

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 9, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 01-1357-CR
STATE OF WISCONSIN**

Cir. Ct. No. 00-CF-446

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRY L. SCHROEDL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Dane County: DANIEL L. LaROCQUE, Judge. *Affirmed.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Terry Schroedl appeals a judgment of conviction and an order denying postconviction relief. Schroedl was convicted of four counts of first-degree sexual assault of a child, two counts of exposing genitals to a child,

and two counts of child enticement—sexual contact. *See* WIS. STAT. §§ 948.02(1), .07(1), .10(1) (1999-2000).¹ Schroedl alleges that the circuit court erred in two respects. First, Schroedl claims the court erred in admitting other acts evidence that Schroedl had a sexual relationship with his girlfriend's thirteen-year-old daughter. Second, Schroedl claims error in the exclusion of allegedly false prior accusations of sexual assault made by the complainant and of her prior sexual knowledge and experience. Finally, Schroedl asserts that justice requires a new trial because the circuit court's admission of the other acts evidence clouded Schroedl's trial. We reject Schroedl's arguments and affirm his conviction.

¶2 This case involves Schroedl's relationship with two minor girls, both named Ashley. According to the depositions of the two girls, Ashley M., the complainant, lived with her mother, Tammy, in an apartment above Helen, Schroedl's long-time girlfriend. Helen had two daughters, Ashley J. and Anita, who lived with her and Schroedl. At the time of the events underlying Schroedl's conviction, Ashley M. and Anita were eight years old, and Ashley J. was twelve years old. Ashley M., Ashley J. and Anita were friends and frequently spent time in each other's apartments.

¶3 One night when Ashley M. was seven or eight years old, she stayed overnight at Anita's apartment. The next morning, Helen and Ashley J. left the apartment to get donuts. While they were gone, Schroedl sexually assaulted Ashley M. At some point there was a knock on the door indicating that Helen and

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Ashley J. were home, and Ashley M. returned to the living room to watch cartoons.

¶4 Ashley M. did not tell anyone about that assault until Schroedl had assaulted her a second time. On the second occasion, Ashley M., Ashley J. and Anita were watching a movie in Ashley M.'s apartment. Ashley M.'s mother was out. Schroedl then asked Ashley M. if she wanted to go to her mother's bedroom. She agreed. In the bedroom, Schroedl told Ashley M. to take her pants down and he sexually assaulted her. Afterward, he told her not to tell anyone.

¶5 Ashley M. told Tammy, her mother, about the assault two days after it occurred. At trial, Tammy denied that Ashley M. had told her about the assault. Tammy never notified the authorities. Ashley M. later told her stepmother, who told Ashley M.'s father. Ashley M.'s father notified the authorities.

Other Acts Evidence

¶6 In preparation for trial, the parties deposed Ashley J. The State sought to corroborate Ashley M.'s testimony about various details connected to the assaults. However, Ashley J.'s testimony differed from Ashley M.'s. Furthermore, when the police interviewed Ashley J., she said that Schroedl had never done anything inappropriate to anyone. To explain the conflict between Ashley M. and Ashley J.'s testimony, the State wanted to show Ashley J.'s bias by introducing evidence that Ashley J. had a sexual relationship with Schroedl, became pregnant by Schroedl and chose to keep Schroedl's baby. Schroedl objected, arguing that the introduction of the evidence would preclude his ability to have a fair trial. The circuit court encouraged the parties to reach a compromise on the admission of the evidence, and the parties stipulated that the jury would be told the following: (1) Schroedl had sexual intercourse with Ashley J. between

June 1998 and September 1999; (2) Ashley J. had feelings of affection for Schroedl; and (3) Ashley J., in her initial contact with the police, denied having sexual intercourse with Schroedl. The parties further stipulated that these facts were relevant only to show bias.

¶7 Schroedl contends that the circuit court erred in allowing the State to introduce evidence of his relationship with Ashley J. Schroedl argues that there were several other ways the State could have shown bias and that the evidence was unfairly prejudicial.

