COURT OF APPEALS
DECISION
DATED AND RELEASED

AUGUST 28, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 94-0741-CR
95-0830-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JESSIE L. REDMOND,

Defendant-Appellant.

APPEALS from a judgment and orders of the circuit court for Racine County: DENNIS J. FLYNN, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

ANDERSON, P.J. Jessie L. Redmond appeals from a judgment of conviction for two counts of second-degree sexual assault of a child as a repeater, contrary to §§ 948.02(2) and 939.62, STATS., and distributing cocaine to a minor as a repeater, contrary to §§ 161.46(3) and 939.62, STATS., and

orders denying his postconviction motions for a new trial.[1] On appeal, Redmond makes various claims including ineffective assistance of trial counsel, violation of the preliminary hearing time limits under § 970.03(2), STATS., and numerous evidentiary errors by the trial court. We conclude that any alleged defects by trial counsel were not prejudicial to Redmond's case and therefore fail to meet the threshold requirements for ineffective assistance of counsel. We further conclude that ***State v. Webb***, 160 Wis.2d 622, 467 N.W.2d 108, *cert. denied*, 502 U.S. 889 (1991), precludes Redmond's preliminary hearing argument. We find no errors in the evidentiary rulings made by the trial court. Accordingly, we affirm the judgment and the orders of the trial court.

FACTUAL BACKGROUND

Redmond worked as a counselor at the Burlington Group Home (Group Home) from approximately September 1992 until his termination on November 4, 1992.[2] The juvenile victim in this case, Heather T., was a resident of the Group Home. The Group Home is an alcohol and drug abuse treatment facility for juveniles who are on their way to or from corrections.

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[1] Appeal nos. 94-0741-CR and 95-0830-CR have been consolidated for purposes of briefing and disposition. Appeal no. 94-0741-CR is Redmond's appeal from the judgment of conviction and his first postconviction order. Appeal no. 95-0830-CR is Redmond's appeal from the trial court's April 13, 1995, order denying Redmond's third postconviction claim of ineffective assistance of counsel.

Redmond has also appealed, pro se, his second postconviction motion, appeal no. 94-1544-CR, which has not been consolidated with these two appeals. The disposition of appeal no. 94-1544-CR does not affect the disposition of these consolidated appeals. ***State v. Redmond***, No. 94-1544-CR (Wis. Ct. App. June 12, 1996, ordered published July 29, 1996).

[2] According to Redmond, he was employed at the Group Home from August 30, 1992, until November 1, 1992.

Redmond's convictions stem from events occurring on October 31, 1992. Redmond was to escort several residents, including Heather, Michelle E. and Jason W., to an Alcoholics Anonymous dance at the Grove Club in Racine. Heather testified that earlier that day, Redmond offered to obtain some cocaine for her if Michelle agreed to have sex with him. Michelle rejected his proposal, but Redmond said he would still buy Heather some cocaine if she paid him back. Redmond also suggested that Heather use Michelle's urine to evade the Group Home's mandatory urinalysis. Michelle corroborated Heather's testimony.[3]

On the way to the Grove Club, the group stopped at a gas station where, according to Michelle's testimony, she bought Redmond two condoms. Next they stopped by a blue house in Mount Pleasant, Redmond's brother's or cousin's house, where both Heather and Michelle believed he was purchasing the cocaine. Then the group stopped at a restaurant where Redmond gave Heather "some rocks [of cocaine] and a pipe." Heather smoked some of it in the bathroom and showed the remainder to Michelle.

The group also stopped at the lakefront. Heather stated that when the other juveniles went to get a soda, Redmond unzipped his pants and

[3] Michelle also described several conversations she had had with Redmond. Before this incident, Redmond approached her in the garage and said he was divorced and was lonely. Then on October 31, 1992, Redmond and Michelle discussed Andrew L., whom Michelle liked. Redmond told her that "what [she] needs right now wasn't a long term relationship, more or less a quickie." He also mentioned that "he does favors for Heather and Heather does favors for him sometimes and he hoped sometime in the future he could do favors for [Michelle]." Upon returning to the Group Home on October 31, 1992, Redmond told Michelle that he could not "afford any slip-ups and that he was in prison before, he's not going to afford to go back."

exposed his penis and she began to "suck him off." She stopped when the others returned.

At the Grove Club, Heather testified that Redmond approached her in the dance and told her it was time to go outside. She went outside to smoke some more crack and to meet Redmond. They discussed the value of the crack, about one hundred dollars, and Redmond said he wanted Heather in exchange. They had sexual intercourse in the van. In the bathroom, Heather told Michelle of the incident in the parking lot.

