

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 30, 2002**

Cornelia G. Clark  
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. 01-2961  
STATE OF WISCONSIN**

**Cir. Ct. No. 94-CF-100**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**RICHARD C. DEVEREUX,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Oconto County:  
LARRY L. JESKE, Judge. *Affirmed.*

Before Cane, C.J, Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Richard Devereux appeals an order denying his postconviction motion in which he alleged ineffective assistance of trial counsel. The trial court denied the motion without a hearing, implicitly concluding that the record conclusively showed that the motion lacked merit. Devereux argues that his trial counsel should have presented evidence that the fifteen-year-old victim of

his sexual assault, Cindy S., lied to police about being a virgin and that counsel should have introduced a medical report that found no physical evidence of an assault. Because Devereux's motion establishes neither deficient performance nor prejudice to his defense, we affirm the order.

¶2 At trial, the State's evidence consisted primarily of Cindy's testimony that Devereux forcibly raped her at his home, Devereux's inculpatory statements to police at the time of his arrest and expert testimony that lack of physical evidence is not uncommon in sexual assault cases. Devereux argues that his trial counsel should have attempted to establish that Cindy lied to police about being a virgin as part of a general attack on her credibility.

¶3 To establish ineffective assistance of counsel, Devereux must show that his counsel's performance was deficient and prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). He must identify acts or omissions of counsel that were not the result of reasonable professional judgment. *Id.* at 689. To establish prejudice, he must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is one that undermines this court's confidence in the outcome. *Id.*

¶4 The trial court properly denied Devereux's motion without a hearing because the motion does not allege facts which, if true, would entitle Devereux to a new trial. *See State v. Bentley*, 201 Wis. 2d 303, 309, 548 N.W.2d 50 (1996). Evidence of Cindy's prior sexual activity is not admissible under the Rape Shield Statute, WIS. STAT. § 972.11(2)(b)<sup>1</sup>. Devereux correctly notes that the Rape

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1999-2000 version.

Shield Statute can give way to a defendant's constitutional right to confront witnesses if the complainant's sexual history is sufficiently relevant to his defense. *See State v. Pulizzano*, 155 Wis. 2d 633, 645-48, 456 N.W.2d 325 (1990). In *Pulizzano*, the complainant's prior sexual history was at issue because the prosecutor contended that her knowledge of sexual matters was derived from the sexual assault. The court concluded that the defendant's right to confront witnesses superseded the Rape Shield Statute based on a five-factor test: (1) the prior act clearly occurred; (2) the act closely resembles the act in question; (3) the prior act is clearly relevant to a material issue; (4) that evidence is necessary to the defendant's case; and (5) the probative value of the evidence outweighs its prejudicial effect. *Id.* at 656. Without expressly reviewing each of these criteria, we are satisfied that based on these factors, Cindy's prior sexual history is not relevant to any material issue. The right to confront accusers does not give a defendant the right to present irrelevant or immaterial evidence. *See State v. McCall*, 202 Wis. 2d 29, 44, 549 N.W.2d 418 (1996). This trial presented no special circumstances that would make Cindy's prior sexual history relevant.

¶5 Devereux also contends that he should be entitled to impeach Cindy because his case is comparable to *State v. Penigar*, 139 Wis. 2d 569, 409 N.W.2d 28 (1987). In *Penigar*, the Wisconsin Supreme Court exercised its discretionary right of reversal in the interest of justice, concluding that the real controversy had not been fully tried. The court concluded that false testimony about the victim's prior sexual activities had a pervasive effect on the trial because it clouded the issue of consent. In this case, however, Cindy had not reached the age of consent. Her prior sexual activity, if any, was not a factor in determining whether the sexual assault occurred. Rather, Devereux seeks to challenge her credibility by focusing on one statement she made to the police on a collateral issue that does not

directly relate to any of the elements of the offense. Cindy's alleged lie about her virginity is a collateral matter because it would not be admissible in evidence for any purpose other than showing the contradiction. *See State v. Olson*, 179 Wis. 2d 715, 724, 508 N.W.2d 616 (Ct. App. 1993). Extrinsic evidence may not be used to impeach a witness on a collateral matter. *See WIS. STAT. § 906.08; State v. Rognrud*, 156 Wis. 2d 783, 457 N.W.2d 573 (Ct. App. 1990).

¶6 Devereux further argues that he fits within the exception to the Rape Shield Statute that allows evidence of untruthful allegations of sexual assault made by the complaining witness. *See WIS. STAT. § 972.11(2)(b)(3)*. Devereux refers to a letter of Steven Gerbyshak dated August 15, 1995, admitting that he and Cindy had participated in sexual intercourse with one another and that Cindy had told Gerbyshak that she had participated in intercourse with a Clarence Brown. If her statement to the police that she was a virgin is true, Devereux contends that her statement to Gerbyshak was a prior false accusation. However, we conclude that Devereux cannot fault his trial attorney for failing to present that evidence because the evidence did not exist at the time of trial.<sup>2</sup> Counsel cannot be faulted for failing to introduce evidence that did not exist at the time of trial.

¶7 Devereux alludes to his right to be sentenced on the basis of correct information. Regardless of the truth of Cindy's claim of virginity, Devereux was not sentenced on that basis. At sentencing, the trial court concluded that Cindy's prior sexual history was not relevant. The seriousness of the offense, Devereux's character and the need to protect the public are not affected by matters beyond

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<sup>2</sup> Gerbyshak's letter is dated approximately four months after the April 1995 trial.

Devereux's knowledge and control. His punishment and rehabilitation do not depend on his victim's prior sexual experience.

¶8 Devereux contends that corrections officials continue to use Cindy's virginity as an aggravating factor for security classification, rehabilitative treatment and parole determination. A new trial under WIS. STAT. § 974.06 is not an appropriate vehicle for challenging those uses of the police report. The prejudice prong of the *Strickland* analysis requires this court to consider whether counsel's performance undermines this court's confidence in the outcome of the trial, not to correct any information in a police report that was never presented to the jury.

¶9 Devereux has not established any prejudice from his counsel's failure to produce a hospital record that reports no physical signs of abuse. The record would only confirm the testimony of several witnesses on a point that was fully conceded by the prosecutor. In their opening and closing statements, both the prosecutor and defense counsel informed the jury that there was no physical evidence that sexual intercourse occurred or that Cindy was the victim of a forcible assault. A police officer testified that results were negative for the presence of semen and that the pubic hair recovered from the victim may have originated from Cindy. The State's expert witness in medical forensic nursing testified that lack of physical evidence or trauma is not unusual in sexual abuse cases. Under the circumstances, the medical report constituted only cumulative evidence, and counsel's failure to present the report does not undermine our confidence in the trial's outcome.

¶10 Devereux argues that this case is analogous to *State v. Glass*, 170 Wis. 2d 146, 488 N.W.2d 432 (Ct. App. 1992), where this court affirmed the trial

court's decision to grant a new trial after defense counsel inaccurately described test results as "inconclusive" rather than "negative." In *Glass*, the lack of physical evidence was significant because the laboratory report would have shown that there was no physical evidence under circumstances that normally result in physical evidence. *Id.* at 154. In this case, however, the State's expert witness testified that it would not be unusual to find no physical evidence. Furthermore, the jury was fully apprised of the lack of physical evidence. The absence of the medical report had no conceivable impact on the verdict.

*By the Court.*—Order affirmed.

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

