occurred. The jury acquitted Tucker of a charge of child enticement. Prior to trial, Tucker sought to introduce evidence that N.S. made a prior untruthful allegation that her father sexually assaulted her when she was five years old. *See* WIS. STAT. § 972.11. The circuit court denied his motion. Tucker challenges that ruling on appeal.

¶3 “Wisconsin’s rape shield law, WIS. STAT. § 972.11, generally prohibits the introduction of any evidence of the complainant’s prior sexual conduct ‘regardless of the purpose.’” *State v. Ringer*, 2010 WI 69, ¶25, 326 Wis. 2d 351, 785 N.W.2d 448. “The rape shield law was enacted to counteract outdated beliefs that a complainant’s sexual past could shed light on the truthfulness of the sexual assault allegations.” *Id.* (citations omitted). This evidentiary prohibition has three exceptions including, as applicable here, “evidence of prior untruthful allegations of sexual assault made by the complaining witness.” Sec. 972.11(2)(b)3. “[T]o admit evidence of alleged prior untruthful allegations of sexual assault under [§] 972.11(2)(b)3., the circuit court must first conclude from the proffered evidence

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

that a jury could reasonably find that the complainant made prior untruthful allegations of sexual assault.” *Ringer*, 326 Wis. 2d 351, ¶31.

¶4 Our review of the circuit court’s evidentiary ruling is deferential. *See id.*, ¶24. We will uphold the circuit court’s decision unless it erroneously exercises its discretion. *Id.* The circuit court properly exercises its discretion if it examines the relevant facts and applies the proper standard of law to reach a reasonable conclusion. *State v. Jackson*, 216 Wis. 2d 646, 655, 575 N.W.2d 475 (1998).

¶5 Tucker contends that N.S.’s allegation that her father sexually assaulted her was untruthful because N.S.’s father denied touching N.S. in a sexual manner, N.S.’s father was not charged with a crime based on N.S.’s allegation, and N.S. had a motive to make a false allegation because N.S. did not want to live with her father.

¶6 Tucker’s argument, however, overlooks the difference between an unproven allegation and an *untruthful* allegation. The circuit court explained it did not know if N.S.’s allegation was true, but it also did not know whether the allegation was untrue. Stated differently, the prior allegation was unsubstantiated but not established to be untruthful. The circuit court considered the information Tucker presented and concluded that he did not present enough evidence for a reasonable person to find that N.S.’s allegation against her father was untruthful, as opposed to unproven. Therefore, the circuit court properly concluded that Tucker did not meet his burden of production to show that N.S.’s accusation against her father fit within one of the exceptions to WIS. STAT. § 972.11(2)(b)3. The circuit court’s evidentiary ruling was a proper exercise of discretion.

¶7 Tucker also argues that the circuit court’s ruling barring the evidence denied his constitutional rights to present a defense, to confront the witnesses

against him, to cross-examine the witnesses against him, and to a fair trial. Tucker did not raise these constitutional arguments in the circuit court. Therefore, he forfeited his right to raise these claims on appeal. *See State v. Ndina*, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612 (“forfeiture is the failure to make the timely assertion of a right.” (citation omitted)).

*By the Court.*—Judgment affirmed.

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