The next day, Heather showed the remaining crack cocaine to Chris Liebenthal, a counselor at the Group Home, but Heather flushed it down the toilet before he could confiscate it. Greta Sorenson, another counselor, took Heather to the hospital for a urinalysis, which turned up positive for cocaine.

At the hospital, Heather told Sorenson that someone at her recovery meeting at Charter Hospital provided the cocaine for her because she "didn't want to get [Redmond] in trouble." Once Heather returned to the Group Home, she found out that Michelle had told the staff what had happened. Heather confirmed that what Michelle had said was true.

In subsequent interviews, Heather disclosed details of the incident at the Grove Club, and eventually she discussed the incident at the lakefront as well. She was hesitant to provide details of the lakefront incident because "she felt she was ashamed, that it was her fault, that she was not forced to do any of this, that she just went and performed fellatio on the defendant."

Despite Redmond's denial of the allegations during the investigation, he was arrested and charged with two counts of second-degree sexual assault of a child, contrary to §§ 948.02(2) and 939.62, STATS., and distributing cocaine to a minor, contrary to §§ 161.46(3) and 939.62, STATS. A jury convicted him on all three counts on April 5, 1993. Redmond appeals the judgment of conviction and the trial court's orders dated February 24, 1994, and April 13, 1995, denying postconviction relief. Other facts shall be incorporated into the opinion as necessary.

DISCUSSION

Redmond makes the following claims: (1) his trial counsel was ineffective on twelve separate bases; (2) the preliminary hearing was not held in accordance with § 970.03(2), STATS.; (3) the trial court should have excluded evidence regarding Redmond's employment application; (4) the trial court should have excluded testimony of the State's expert; (5) the trial court should have allowed Redmond to present evidence regarding an alleged prior untruthful allegation of sexual assault made by Heather; and (6) the trial court should have permitted evidence regarding the probationary status of the State's juvenile witnesses. We will address each issue separately.

Ineffective Assistance of Counsel

Redmond's first argument is that numerous omissions by his trial counsel deprived him of his constitutional right to effective counsel as guaranteed by the Sixth Amendment to the United States Constitution and art.

I, § 7 of the Wisconsin Constitution. Redmond raises twelve separate incidents which he claims constituted ineffective assistance of trial counsel.[4] Redmond argues that "[t]aken individually or collectively, there is no doubt the errors of trial counsel deprived [him] of a fair trial."

A defendant, when establishing ineffective assistance of counsel, must show that counsel's performance was deficient and that such performance prejudiced his or her defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Questions of whether counsel's performance was deficient and whether it prejudiced the defendant's defense are questions of law that we review de novo. ***State v. Johnson***, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990).

We may avoid the deficient performance analysis altogether if the defendant has failed to show prejudice. ***State v. Wirts***, 176 Wis.2d 174, 180, 500 N.W.2d 317, 318 (Ct. App.), *cert. denied*, 114 S. Ct. 257 (1993). A showing of prejudice requires more than speculation, ***id.*** at 187, 500 N.W.2d at 321; rather, the defendant must affirmatively prove prejudice, ***State v. Pitsch***, 124 Wis.2d 628, 641, 369 N.W.2d 711, 718 (1985). To prove prejudice under ***Strickland***, the defendant must show that there is a reasonable probability that but for counsel's

[4] We conclude that Redmond has failed to cite to any legal authority in support of seven of his constitutional claims. We may decline to review issues inadequately briefed or arguments unsupported by references to legal authority. ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992). Accordingly, under Redmond's ineffective assistance of counsel argument, we decline to address the following alleged omissions: (1) failure to move to dismiss because the preliminary hearing was untimely; (2) failure to take a series of actions in relationship to the testimony of Investigator David Boldus; (3) failure to show a relationship between Heather and Detective Thomas Kelter; (4) failure to object to the amendment of the information; (5) failure to argue that the victim had made a previous false sexual assault charge; (6) discovery errors; and (7) counsel's conflict of interest.

unprofessional errors, the result of the proceeding would have been different. ***Strickland***, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Id.*** Our review focuses on whether the errors cause us to believe that the outcome has been rendered unreliable. In determining this issue, we look at the totality of the circumstances and assume that the judge or jury acted in accordance with the law. *See* ***id.*** at 694-95.

