COURT OF APPEALS
DECISION
DATED AND FILED

November 12, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP3060-CR **Cir. Ct. No. 2006CF1976**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL I. AVIDAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

Before Dykman, P.J., Lundsten and Bridge, JJ.

¶1 BRIDGE, J. Daniel Avidan appeals the judgment convicting him of second-degree sexual assault and the order denying his postconviction motion for a new trial. He argues that he is entitled to a new trial for the following reasons: (1) the circuit court ceded the decision to require him to wear an electronic

security device during trial to law enforcement officers rather than making its own decision on the record at the time of trial; (2) the security device interfered with his constitutional right to represent himself, to be present at trial, and to testify on his own behalf; and (3) he was denied his constitutional right to present a defense when the circuit court denied his request to admit evidence at trial that the victim had a sexually transmitted disease which Avidan observed just before the alleged sexual assault, and which caused him to discontinue sexual activity with her before penetration occurred. He also seeks a new trial in the interests of justice. We reject Avidan's first two arguments, and, as to the third argument, we assume for the sake of argument that error occurred, and conclude that it is clear beyond a reasonable doubt that any error is harmless. We also reject Avidan's request for a new trial in the interests of justice.

BACKGROUND

¶2 Following a jury trial, Avidan was convicted of second-degree sexual assault in violation of WIS. STAT. § 940.225(2)(a) (2007-08)[1] for having sexual intercourse with Meghan P.-C. without her consent. Avidan represented himself and was required to wear an electronic security device on his leg during his trial. By counsel, Avidan argues on appeal that he is entitled to a new trial because: (1) the circuit court improperly ceded the decision whether to require him to wear the device to law enforcement rather than making its own findings on the record at the time of trial; (2) the security device interfered with his right under the Sixth Amendment to the United States Constitution and Article I, Section 7 of

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

the Wisconsin Constitution to represent himself, to be present at trial, and to testify on his own behalf; and (3) he was denied his right to present a defense because the circuit court denied his request to admit evidence at trial that Meghan P.-C. had a sexually transmitted disease which he observed just before the alleged sexual assault, and which caused him to discontinue sexual activity with her before penetration occurred. Avidan also argues that he is entitled to a new trial in the interests of justice. We refer to additional facts as needed in the discussion below.

DISCUSSION

ELECTRONIC SECURITY DEVICE

¶3 The electronic security device which Avidan was required to wear at trial was a Band-It, which was placed on Avidan's leg. Avidan argues that he is entitled to a new trial for two reasons relating to his required wearing of the device: (1) the circuit court erroneously exercised its discretion by improperly ceding the decision to use the device to law enforcement, and did not make its own on-the-record findings at trial that such a device was necessary; and (2) the circuit court erred in denying his motion for a new trial because the use of the device interfered with his constitutional right to represent himself, to be present at trial, and to testify in his own behalf.[2]

[2] Avidan also suggests that the use of the security device may have implicated his right to the presumption of innocence. He states that "[a]lthough here, it's unclear whether or not the jury ever observed the taser device they may have suspected he was wearing stun device as a result on [sic] Avidan's comments to the jury during his closing argument …." In response, the State asserts that at postconviction proceedings, the circuit court stated that the jury "could never see the Band-It because he wore long pants" and that "the jury couldn't see it." Avidan does not respond to this assertion and we thus treat the matter as conceded. *See* ***Schlieper v. DNR,*** 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994). Because the Band-It was invisible to the jury, (continued)

¶4 "A criminal defendant generally should not be restrained during the trial because such freedom is 'an important component of a fair and impartial trial.'" ***State v. Champlain,*** 2008 WI App 5, ¶22, 307 Wis. 2d 232, 744 N.W.2d 889 (Ct. App. 2007), *review denied*, 2008 WI 40, 308 Wis. 2d 611, 749 N.W.2d 662 (quoting ***Sparkman v. State,*** 27 Wis. 2d 92, 96-97, 133 N.W.2d 776 (1965)). However, a defendant may be subjected to physical restraint while in court if the circuit court "has found such restraint reasonably necessary to maintain order." ***Id.*** A circuit court maintains the discretion to decide whether a defendant should wear a physical restraint during trial, as long as the reasons justifying the restraints have been set forth on the record. ***Champlain***, 307 Wis. 2d 232, ¶33. "It is an erroneous exercise of discretion to rely primarily upon law enforcement department procedures instead of considering the risk a particular defendant poses for violence or escape." ***Id.*** We will uphold such a discretionary determination if it is "'the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.'" ***State v. Grinder,*** 190 Wis. 2d 541, 550-51, 527 N.W.2d 326 (1995).