¶8 WISCONSIN STAT. § 904.04(2) prohibits the introduction of evidence of other crimes, wrongs or acts to prove a person's character in order to show conduct in conformity therewith. The statute allows the admission of other acts evidence for other purposes, however. *See id.* Other acts evidence is admissible if: (1) it is offered for an acceptable purpose under WIS. STAT. § 904.04(2); (2) it is relevant; and (3) its probative value substantially outweighs the danger of unfair prejudice, confusion of the issues, misleading of the jury, undue delay, waste of time or needless presentation of cumulative evidence. *State v. Sullivan*, 216 Wis.2d 768, 772-73, 576 N.W.2d 30 (1998). We review the circuit court's decision to admit or exclude other acts evidence under the erroneous exercise of discretion standard of review. *Id.* at 780.

¶9 The circuit court applied the correct law, the three-step *Sullivan* test. First, the circuit court noted that the purpose of the proposed evidence was to show bias. Bias is not a listed purpose in WIS. STAT. § 904.04(2), but, as the circuit court noted, the list in § 904.04(2) is "illustrative and nonexclusive." Schroedl does not challenge the circuit court's conclusion that bias is a permissible purpose under the statute.

¶10 Next, the circuit court considered the relevance of the evidence. Evidence is relevant if (1) it relates to a consequential fact that the State must prove, and (2) it has probative value. *Sullivan*, 216 Wis. 2d at 772. The State offered evidence of Ashley J.'s bias to discredit her testimony that conflicted with Ashley M.'s regarding where the two girls watched a movie on the day of the second assault. The circuit court concluded that evidence of where the girls watched the movie related to a consequential fact the State had to prove—that Ashley M. and Schroedl were in Tammy's apartment, as Ashley M. maintained. Regarding probative value, the circuit court concluded that the credibility of Ashley M.'s testimony hinged in part on the credibility of Ashley J.'s testimony. The two girls' testimony on where they watched the movie was in direct conflict. If the jurors did not believe Ashley J. they would more likely believe Ashley M. The circuit court did not erroneously exercise its discretion in concluding the proffered evidence was relevant.

¶11 Finally, the circuit court weighed the prejudicial effect of the evidence against its probative value. Regarding unfair prejudice, the circuit court noted that "the danger is real in this case." To minimize the danger, the circuit court encouraged the parties to reach a compromise, which they did. Their agreement allowed in the fact that Ashley J. had a consensual sexual relationship with Schroedl, but excluded the facts that he impregnated her and she intended to

keep the baby. We conclude that the trial court did not err in permitting the stipulated evidence to be presented to the jury.²

Prior False Accusation and Prior Sexual Knowledge

¶12 Schroedl next argues that the circuit court erred in refusing to allow Schroedl to introduce evidence of an alleged prior false accusation made by Ashley M. and of her alleged prior sexual knowledge and experience. According to Schroedl, Ashley M. reported to medical personnel in 1997 or 1998 that her mother's boyfriend had molested her, but no charges were ever filed. Schroedl also sought to introduce evidence that Ashley M. had told Anita that "a lot of people touched me in a bad way" and that Ashley M. liked it. The circuit court denied Schroedl's motion to admit the evidence, citing the rape shield law, WIS. STAT. § 972.11(2). Schroedl argues that the exclusion of this evidence deprived him of the constitutional right to present a defense. We disagree.

¶13 Evidentiary rulings are discretionary, and therefore we review them under an erroneous exercise of discretion standard. *State v. Hammer*, 2000 WI 92, ¶43, 236 Wis. 2d 686, 613 N.W.2d 629. When evidentiary rulings implicate a defendant's confrontation and compulsory process rights, however, we review those rulings without deference to the circuit court. *Id.*

² Schroedl, citing *State v. Harris*, 123 Wis. 2d 231, 235-39, 365 N.W.2d 922 (Ct. App. 1985), argues that the circuit court should have considered the fact that other evidence was available to show Ashley J.'s bias. The availability of other evidence is a factor relevant to admissibility of other acts evidence, *id.*; but it is not dispositive. The trial court did not err in concluding that the jury should know of Schroedl's relationship with Ashley J. in order to evaluate the credibility of her testimony.