Redmond alleges the following omissions: (1) failure to review Redmond's personnel file; (2) failure to devise a more succinct method for introducing Redmond's prior convictions; (3) failure to call an expert on recovery of dried semen; (4) failure to pursue prosecutorial misconduct; and (5) failure to investigate. These claims of deficient performance are weak. Redmond knew of the information in his personnel file and had a responsibility to tell his attorney; Redmond does not have the right to control how the State puts in evidence, nor can defense counsel be expected to predict the State's method; the proposed expert testimony on the recovery of dried semen from the van's fabric was unrelated to the investigator's testimony regarding the usefulness of a medical exam in conjunction with a sexual assault charge; there was no prosecutorial misconduct as the ongoing contempt proceedings against the victim in juvenile court were unrelated to this action; and there is no evidence that a different investigation would have turned up relevant evidence.

Furthermore, Redmond has not affirmatively proven prejudice. Even if these omissions constituted deficient performance, there is no reasonable probability of a different outcome had trial counsel proceeded as

Redmond now argues. The evidence is overwhelming that Redmond had sexual contact with Heather and that he provided her with cocaine.

Heather consistently testified that she was responsible for both the incidents of sexual activity and her drug use. This likely had a powerful affect on the jury. In addition, many details of Heather's testimony were corroborated by Michelle's version of the facts. In fact, Michelle's testimony not only substantiated Heather's frankness, but also provided additional information regarding Redmond's willingness to "do favors" for both she and Heather. Redmond's testimony was simply not convincing enough to overcome the consistency of both Heather's and Michelle's testimony.

The positive urinalysis at the hospital provided uncontroverted evidence that Heather had obtained cocaine. Both girls indicated that it was Redmond who suggested switching their urine in order to avoid detection at the Group Home. A logical inference is that Redmond provided Heather with the cocaine, as alleged. We must keep in mind that it is not within the province of this court to choose not to accept an inference drawn by a fact finder when the inference is a reasonable one. ***State v. Friday***, 147 Wis.2d 359, 370-71, 434 N.W.2d 85, 89 (1989). We cannot say that trial counsel's alleged omissions invalidate any inferences drawn by the jury.

Based upon the evidence and the reasonable inferences drawn from that evidence, the jury concluded that Redmond in fact had two incidents of sexual contact with Heather and that he provided her with cocaine. Even if

the alleged omissions by trial counsel constituted deficient performance, we conclude that there is no reasonable probability of a different outcome had he proceeded as Redmond now argues. Without prejudice, trial counsel's errors are not grounds for reversal. *See* ***Pitsch***, 124 Wis.2d at 633, 369 N.W.2d at 714. Thus, we affirm the trial court's denials of Redmond's postconviction motions based upon ineffective assistance of counsel.

Preliminary Hearing

Redmond's second contention on appeal is that his convictions should be reversed because the preliminary hearing was held eleven days after his initial appearance, in violation of § 970.03(2), STATS. Redmond further asserts that he pled not guilty at the arraignment, thereby reserving any jurisdictional arguments.

Procedural defects at the preliminary hearing do not affect the circuit court's jurisdiction to proceed to trial. ***Webb***, 160 Wis.2d at 635, 467 N.W.2d at 113. A defendant who claims errors occurred at the preliminary hearing may only obtain relief prior to trial. ***Id.*** at 636, 467 N.W.2d at 114.

At no time prior to trial did Redmond or his counsel challenge the bindover. As stated in ***Webb***, procedural defects at the preliminary hearing do not affect the circuit court's jurisdiction to proceed to trial. ***Id.*** at 635, 467 N.W.2d at 113. Moreover, to vacate the judgment of conviction and require the State to begin anew would run "counter to a policy of conservation of [judicial] time and resources." ***Id.*** at 629, 467 N.W.2d at 111. This is particularly

compelling where, as here, the procedural defect—a continuance of the preliminary hearing beyond the ten-day time limit—was at the behest of Redmond's attorneys. Accordingly, Redmond's argument must fail.

Employment Application

Redmond's third contention on appeal is that the trial court erred when it admitted evidence of the false information he provided on his employment application with the Group Home. At trial, Daniel Farrell, supervisor of the Group Home staff, testified that on Redmond's employment application form he failed to indicate his previous convictions for delivery of cocaine. Redmond contends that there was no connection between the omitted information on his employment application and the charges of sexual assault and delivery of cocaine to a minor.

