

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 1, 2004

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. 04-0249
STATE OF WISCONSIN**

Cir. Ct. No. 03JV000103

**IN COURT OF APPEALS
DISTRICT II**

**IN THE INTEREST OF TIMOTHY M. F.,
A PERSON UNDER THE AGE OF 17:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

TIMOTHY M. F.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Kenosha County:
MARY KAY WAGNER, Judge. *Affirmed.*

¶1 SNYDER, J.¹ Timothy M. F. appeals from a dispositional order finding him delinquent and further appeals from a postdispositional order denying

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

his request for a new trial. Timothy challenges three of the circuit court's evidentiary rulings and also contends that the court's denial of his demand for a jury trial violated his constitutional rights. We disagree and affirm the orders of the circuit court.

¶2 Timothy and Sarah dated from August 2002 to March 2003. Both were in high school, although at different schools, during their relationship. Sarah testified that in December 2002 the nature of the relationship changed, and Timothy began to physically abuse her. Sarah reported to police that between December 2002 and March 2003, Timothy was physically abusive towards her. Sarah's allegations included instances where Timothy punched her in the arm, bit her on the cheek, pushed her head into a window, stabbed her in the leg with a pen, put his thumbs on her throat and choked her, and punched her in the stomach. Sarah also reported that on March 1, 2003, Timothy sexually assaulted her and used a knife to threaten her during the assault.²

¶3 On March 8, while at Timothy's home, Sarah told Timothy and his mother that she did not want to be in the relationship anymore. Sarah left Timothy's house to go home, but he followed her. At Sarah's house, Sarah's father went outside and saw Timothy restraining Sarah against her will by holding onto both of her arms, stomping on her feet, and screaming at her. Sarah's father ordered Timothy to leave the property and then went inside with Sarah and called the police.

² We observe that the date of the sexual assault is listed as March 1, 2003, in the delinquency petition, but appears as March 2, 2003, in other parts of the record. The discrepancy is not material to our decision.

¶4 Timothy was arrested, and on March 10, the Kenosha County Circuit Court transferred temporary physical custody of him to Racine Detention. Timothy continued in secure custody, and a court trial date was set. Timothy was charged with ten counts of misdemeanor battery, one count of disorderly conduct, one count of first-degree sexual assault by use or threat of a dangerous weapon, one count of false imprisonment, and one count of threats to injure or accuse of a crime.

¶5 Timothy filed several pretrial motions: first, requesting that he be allowed to introduce prior sex acts evidence in his defense; second, requesting that the court conduct an in camera review of Sarah's mental health and counseling records; and third, requesting permission to introduce other acts evidence related to Sarah's relationship with him. He also filed a demand for a jury trial. The circuit court denied Timothy's motion to admit prior sex acts evidence and his demand for a jury trial. The court considered each of the other acts evidence Timothy proposed to present and ruled on each separately. The court determined that certain information connected with the other acts could be used for impeachment purposes or on rebuttal. The court ordered the parties to submit additional information regarding an in camera review of Sarah's mental health and counseling records. Following a subsequent hearing on the matter, the circuit court denied Timothy's request for an in camera inspection.

¶6 Timothy moved for reconsideration of his motion to admit prior sex acts evidence, and the circuit court did reconsider. The court stated that evidence regarding a pattern of sexual behavior between Sarah and Timothy on Saturdays at Timothy's house while his parents were gone was probably admissible; however, the court advised that it would reread the relevant case law and might change its ruling. At trial, the court reframed its ruling to require that Timothy establish a

pattern “of behavior that led to the incident that has been testified to that it was a similar type of action with a knife and all the rest of it.”

¶7 Timothy was adjudicated delinquent on ten counts of misdemeanor battery, one count of false imprisonment, and one count of first-degree sexual assault by use or threat of a dangerous weapon. The disorderly conduct charge and the threats to injure charge were dismissed.

¶8 Timothy appeals, first arguing that the court erred in refusing to allow his testimony about a pattern of consensual sex between him and Sarah. He contends that Sarah’s past sexual relationship with him presented an exception to the general rule that a complainant’s past sexual conduct is inadmissible. We have before us, therefore, the question of whether the circuit court properly excluded evidence of Sarah’s sexual history with Timothy despite Timothy’s constitutional right to confront witnesses and present a defense. The admission of evidence is a decision left to the discretion of the circuit court, and we will not find an erroneous exercise of discretion if the circuit court applied the facts of record to accepted legal rules. *State v. Jackson*, 216 Wis. 2d 646, 655, 575 N.W.2d 475 (1998).

¶9 Wisconsin’s rape shield statute states in relevant part:

If the defendant is accused of a crime under s. 940.225, 948.02, 948.025, 948.05, 948.06 or 948.095, 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, nor shall any reference to such conduct be made in the presence of the jury, except the following, subject to s. 971.31(11):

1. Evidence of the complaining witness’s past conduct with the defendant.

WIS. STAT. § 972.11(2)(b). Under the rape shield statute, a defendant may not present evidence related to the complainant's sexual history or reputation without application of a statutory or judicially created exception. *Jackson*, 216 Wis. 2d at 657. Here, Timothy raises the exception set forth in § 972.11(2)(b)1, evidence of his past sexual relationship with Sarah. A court considering a defendant's motion to introduce such evidence must conduct a pretrial inquiry to make three determinations: (1) whether the proffered evidence fits within § 972.11(2); (2) whether the evidence is material to a fact at issue in the case; and (3) whether the evidence is of sufficient probative value to outweigh its inflammatory and prejudicial nature. WIS. STAT. § 971.31(11); see *State v. DeSantis*, 155 Wis. 2d 774, 785, 456 N.W.2d 600 (1990).