¶5 Here, the circuit court made no findings on the record regarding the need for the restraint. Avidan raised the issue in his postconviction motion,

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the concern that its use "may psychologically engender prejudice in the minds of jurors," *see* ***State v. Grinder,*** 190 Wis. 2d 541, 551, 527 N.W.2d 326 (1995), is absent here. Moreover, Avidan may not complain on appeal that merely wearing the Band-it on his leg may have negatively impacted his presumption of innocence because he himself brought it to the jury's attention. *See* ***Ohler v. United States***, 529 U.S. 753, 755 (2000).

The State argues that Avidan has forfeited his arguments regarding the security device issue by failing to object to the use of the device at trial. Because we conclude that Avidan's arguments fail on the merits, we will not address whether he forfeited them.

however, and the court then made retrospective findings that Avidan posed both a threat of violence and a threat of escape, making the Band-It necessary. The State argues that we should hold the court's retrospective findings, the accuracy of which Avidan does not dispute, to be a proper exercise of the court's discretion. It is unnecessary that we reach this issue however, because, even assuming for the purpose of argument that the court's findings constituted an erroneous exercise of discretion, Avidan's constitutional argument fails on the merits.

¶6 Avidan argues that the use of the Band-It interfered with his constitutional right to represent himself, to be present at trial, and to testify on his own behalf. This requires us to apply the constitution to undisputed facts, which is a question of law subject to our independent review. ***State v. Eason,*** 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625.

¶7 We first observe that Avidan does not argue that wearing the Band-It limited his movements or limited his participation in his defense in any specific way so as to compromise his effective communication with the jury. Instead, he argues that, by its very nature, the device placed him in constant fear of receiving an electric shock, which adversely affected his "demeanor or ability to focus on the tasks at hand." However, the record does not support this assertion. During posttrial proceedings, the court stated:

> I did not observe any physical manifestation whatsoever of this affecting his performance before the jury or before this Court. All protestations made by him were the fact that he didn't want to wear it, but [it] did not in any way interfere with his ability to conduct his own defense ….

¶8 The record bears out the court's observation, and makes clear that Avidan was able to forcefully advocate his cause. Avidan participated actively in voir dire; delivered a lengthy opening statement; cross-examined all witnesses

presented by the State, including an extensive cross-examination of Meghan P.-C.; and delivered an hour-long closing argument. Furthermore, the Band-It did not have a disproportionate effect on his ability to testify. To the extent Avidan contends that he was at risk of being subjected to a shock from the security device during his testimony, he was equally at risk during the rest of his vigorous participation in the trial. We conclude that Avidan's required wearing of the Band-It did not violate his constitutional right to represent himself, to be present at trial, or to testify in his own behalf.

EVIDENCE REGARDING THE VICTIM'S MEDICAL CONDITION

¶9 Avidan argues that the circuit court also violated his right to present a defense when it barred him from admitting evidence relating to Meghan P.-C.'s medical condition. The evidence he sought to have admitted was his assertion that he saw what he believed to be indicia of a sexually transmitted disease on the victim's genital area, and this dissuaded him from having sexual intercourse with her. The State argues that the victim's medical condition was evidence of prior sexual conduct and thus was covered by the rape shield law, WIS. STAT. § 972.11(2)(b).[3] The State also argues that once evidence is barred by the rape shield law, the only way Avidan could gain its admission was by showing that he had a constitutional right to present such evidence, *see* ***State v. St. George,*** 2002 WI 50, ¶18-20, 252 Wis. 2d 499, 643 N.W.2d 777, and he did not make this necessary showing. We need not reach either of these arguments, however,

[3] WISCONSIN STAT. § 972.11(2)(b) provides in relevant part that "[i]f the defendant is accused of a crime under s. 940.225 … any evidence concerning the complaining witness's prior sexual conduct or opinions of the witness's prior sexual conduct and reputation as to prior sexual conduct shall not be admitted into evidence during the course of the hearing or trial …."

because, even assuming for the sake of argument that the court erred in barring Avidan from presenting this evidence, the error was harmless beyond a reasonable doubt.