The decision to admit evidence under § 904.04(2), STATS., is within the trial court's discretion. ***State v. Wagner***, 191 Wis.2d 322, 330, 528 N.W.2d 85, 88 (Ct. App. 1995). The admissibility of evidence of prior bad acts is determined by a two-pronged test. *See* ***State v. Peters***, 192 Wis.2d 674, 695, 534 N.W.2d 867, 875 (Ct. App. 1995). The trial court must determine whether the evidence fits within one of the exceptions contained in § 904.04(2). ***Peters***, 192 Wis.2d at 695, 534 N.W.2d at 875. The grounds for admission of "other acts" evidence are not exclusive, but illustrative. ***Id.*** If the trial court finds the evidence satisfies one of the grounds for admission, then it must determine whether the probative value of the evidence is substantially outweighed by the prejudicial value of the

evidence. ***Id.***; *see also* § 904.03, STATS. We will uphold the trial court's admission of "other acts" evidence as long as the record discloses a reasonable basis for the court's decision. ***Peters***, 192 Wis.2d at 695, 534 N.W.2d at 875. We do so here.

In this case, the trial court concluded that the false data on the employment application was relevant to plan and to issues of motive. The court determined that the employment information would have greater probative value and would not have unfair prejudicial value because "[i]t focuses on the established proposition of the case insofar as plan and motive are at issue." The court also read WIS J I—CRIMINAL 275 to the jury so that the jury would not misuse the evidence.

The trial court properly admitted the employment application information. The testimony regarding Redmond's falsification of his employment application was evidence of plan and motive. In addition, this evidence furnished part of the context of the crime and was necessary for a "full presentation" of the case. *See* ***State v. Shillcutt***, 116 Wis.2d 227, 236, 341 N.W.2d 716, 720 (Ct. App. 1983) (citation omitted); *see also* ***State v. Bettinger***, 100 Wis.2d 691, 697, 303 N.W.2d 585, 588 (1981) (we have recognized that "other crimes" evidence is admissible to complete the story of the crime by proving its immediate context of happenings near in time and place). Given the nature of the charges against Redmond, as well as Heather's and Michelle's testimony regarding Redmond's desire to "do favors" for the girls, the "other crimes" evidence established an overall scheme, plan, motive and context to have access to vulnerable juveniles to facilitate the sale and delivery of drugs. The

falsification on the employment form was part of the panorama of evidence to show that Redmond was seeking easy access for drug sales, and we affirm the trial court's determination on these grounds.

Moreover, the court provided the jury with a limiting instruction. We have recognized that possible prejudice is presumptively erased from the jury's collective mind when admonitory instructions have been properly given by the court. ***Vogel v. Grant-Lafayette Elec. Co-op.,*** 195 Wis.2d 198, 217, 536 N.W.2d 140, 147 (Ct. App. 1995) (quoted source omitted). We assume that a properly given admonitory instruction will be followed. ***Id.*** We conclude that any potential for prejudice was erased by the court reading WIS J I—CRIMINAL 275 to the jury.

Report of State's Expert

Redmond's fourth argument on appeal is that the trial court erred by permitting the State's expert to testify about the addictive nature of cocaine. Redmond claims lack of notice and surprise because the State waited until one or two days before trial to decide on an expert. Redmond further argues that allowing the defense to speak with the expert before taking the witness stand still denied Redmond sufficient time to find his own expert and the only fair remedy was exclusion. This argument is without merit.

An evidentiary objection is addressed to the trial court's discretion. ***State v. Kuntz***, 160 Wis.2d 722, 745, 467 N.W.2d 531, 540 (1991). A discretionary decision must be 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. Pittman***, 174 Wis.2d 255, 268, 496 N.W.2d 74, 79-80, *cert. denied*, 114 S. Ct. 137 (1993). If there is a reasonable basis for the trial court's determination, this court will uphold its ruling. ***Kuntz***, 160 Wis.2d at 745-46, 467 N.W.2d at 540.

At the motion in limine, the trial court determined that the proper evidentiary foundation was laid and the evidence was admissible.[5] The trial court also decided "in the interests of basic fairness," that prior to the witness taking the stand, the defense would be allowed to interview the witness. At trial, Redmond's counsel interviewed the witness, Joseph Vignieri, prior to his taking the stand, conducted voir dire before the jury and stipulated to his qualifications as an expert on the drug cocaine, its dependent and addictive qualities and its pharmacology.

We conclude that the proper evidentiary foundation was laid and the trial court's decision to allow Vignieri's testimony was a reasonable application of the facts of record to the law. Redmond stipulated to Vignieri's qualifications as an expert, and Vignieri provided significant background information on what cocaine is, on the neurological effects of cocaine, its addictive potency and the effects of withdrawal for the jury. The information

[5] Redmond stipulated to Joseph Vignieri's qualifications as an expert on the drug cocaine.

was beyond the realm of the average layman and was based upon documented evidence rather than upon conjecture.

