

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 26, 2003

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. 02-2577-CR
STATE OF WISCONSIN**

Cir. Ct. No. 00-CF-562

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOSEPH M. MALINOWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County:
PATRICK M. BRADY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Joseph Malinowski appeals a judgment convicting him of sexually assaulting his stepdaughter, Samantha, a child under the age of sixteen, and three or more incidents of sexual contact with her. The jury acquitted Malinowski of one count of intercourse with Samantha and one count of bail jumping. Malinowski argues that: (1) the trial court improperly exercised its

discretion when it denied his request for a mistrial based on a juror having a conversation with Samantha's father; (2) the court improperly admitted hearsay from Samantha's aunt; (3) the trial court violated Malinowski's due process right to present a defense when it refused to allow him to question a school counselor regarding his opinion of Samantha's honesty and her reputation; and (4) the trial court improperly excluded testimony about four specific acts Samantha committed and improperly excluded evidence that Samantha wrote a note to a boy offering sexual activity between them. We reject these arguments and affirm the judgment.

¶2 Samantha alleged that Malinowski had repeated sexual contact with her over a period of approximately six months. Her mother had witnessed some inappropriate behavior between them and took Samantha out of school to question her. At that time, Samantha denied any sexual activity. Several days later, her mother again became suspicious and crawled on her hands and knees behind a couch to observe their activity. She observed that her daughter's pants were open with pubic hairs showing and Malinowski fondling that area. She left the house and went to her brother's house and spoke with her sister-in-law, the victim's aunt. The aunt later spoke to Samantha and Samantha told her of numerous instances of sexual contact and intercourse with Malinowski.

¶3 During a break in the trial, a juror was observed talking to Samantha's father. Upon inquiry by the court, the juror indicated that they discussed the Air Force jacket he was wearing. Samantha's father's great uncle was the Air Force chief of staff during the time the juror served in the military. The juror did not know that the man he spoke with had any connection with the case and Samantha's father did not know the other man was a juror. They assured the court that they did not discuss the case, and the juror stated that the conversation would not have any impact on his decision.

¶4 Contrary to Malinowski's argument, some showing of probable prejudice is required. See *Nyberg v. State*, 75 Wis. 2d 400, 407, 249 N.W.2d 524 (1977). The nature of the discussion and the juror's assurance that it would not affect his verdict support the trial court's discretionary decision to deny a mistrial.

¶5 Malinowski has not established any prejudice from Samantha's aunt's testimony in which she repeated what Samantha told her shortly after the final sexual assault. Malinowski concedes that this alleged error alone would not be sufficient to overturn his conviction. We need not determine whether the statements were admissible as an excited utterance or as a nonhearsay, prior consistent statement because the error, if any, was harmless. The test is whether there is a reasonable possibility that the alleged hearsay contributed to the conviction. See *State v. Moore*, 2002 WI App 245, ¶16, 257 Wis. 2d 670, 653 N.W.2d 276. The aunt's testimony merely repeated what Samantha told her. The jury only learned from this testimony that Samantha gave the same story shortly after the assault.

¶6 The trial court correctly ruled that the school counselor would not be allowed to testify to opinions he formed during counseling sessions. Opinions, perceptions and impressions gained during confidential communications are privileged. Cf. *State v. Meeks*, 2003 WI 104, ¶40, ___ Wis. 2d ___, ___ N.W.2d ___ (relating to confidential communications with an attorney). The counselor testified that all of his information relevant to the case was based on his contact with Samantha in his capacity as a counselor. Her counseling sessions are privileged under WIS. STAT. § 905.04.¹ *Id.* Malinowski also contends that the

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

counselor could have testified to Samantha's reputation for honesty. Aspects of Malinowski's argument appear to suggest that he sought the counselor's opinion on whether Samantha was telling the truth. That testimony would not be permissible. *See State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). It also appears that he sought to disclose specific acts of conduct, contrary to WIS. STAT. § 906.08(2). To the extent he merely wanted to show Samantha's reputation for honesty, other witnesses should have sufficed.

¶7 The trial court also properly exercised its discretion when it refused to allow Malinowski to present evidence of four specific sexual acts by Samantha. These acts are barred by the rape shield statute, WIS. STAT. § 972.11(2), and can only be admitted if they meet the factors set out in *State v. Pulizzano*, 155 Wis. 2d 633, 656, 456 N.W.2d 325 (1990). The acts Malinowski described do not meet at least three of the *Pulizzano* factors. They do not closely resemble the acts alleged in this case; they are not material to any issue in the case; and their prejudicial effect outweighs their probative value. Malinowski contends that the four incidents show an alternative source for Samantha to have learned of sexual matters, specifically the color of semen and the look on a man's face during orgasm. None of the four alleged incidents involved Samantha seeing a man ejaculate. Malinowski established no legitimate reason for informing the jury of these acts.

¶8 Likewise, the note Samantha allegedly wrote to a classmate suggesting sexual activity, while not protected by the rape shield law, is irrelevant. It showed nothing other than her desire to have sexual activity with a boy her age. The note would not tend to make the existence of any fact of consequence more or less probable. *See* WIS. STAT. § 904.01. Samantha's willingness to engage in sexual activity is irrelevant. She had not reached the age of consent.

By the Court.—Judgment affirmed.

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