¶14 The rape shield law, WIS. STAT. § 972.11(2), prohibits the introduction of evidence of the complainant’s past sexual conduct, but there are exceptions to its application. Schroedl claims two exceptions apply to his proffered evidence. We examine each in turn.

¶15 First, under § 972.11(2)(b)3, evidence of prior untruthful allegations of sexual assault is admissible, provided it is “material to a fact at issue in the case and of sufficient probative value to outweigh its inflammatory and prejudicial nature.” WIS. STAT. § 971.31(11). To fit within the WIS. STAT. § 972.11(2)(b)3 exception, evidence must meet three criteria: (1) it must fit within the language of the statute, (2) it must be material to a fact at issue in the case, and (3) it must be of sufficient probative value to outweigh its inflammatory and prejudicial nature. *State v. DeSantis*, 155 Wis. 2d 774, 785, 456 N.W.2d 600 (1990). The first criterion encompasses a determination by the court as to whether “the defendant has established a sufficient factual basis for allowing the jury to hear the evidence that the complainant has made prior allegations of sexual assault that are untruthful.” *Id.* at 786.

¶16 We conclude that the evidence fails the first criterion because Schroedl did not make a sufficient showing that Ashley M. made a false accusation of sexual assault. Schroedl bases his claim of a false accusation of sexual assault on documents purportedly obtained from the DuPage County, Illinois, Children’s Sexual Abuse Center and Naperville Health Care Associates, Ltd., in Naperville, Illinois. According to these documents, Ashley M.’s father was aware that Tammy’s boyfriend had molested Ashley M. Also according to these documents, Ashley M. herself stated that “her mother does not believe her about Brian (the mother’s boyfriend).” The Naperville document refers to “possible sexual abuse from mother’s male partner.” Schroedl points out in his

brief that no charges were ever filed, presumably to raise an inference that the allegation was false. Schroedl produced no witnesses to substantiate the information in the documents, and Ashley M.'s father testified that Ashley M. had never accused Brian of abusing her. The circuit court conducted an *in camera* interview of Ashley M. in which she denied saying that Brian had molested her, and the circuit court found her credible. Considering all of the above, we agree with the circuit court that Schroedl failed to show that Ashley M. made a prior false accusation, and we thus conclude the circuit court properly excluded the evidence of a purported prior false accusation.

¶17 Schroedl also argues that the proffered evidence of Ashley M.'s prior sexual experience and knowledge is so relevant and probative that he had a constitutional right to present it. See *State v. Pulizzano*, 155 Wis. 2d 633, 647, 456 N.W.2d 325 (1990). To establish the right to present otherwise excluded evidence, the defendant must show: “(1) that the prior acts clearly occurred; (2) that the acts closely resembled those of the present case; (3) that the prior act is clearly relevant to a material issue; (4) that the evidence is necessary to the defendant's case; and (5) that the probative value of the evidence outweighs its prejudicial effect.” *Id.* at 656. If the defendant's offer of proof shows all five elements, then the court must determine whether the State's interest in excluding the evidence is so strong that it outweighs the defendant's right to present it. *Id.* at 656-57.

¶18 As with the alleged prior false accusation, Schroedl fails at the first step because he did not sufficiently show that Ashley M. possessed prior sexual experience and knowledge. Schroedl attempted to introduce statements made by Anita that Ashley M. had told her that many people had touched her in a bad way and that she liked it. As noted above, the circuit court conducted an *in camera*

interview of Ashley M., at which she denied ever making the statements about having sexual contact with other men. The circuit court found Ashley M. credible, and Schroedl has not challenged this finding. We conclude that the trial court did not err in excluding Anita's statement.

New Trial in the Interest of Justice

¶19 Schroedl's final argument is that the State's introduction of evidence of his relationship with Ashley J. so clouded the crucial issue of whether he had intercourse with Ashley M., that a new trial in the interest of justice is merited. We have concluded that there was no error in the admission of the evidence regarding Ashley J., and we decline to order a new trial in the interest of justice.

By the Court.—Judgment and order affirmed.

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