Contrary to Redmond's argument, the trial court's remedy was more than fair. Redmond was permitted to interview the witness to determine the scope of his testimony. During cross-examination, Redmond's counsel elicited testimony that was favorable to the defense. Most importantly, the trial court offered Redmond the option of a continuance, if necessary, to allow the defense the opportunity "to present information countering [Vignieri's testimony] if it chooses to." We conclude that the trial court properly exercised its discretion in allowing the State's expert testimony.

Prior Untruthful Allegations

Redmond's fifth contention on appeal is that the trial court erred by excluding evidence of an alleged prior untruthful allegation by the victim, under § 972.11(2)(b)3, STATS. Redmond filed a motion in limine and an offer of proof seeking admission of this evidence. The offer of proof consisted of the incident report and subsequent investigation conducted by the Racine County Sheriff's Department.

The facts relating to the incident report are as follows. On November 12, 1991, the department received a report of a sexual assault by Pamela T., Heather's mother. According to Pamela, Heather, who was fourteen at the time, returned home hysterical with her sweater ripped and said, "Mom,

it happened again."[6] Pamela understood this to mean that Heather was sexually assaulted.

At the initial contact, Heather stated that a Hispanic man with a full beard and mustache forced her into his car and struck her in the face and stomach. Heather would not disclose what occurred in the vehicle. She was taken to the hospital and the investigation was turned over to the sheriff's department.

Heather told the registered nurse, Ann Petkovich, who interviewed her at the hospital, that she was approached by a Mexican man with a mustache. The man forced her into his car. They had sexual intercourse which lasted about a minute and a half and about fifteen minutes of sexual fondling. Heather indicated that the man had oral sex with her, that he pinched her breasts and that she was unsure whether he ejaculated or not. Heather also noticed a twelve-pack of beer in the back seat and a photo ID from a dog kennel or dog track.

When interviewed by the officer, Heather's version of the facts changed slightly. She indicated that the man grabbed her and pushed her into the back seat of the car. Then he pulled her into the front seat by her arms, grabbed her hair and struck her in the stomach. After parking the car, he got on top of her and used something to cut her sweater and her shirt. He "went

[6] Pamela also told the officers that when Heather was eight years old, she was fondled by an elderly man in the neighborhood. Also, when Heather was thirteen years old, she was sexually assaulted by an uncle.

inside [her]" for a couple of minutes, he fingered her vagina and played with her breasts for about fifteen minutes. After the assault, he took her back to Eagle Lake Manor.

The investigators later confronted Heather with several inconsistencies in her story: location of the beer, her purse, oral sex, location of the sexual intercourse and pinching of her breasts. Heather then told the investigators that she willingly got in the car with the man and eventually had consensual sex with him. She did not know his name, but he told her he worked at the dog track. She admitted that she cut her own clothing, and she confessed that she made the story up to get her mother's attention. The department treated the incident as a crime and continued the investigation until all leads were exhausted.

At the motion in limine, Redmond argued that the victim went to great lengths to indicate that she had been forcibly sexually assaulted, but then admitted that she made up this "rather intricate and detailed story about what happened." Redmond claimed that the allegations and the manner in which the November 1991 incident arose were very similar to the October 1992 charges. Because this case had become a "credibility contest" between Redmond and Heather, Redmond urged the court to admit the allegations under either §§ 972.11(2)(b)3 or 904.04(2), Stats.

The State contended that because consent was not an issue under §§ 972.11(2)(b)3 or 904.04(2), STATS., Heather's allegations were in fact

legitimate—only details regarding those allegations were recanted. The State further argued that this evidence "may so prejudice and poison [the jury's] mind set as to this victim [] that they could not find this defendant guilty even if they thought he had in fact done everything that she said he did." The court agreed with the State and denied the motion.

On appeal, Redmond contends that the trial court erred in its holding that a prior allegation of sexual assault by the victim did not fall under § 972.11(2)(b)3, STATS., an exception to the rape shield law. Redmond argues that the trial court incorrectly focused on consent when the real issue was Heather's proclivity to lie about her sexual activity.

The State responds that the trial court's determination was correct. The State argues that the prior allegation was in fact truthful. It is clear from the State's brief and from oral arguments that the State would like this court to establish a bright-line rule that if the victim is untruthful about a detail which is not an element of the crime charged, then there was not an untruthful allegation as a matter of law. We decline this invitation. We can only interpret the law, not rewrite it. *See* ***Georgina G. v. Terry M.***, 184 Wis.2d 492, 520, 516 N.W.2d 678, 687 (1994) (Geske J., concurring).

