

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 4, 2011

A. John Voelker
Acting 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. 2010AP306-CR

Cir. Ct. No. 2008CF983

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AMANCIO REYES-CRUZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: JOHN D. MCKAY, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Amancio Reyes-Cruz appeals a judgment convicting him of sexually assaulting his former girlfriend, Yolanda M-P. He also appeals an order denying his postconviction motion. The motion claimed ineffective assistance of counsel because his trial attorney violated discovery rules

by failing to supplement his expert witness's report, resulting in the trial court's exclusion of some of the expert's proffered testimony. Because we conclude that Reyes-Cruz failed to establish prejudice from his counsel's error, we affirm the judgment and order.

BACKGROUND

¶2 Yolanda testified that she had just broken off a five-year relationship with Reyes-Cruz when he entered her apartment without her permission. When she refused to have sex with him and ordered him to leave, he responded: "If it's not in a good way, then it's going to be in a bad way." He then forced her onto the bed and held her down with one arm while undressing her. She stopped struggling because she had no more strength to resist. Although he was unable to attain an erection, Reyes-Cruz inserted his penis in her vagina. After the assault, Reyes-Cruz told Yolanda that he had already called the police so she could tell them what he did. He then left the building.

¶3 Yolanda called her daughter who arrived as Reyes-Cruz was leaving. When she asked Reyes-Cruz what happened, he responded, "Go and ask your mother." Yolanda's daughter found her mother crying, unable to talk at first, and grabbing her head and complaining of pain to her arms. Yolanda's hair was messy and her face was red. Yolanda's daughter checked the telephone and determined that Reyes-Cruz had not called the police. She then called the police.

¶4 The responding police officer observed Yolanda crying. Her face was red and she seemed agitated. He advised her to seek medical attention.

¶5 At the hospital, Yolanda was examined by Angela Parmentier, a sexual assault nurse examiner (SANE nurse). She described Yolanda as "very

upset, tearful, crying,” with high blood pressure. She noted abrasions on Yolanda’s left shoulder and redness around her left wrist. She also noted abrasions and bleeding to the cervical area consistent with blunt force trauma. Because Yolanda was postmenopausal, Parmentier opined that bleeding in the cervix was not caused by menstruation. On cross-examination, Parmentier testified that ability to lubricate the vagina after menopause varies from person to person.

¶6 The defense called an expert witness, Jill Poarch, who is also a SANE nurse. Poarch testified that vaginal lubrication decreases after menopause, but conceded on cross-examination that individuals’ bodies vary. Because Reyes-Cruz’s counsel failed to provide the prosecutor with an updated report, the trial court prohibited Poarch from testifying that Yolanda’s injuries were consistent with consensual sex. At the postconviction hearing, Reyes-Cruz made an offer of proof that Poarch would have said Yolanda’s injuries were consistent with consensual sex, that because Yolanda was postmenopausal for five years, her decreased lubrication would increase the likelihood of having an injury during consensual sex, and that Reyes-Cruz’s inability to achieve an erection made it highly unlikely that he caused any kind of blunt force trauma injuries. Poarch believed Yolanda’s injury would have been more severe if she had been forcibly assaulted.

¶7 The trial court denied the postconviction motion, concluding that the proffered testimony involved mere speculation because Poarch did not examine Yolanda and had no knowledge of Yolanda’s ability to produce lubricant during sex. Regardless of counsel’s compliance with the discovery rules, the court would not have allowed Poarch to speculate regarding Yolanda’s ability to lubricate during sex.

DISCUSSION

¶8 To establish ineffective of counsel, Reyes-Cruz must show deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish prejudice, he must show a reasonable probability that, but for counsel’s unprofessional errors, the result of the trial would have been different. A reasonable probability is one that undermines our confidence in the outcome. *Id.* at 694.

¶9 Reyes-Cruz did not establish prejudice based on his counsel’s failure to provide the prosecutor with an updated report from Poarch. As the trial court noted, much of Poarch’s proffered testimony would have been speculative. Poarch conceded that individuals vary. She did not examine Yolanda and could offer no testimony contradicting Parmentier’s report that described Yolanda’s vaginal mucosa as “pink and moist.” Testimony regarding other women’s ability to lubricate after menopause would be of minimal probative value.

¶10 Poarch’s opinion that Yolanda’s injuries would have been more severe if there had been a forcible assault was also speculative. Yolanda indicated that the intercourse occurred after she had no more strength to resist. Under those circumstances, Poarch could only speculate regarding the vaginal injuries Yolanda might incur during the assault.

¶11 Furthermore, Reyes-Cruz’s counsel’s inability to elicit Poarch’s opinions does not undermine our confidence in the outcome. Yolanda immediately reported the assault. Her daughter, a responding police officer and Parmentier described her emotional trauma. She suffered injuries to her shoulder and wrist in addition to her vaginal area. It is highly unlikely that a jury hearing Poarch’s testimony would have acquitted Reyes-Cruz.

¶12 Finally, Reyes-Cruz requests a new trial in the interest of justice, arguing that the controversy was not fully tried. We disagree. Granting a new trial in the interest of justice occurs in “exceptional cases” where the jury was prevented from hearing important testimony that bore on an important issue. *State v. Williams*, 2000 WI App 123, ¶17, 237 Wis. 2d 591, 614 N.W.2d 11; *Vollmer v. Luety*, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990). This is not an exceptional case that merits granting a new trial in the interest of justice. Evidence of Reyes-Cruz’s guilt was overwhelming, and Poarch’s speculation about Yolanda’s ability to lubricate and the severity of her injuries did not constitute important testimony on an important issue.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2007-08).