¶10 In his pretrial motion, Timothy argued that the prior sexual activity evidence was relevant to the issue of consent. On appeal, he argues that the court's midtrial reframing of its ruling on the issue of admissibility reflects a lack of "reasoned process based upon the record." Although we acknowledge that the unexpected change in the circuit court's position was probably error, we conclude that it was harmless. The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction. *Jackson*, 216 Wis. 2d at 668.

¶11 Here, two factors convince us that the error was harmless. First, the parties stipulated that "there had been prior consensual sexual involvement between [Timothy and Sarah]." Second, in its ruling, the circuit court specifically acknowledged that "a sexual relationship went on back and forth" between Timothy and Sarah. Clearly, evidence of Timothy and Sarah's prior sexual relationship was considered by the circuit court. We conclude that any error in the

circuit court's ruling on admissibility of the prior sexual contact evidence was therefore harmless.

¶12 Next, Timothy argues that the court erred when it refused his request for an in camera review of Sarah's mental health and counseling records. Whether a defendant offered a sufficient preliminary showing for an in camera review presents a question of law which we review de novo. *State v. Robertson*, 2003 WI App 84, ¶24, 263 Wis. 2d 349, 661 N.W.2d 105. Timothy filed a motion for an in camera review of Sarah's mental health records based on information he provided as well as information gathered from his family that suggested Sarah might have been suffering from depression. Timothy specifically claims that Sarah's prescription drug history should have been reviewed by the court. He argues that his due process rights were violated when the court failed to conduct an in camera review of any potential exculpatory material contained in the records.

¶13 A defendant who wishes to have the circuit court perform an in camera review of confidential records to determine whether due process requires disclosure of those records must first make a preliminary showing of "a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence." *State v. Green*, 2002 WI 68, ¶34, 253 Wis. 2d 356, 646 N.W.2d 298. In this, Timothy fails. He has speculated at great length as to what the records may disclose about Sarah's mental state; however, he has made no reasonable connection between Sarah's alleged mental health issues and a determination of his guilt or innocence. For this reason, we hold that the circuit court properly declined an in camera review of Sarah's prescription drug history.

¶14 Timothy's third contention stems from the State's affirmative duty to disclose certain materials and information prior to trial. *See* WIS. STAT. § 971.23(1). He argues that the State violated its duty to reveal exculpatory evidence, specifically, documents related to the pelvic examination performed by a doctor two weeks after the sexual assault took place. Under the Fourteenth Amendment to the United States Constitution, the State's suppression of evidence favorable to the defendant upon the defendant's request violates due process where the evidence is material either to guilt or innocence. *State v. Chu*, 2002 WI App 98, ¶29, 253 Wis. 2d 666, 643 N.W.2d 878 (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Chu*, 253 Wis. 2d 666, ¶30.

¶15 Whether the State violated its discovery obligations, whether it has shown good cause for the violation, and whether the defendant was prejudiced are questions of law which we review de novo. *State v. DeLao*, 2002 WI 49, ¶¶14-15, 252 Wis. 2d 289, 643 N.W.2d 480. Our review of a claimed discovery violation is also subject to a harmless error analysis. *State v. Nielsen*, 2001 WI App 192, ¶19, 247 Wis. 2d 466, 634 N.W.2d 325. The test for harmless error is whether we, in our independent determination, can conclude that there was sufficient evidence, other than and uninfluenced by the inadmissible evidence, that would convict the defendant beyond a reasonable doubt. *Id.* Assuming, without deciding, that the State was required to disclose its knowledge of Sarah's pelvic examination and the doctor's report, we conclude that any error was harmless.

¶16 Our independent review of the record demonstrates that sufficient evidence existed upon which the circuit court could reasonably determine that Timothy sexually assaulted Sarah and that the pelvic examination information

would not have changed the result of the proceeding. The parties stipulated on the record that Sarah's doctor performed a pelvic examination two weeks after the alleged sexual assault and there was no evidence of trauma or bruising. We agree with the circuit court that the pelvic examination report was not material to Timothy's guilt or innocence because there had been no allegation that Timothy used violence or force during the sexual assault, but instead used the threat of a knife. The pelvic examination report did not make Timothy's guilt or innocence any more or less likely.

¶17 Timothy's final argument posits that the circuit court improperly denied his demand for a jury trial. Our supreme court has stated, however, that juveniles do not have a constitutional right to a jury trial in delinquency proceedings. *State v. Hezzie R.*, 219 Wis. 2d 848, 889-90, 580 N.W.2d 660 (1998). Timothy acknowledges that the current law does not support his position, but he argues that "it is time that this court and the legislature revisit a juvenile's right to a jury trial where he is faced with felony charges." Nonetheless, as stated many times before, this court is an error-correcting court, and we are bound by the law as it exists. *State v. Mosley*, 102 Wis. 2d 636, 665-66, 307 N.W.2d 200 (1981); *State v. Grawien*, 123 Wis. 2d 428, 432, 367 N.W.2d 816 (Ct. App. 1985). We therefore decline Timothy's invitation to declare a change in current law and hold that the court properly denied his demand for a jury trial.

¶18 For the foregoing reasons, we conclude that any error regarding the admissibility of prior sexual acts evidence or in the production of discoverable information by the State was harmless because there is no reasonable probability that the outcome of this case would have been different in the absence of the error. We further conclude that the court properly denied Timothy's request for an in camera review of Sarah's confidential mental health and counseling records and

his demand for a jury trial. We hold that Timothy is not entitled to a new trial. The dispositional order and postdispositional order of the circuit court are affirmed.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