In Wisconsin, the rape shield law prohibits the admission of evidence of a complainant's prior sexual conduct with three exceptions.[7] *See*

[7] Section 972.11(2)(b), STATS., provides in relevant part:

> [A]ny evidence concerning the complaining witness's prior sexual conduct … shall not be admitted into evidence during the course of the … trial, nor

State v. DeSantis, 155 Wis.2d 774, 784, 456 N.W.2d 600, 605 (1990). Here, we are concerned with evidence of an alleged prior untruthful allegation of sexual assault. Our supreme court has outlined three determinations under §§ 972.11(2)(b)3 and 971.31(11), STATS., which the trial court must make before admitting evidence of prior untruthful allegations:

> (1) whether the proffered evidence fits within sec. 972.11(2)(b)3; (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.

DeSantis, 155 Wis.2d at 785, 456 N.W.2d at 605. Section 971.31(11) provides:

> (11) In actions under s. 940.225, 948.02 or 948.025, evidence which is admissible under s. 972.11(2) must be determined by the court upon pretrial motion to be material to a fact at issue in the case and of sufficient probative value to outweigh its inflammatory and prejudicial nature before it may be introduced at trial.

See also ***DeSantis***, 155 Wis.2d at 785, 456 N.W.2d at 605.

The first determination the trial court must make is whether the evidence falls within the exception under § 972.11(2)(b)3, STATS. ***DeSantis***, 155 Wis.2d at 786, 456 N.W.2d at 605-06. Based upon an offer of proof from the defendant, the court must be able to conclude that "a reasonable person could

(..continued)

> shall any reference to such conduct be made in the presence of the jury, except the following …:
>
> ….
>
> 3. Evidence of prior untruthful allegations of sexual assault made by the complaining witness.

reasonably infer that the complainant made prior untruthful allegations of sexual assault." ***Id.*** at 788, 456 N.W.2d at 607. If the evidence does not meet this threshold, the court must conclude that the evidence does not fall within the exception. ***Id.***

Here, the trial court found that nothing in the initial statement or subsequent investigation would, in any way, allow it to conclude under § 972.11(2)(b)3, STATS., that the child made a prior untruthful allegation of sexual assault.[8] The court failed to address the remaining two issues, but addressed the confrontation issue under § 904.04(2), STATS. *See* ***DeSantis***, 155 Wis.2d at 793, 456 N.W.2d at 609. Under a § 904.04(2) analysis, the court found:

> even if the first test is met of 904.01 relevance to the eight factors in 904.04(2), that the unfair prejudicial value far outweighs the probative value, and as such, the evidence should not be admitted.

The court denied the motion under both "other acts" evidence and as a prior untruthful allegation.

Whether the facts in a particular case fulfill a particular legal standard is a question of law which we review independently. ***State v. Trudeau***, 139 Wis.2d 91, 103, 408 N.W.2d 337, 342 (1987), *cert. denied*, 484 U.S. 1007 (1988). When the trial court reaches the correct result based on erroneous

[8] The court noted that "some of the particulars ... the issue of consent, no consent, were subsequently found to be erroneous ... [but that] does not make untruthful what continues to be true relative to an assertion of being the victim of a sexual assault."

reasoning, we will nevertheless affirm. *See* ***Bence v. Spinato***, 196 Wis.2d 398, 417, 538 N.W.2d 614, 620 (Ct. App. 1995). We do so here.

Following ***DeSantis***, we first consider whether the prior allegation fits within § 972.11(2)(b)3, STATS. We find that it does. Nowhere does § 972.11(2)(b)3 differentiate between juveniles and adults; rather, it must be uniformly applied. Thus, we conclude that simply because the untruthful detail here, consent, was not an element of the prior sexual assault does not make the allegation truthful. Although we find it deeply troubling that a child of fourteen years has been the subject of several sexual assaults, it does not follow that this same child has the *legal* sophistication to know the difference between consensual and nonconsensual sexual intercourse with a child. Section 972.11(2)(b)3 does not require us to make this finding and the trial court's ruling that Heather did not make a prior untruthful allegation of sexual assault was erroneous.