¶10 In determining whether a constitutional error is harmless, the inquiry is whether it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *See* ***State v. Mayo***, 2007 WI 78, ¶47, 301 Wis. 2d 642, 734 N.W.2d 115. The test has also been formulated to provide that an "error is harmless if the beneficiary of the error proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" ***Id.*** Whether a constitutional error is harmless is a question of law subject to our independent review. *See, e.g.,* ***id.***, ¶¶47-51.

¶11 The supreme court has articulated several factors to aid in harmless error analysis. They include:

> the frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the erroneously admitted evidence duplicates untainted evidence, the nature of the defense, the nature of the State's case, and the overall strength of the State's case.

Id., ¶48.

¶12 In the present case, if Avidan had been allowed to present the evidence he sought regarding Meghan P.-C.'s sexually transmitted disease and testified that he discontinued sexual activity with Meghan P.-C. before penetration occurred, the State would have introduced the testimony of two detectives who testified that during an interview with them, Avidan claimed to have had consensual sexual intercourse with Meghan P.-C. The State would also have

introduced Avidan's statements from the preliminary hearing, including his questioning of the victim, all of which were designed to show that he and Meghan P.-C. had consensual intercourse, and that he did not use force against her. In addition, the jury would have heard testimony that it was only after Avidan received a copy of the report prepared by the sexual assault nurse examiner that he learned that Meghan P.-C. had a sexually transmitted disease, and only then did he change his story as to what happened during the sexual encounter.

¶13 In addition to the evidence the State would have presented to the jury if Avidan had been allowed to present the testimony he sought, the jury had already heard testimony of a witness who Meghan P.-C. contacted within minutes of leaving Avidan's apartment. The witness described Meghan P.-C.'s hysteria and statements that she had been raped, which could not be explained by Avidan's having ceased the sexual contact before penetration occurred. The jury had also heard about Avidan's attempt to manufacture evidence by asking his wife to contact Oyewale Oyerinde and ask Oyerinde to tell the defense investigator about an alleged prior sexual act in which Meghan P.-C. performed fellatio on Oyerinde in a doorway on a public street, thus attempting to portray her as a person of loose morals who would readily consent to sexual contact. In addition, the jury also had before it testimony from a forensic scientist from the State Crime Lab supporting Meghan P.-C.'s assertion that Avidan had vaginal intercourse with her.

¶14 Based on all of the foregoing evidence, we conclude that it is clear beyond a reasonable doubt that a rational jury would have found Avidan guilty even if he had been permitted to introduce evidence of Meghan P.-C.'s sexually transmitted disease and testified as to when he discovered this information and its influence on his conduct.

NEW TRIAL IN THE INTERESTS OF JUSTICE

¶15 Pursuant to WIS. STAT. § 752.35, this court has the power of discretionary reversal when either: (1) the real controversy has not been fully tried; or (2) it is possible that justice has for any reason miscarried. ***Vollmer v. Luety,*** 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). Avidan asserts that because the jury did not hear three categories of evidence, the real controversy was not fully tried in the present matter. Those categories are: (1) the testimony which Avidan did not give because, he asserts, he was forced to wear the Band-It during trial; (2) evidence of the victim's sexually transmitted disease; and (3) testimony from Avidan's three roommates that they did not hear yelling and sobbing coming from Avidan's bedroom while he and Meghan P.-C. were inside it.

¶16 We have concluded above that Avidan's constitutional rights were not chilled by his wearing the Band-It, and thus we reject his argument that the real controversy was not tried as to the first category of evidence. We have also concluded that any error with respect to the admission of evidence related to Meghan P.-C.'s sexually transmitted disease was harmless error, and thus we reject Avidan's argument that the real controversy was not tried as to the second category of evidence. As to the third category, Avidan failed to present any of the roommate/witnesses at the postconviction hearing, and thus this court has no way of knowing whether these witnesses would testify at a second trial and, if so, what they would say. Accordingly, we reject his argument that the real controversy was not tried as it relates to this evidence. We therefore conclude that Avidan is not entitled to a new trial in the interests of justice.

CONCLUSION

¶17 For the reasons discussed above, we affirm the judgment of conviction and the order denying a new trial.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.