Although the trial court never specifically addressed the remaining two elements under ***DeSantis***, we conclude that it nevertheless addressed them under the guise of its confrontation analysis. The court concluded that the evidence should not be admitted because:

> the evidence ... had de minimis relevance under 904.01, that that de minimis relevance is far outweighed by the potential for unfair prejudice that would occur by having the jury focus on something other than the established proposition of the case. The evidence itself would be prejudicial and inflammatory in nature, and at most would have minimal probative value ....

> [T]he motion is denied ... as other acts evidence or as a prior untruthful allegation evidence.

The second determination under ***DeSantis*** is whether the evidence is material to a fact in issue, here, Heather's credibility. *See* ***DeSantis***, 155 Wis.2d at 789-90, 456 N.W.2d at 608. In determining this issue, the ***DeSantis*** court considered the ambiguity of the recantation, the similarity between the two incidents and the remoteness in time. ***Id***. at 790-91, 456 N.W.2d at 608.

We conclude that Heather's prior untruthful allegation is material to her credibility. Here, there is no ambiguity in either the initial allegation or the recantation. Heather initially alleged that she had been raped. However, once confronted with the discrepancies in her story, she admitted that the sexual intercourse was consensual.

In addition, the circumstances of the conduct alleged in both instances are the same—nonconsensual sexual intercourse—and the two allegations are less than one year apart. The second prong has been satisfied.

The third determination under ***DeSantis*** is whether the evidence of the untruthful allegation is of "sufficient probative value to outweigh its inflammatory and prejudicial nature." ***Id.*** at 791, 456 N.W.2d at 608. Evidence is unduly prejudicial when it threatens the fundamental goals of accuracy and fairness by misleading the jury or by influencing the jury to decide the case upon an improper basis. ***Id***. at 791-92, 456 N.W.2d at 608. Evidence should be excluded if it is sketchy, vague, remote, disputed, cumulative, confuses the

issues, causes undue delay, or is a waste of time. ***Id***. at 791 n.8, 456 N.W.2d at 608.

Although the trial court did not discuss these factors, the record supports the court's conclusion that the evidence was not of sufficient probative value to outweigh its prejudicial nature. *See* ***id.*** at 792, 456 N.W.2d at 608. The evidence was not sketchy, vague or disputed. Once Heather decided to tell the truth, she was candid and cooperative. Also, the prior allegation was not disputed—it involved a substantiated assault.

Nevertheless, the evidence of the untruthful allegation was also cumulative of other evidence which went to Heather's credibility. The most significant evidence came from Heather's testimony. She described her history of drug use which began at age twelve, she admitted to stealing and occasionally dancing to obtain money to buy cocaine, she ran away from the Group Home, she skipped school, and she acknowledged numerous times that she had lied in the past. The jury had sufficient evidence from which to judge Heather's credibility without the evidence of the prior untruthful allegation.

Moreover, the evidence of the untruthful allegation may have confused the issue. The initial recantation involved consent which was not an element of the current charges. Also, the jury may have been misled into focusing on Heather's willingness to have sexual intercourse with a complete stranger, instead of on the charges against Redmond. We conclude that the evidence of Heather's prior untruthful allegation was not of sufficient probative

value to outweigh its prejudicial nature. We conclude that the trial court reached the correct result even though its decision was based on erroneous reasoning. We therefore affirm under ***DeSantis.***

State's Juvenile Witnesses

Redmond's sixth argument on appeal is that ***Davis v. Alaska***, 415 U.S. 308 (1974), compelled the admission of the probationary status of the State's juvenile witnesses. Redmond makes this argument notwithstanding the provisions of § 906.09(4), STATS.; *see also* ***Banas v. State***, 34 Wis.2d 468, 472-73, 149 N.W.2d 571, 574, *cert. denied*, 389 U.S. 962 (1967).

An evidentiary objection is addressed to the trial court's discretion. ***Kuntz***, 160 Wis.2d at 745, 467 N.W.2d at 540. If there is a reasonable basis for the trial court's determination, this court will uphold its ruling. ***Id.*** at 745-46, 467 N.W.2d at 540.

The trial court determined that the evidence of the juvenile witnesses' probationary status was not admissible. The court concluded that:

> It's not allowed in the case law of this State. It's not allowed in our evidence code at 906.09, and specifically is not allowed under the juvenile code—or at least the insight and thrust we get from the juvenile code in terms of other legitimate interests in terms of the ***Chambers v. Mississippi***, [410 U.S. 284, 295 (1973),] ruling that there are other legitimate interests, and here the protection of children is one of them, and that that augurs for not having such information disclosed.

The court also found that under § 904.03, STATS., this information would be "collateral data" with "de minimis probative value, and there would be tremendous potential for unfair prejudice attaching to that data as well."

Even though § 906.09(4), STATS., is dispositive of this issue, we conclude that the trial court's findings were well reasoned and clear. In weighing the probative and prejudicial value of the evidence, we cannot say that the trial court misused its discretion in refusing to allow the introduction of the juvenile witnesses' prior adjudications. We therefore affirm the trial court.

By the Court.—Judgment and orders affirmed.

Not recommended for publication in the official reports.

Nos. 94-0741-CR(D)
95-0830-CR(D)

NETTESHEIM, J. (*dissenting*). I contend that the evidence of Heather's prior untruthful allegation of nonconsensual sexual assault should have been admitted at Redmond's trial. I would reverse Redmond's conviction and remand for a new trial.

This case boiled down to a classic credibility contest between Redmond and Heather. Heather's prior untruthful allegation that she had been sexually assaulted without her consent was very relevant to the credibility issue in this case. The legislature has specifically recognized an exception to the rape shield law which takes in this type of situation. Section 972.11(2)(b)3, STATS.

The majority correctly sets out the three-step analysis which a court must apply in this setting. *See* ***State v. DeSantis***, 155 Wis.2d 774, 456 N.W.2d 600 (1990). First, the court must determine whether the proffered evidence fits within one of the recognized exceptions to the rape shield law. *See* ***id***. at 785, 456 N.W.2d at 605. I agree with the majority's conclusion that this prong of the analysis is satisfied. Heather untruthfully alleged that the prior sexual assault was without her consent. That the law makes consent irrelevant when a minor is the victim does not change the hard fact that Heather's report about this important detail of the sexual assault was false.

The second inquiry under ***DeSantis*** is whether the evidence is material to a fact at issue in the case. Again I agree with the majority that this prong of the analysis was satisfied. As noted above, this case presented a classic credibility confrontation between Heather and Redmond. Both testified and

gave conflicting versions of the events. Heather's prior untruthful allegation was material to the credibility issue in this case.

The third inquiry under ***DeSantis*** is whether the evidence is of sufficient probative value to outweigh its inflammatory and prejudicial nature. ***Id***. It is here that I part ways with the majority and the trial court. Evidence is unduly prejudicial when it threatens the fundamental goals of accuracy and fairness of the trial by misleading the jury or by influencing the jury to decide the case upon an improper basis. ***Id***. at 791-92, 456 N.W.2d at 608.

We must bear in mind that the test is not whether the disputed evidence is prejudicial. Generally, all admissible evidence is prejudicial to one side or the other, and, as the probative value of the evidence increases, so does its prejudice. *See* ***State v. Mordica***, 168 Wis.2d 593, 605, 484 N.W.2d 352, 357 (Ct. App. 1992). That condition, however, argues for admission of the evidence, not against it.

Prejudice does not exist simply because the evidence will involve a jury in a collateral matter. Many times juries are required to address collateral events which bear upon the credibility of competing witnesses. ***State v. Johnson***, 184 Wis.2d 324, 340, 516 N.W.2d 463, 468 (Ct. App. 1994). That was already true in this case. Redmond's employment application was a collateral matter which the trial court properly saw as relevant evidence bearing on Redmond's credibility. Heather's history of drug use and other historical

behavior were collateral matters which the court also admitted. Yet, on this most crucial matter, the majority affirms the trial court's ruling that the proffered evidence would improperly take the jury into a collateral matter.

The proper standard for unfair prejudice is whether the evidence tends to influence the outcome of the case by improper means. ***Id***. Stated differently, but to the same effect, the test is whether the evidence will interfere with the truth-seeking function of the trial. This proffered evidence, more so than the other collateral evidence already admitted, was highly relevant to Heather's credibility. In my judgment, the exclusion frustrated the truth-seeking process in this case.

As the majority concedes, the evidence concerning the prior sexual assault was not "sketchy, vague, remote, disputed, [or] cumulative." Majority op. at 24; *see also* ***DeSantis***, 155 Wis.2d at 792, 456 N.W.2d at 608. Nor did it concern a minor aspect of the event. Although legally irrelevant, the fact of nonconsent in a sexual assault against a minor is a very aggravating fact in an already aggravated situation.

Given the critical and central issue of credibility in this case, I contend that the probative value of Heather's prior untruthful allegation outweighed its prejudicial effect. I fail to see how the admission of this evidence could have interfered with the accuracy or fairness of the trial when it traveled directly to the critical issue which the jury was required to resolve.

I respectfully dissent.