

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 14, 2012

Diane M. Fremgen
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. 2011AP2157-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2008CF938

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WAYLON J. PICOTTE,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Waylon Picotte appeals a judgment convicting him of sexually assaulting Jennifer S. and an order denying his postconviction motion. Picotte argues: (1) his due process rights were violated because the State lost or destroyed a potentially exculpatory surveillance video; (2) his trial counsel, Raj

Kumar Singh, was ineffective for failing to file a motion to dismiss based on the lost video and because Singh failed to adequately investigate information critical to witnesses' credibility; (3) he should be granted a new trial based on newly discovered evidence relating to Jennifer's activities after the assault and her credibility; and (4) he should be granted a new trial in the interest of justice because the controversy was not fully tried and justice has miscarried. We reject these arguments and affirm the judgment and order.

BACKGROUND

Trial Testimony

¶2 Jennifer testified that she ran into Picotte, whom she had known since childhood, while she was out drinking. Around 2:00 a.m., there was a disturbance outside the bar. Jennifer told Picotte she wanted to leave because she had an outstanding arrest warrant for unpaid child support, and he suggested they go to his aunt's house.

¶3 Other friends joined them at the house, but left shortly after they arrived. When Jennifer decided to leave, as she was walking down a hallway, Picotte grabbed her by the back of her neck and forced her into a room. There he pressed her against a window, pulled down her pants from the back and inserted his penis into her vagina. After only about five seconds, he heard a sound, let her go and left the room.

¶4 Jennifer ran from the house and eventually to a gas station where she made "collect calls"¹ to her friend, Sandra Cornelius, from a pay phone. She then

¹ Jennifer apparently confused "collect calls" with voicemail messages.

walked about two hours to meet with Cornelius at Joshua House's residence. There, she called a friend to take her to her stepsister's house. Jennifer arrived at her stepsister's house some time before 10:00 a.m. and tried calling her mother. Around 4:30 p.m., she finally spoke with her mother, who picked her up and drove her to the hospital.

¶5 At the hospital, Jennifer was examined by a sexual assault nurse examiner. The nurse found no vaginal injury, but observed broken blood vessels on Jennifer's neck, consistent with Jennifer's account of the incident. Witnesses were not able to identify Picotte's DNA on samples taken from Jennifer.

¶6 Picotte did not testify. His aunt and his cousin both testified that Jennifer went into the room with Picotte and they did not see or hear anything that would suggest a sexual assault had occurred.

¶7 In the State's closing argument, the prosecutor noted that Jennifer had no reason to falsely accuse Picotte and that she faced arrest on the warrants when she notified police of the sexual assault. In his closing argument, Singh attacked Jennifer's credibility, noting hesitations during her testimony and "gaze aversion." He attacked her character, stressing the warrants for her arrest and the fact that she was out drinking when she did not pay her child support. He argued that her story was implausible because Picotte's aunt and cousin were nearby and she did not call for help. He noted that Jennifer said her face was pressed against a window during the assault, but there was no evidence presented of a smudge on the window. Singh noted that Jennifer's boyfriend's saliva was recovered from a hickey, suggesting that she had not recently bathed. Singh speculated that Jennifer may have smelled bad as a result, causing Picotte to resist her advances, resulting

in a false accusation because she felt humiliated. The jury convicted Picotte of sexually assaulting Jennifer.

Postconviction Proceedings

¶8 Picotte filed a postconviction motion alleging ineffective assistance of counsel because Singh failed to adequately investigate the facts surrounding Jennifer's allegation, failed to challenge the credibility of the State's witnesses and failed to present a meaningful defense. Singh testified that he was presenting a "scorned woman defense," and Jennifer was either lying or telling the truth. He did not remember any witness that Picotte specifically asked him to investigate, interview or call. Singh made no effort to get Cornelius' phone records or to challenge the testimony regarding the number of phone calls Jennifer made because he did not believe it would benefit the defense.

¶9 Picotte alleged that a surveillance video of the gas station might have contained exculpatory evidence, particularly evidence that might contradict Jennifer's testimony regarding the number of times she called or tried to call Cornelius. He contends the videotape would have shown how long Jennifer was at the gas station, what she did while she was there, and whether she left with anyone. Singh testified he believed the surveillance video was a collateral issue, even as to witness credibility. He made no attempt to find the video independently or to file a motion to dismiss on that issue because he believed it would have been frivolous.

¶10 At the postconviction hearing, Joshua House testified that Jennifer was at his party for about twenty minutes before she left. He remembered Jennifer leaving with somebody, but could not be sure who because a number of people came in and went out of the house. He told Scott Hungerford, a private

investigator, he did not remember her leaving at the same time as Cornelius. He also testified that he knew Jennifer by face and not by name and that was why he initially said she was not there. Picotte contends this information would have contradicted Jennifer's testimony about how and where she met with Cornelius after the assault.

¶11 Cathylee Villers testified that Jennifer arrived at her apartment between 9:00 a.m. and 10:00 a.m. and that Jennifer left thirty to forty-five minutes later on the morning after the assault. Jennifer left in a gold or "copperish" colored truck. Cornelius was not with her. Jennifer told Villers she had been raped, but not by whom or where it occurred. Villers contradicted Jennifer's testimony that she went to the apartment Villers shared with Cornelius prior to meeting Cornelius at House's residence and that she and Cornelius walked to the apartment from House's at 6:00 a.m.

¶12 Hungerford testified about reports he had compiled while working for Picotte's initial attorney. He testified that he spoke with the gas station manager, Gary Golomski, who told him a surveillance video had been turned over to the police. Golomski told Hungerford that the pay phones were out of view of the cameras. Hungerford also investigated the phone records involving calls made from the gas station to Cornelius' phone. He could have testified at trial about the correct number of calls Jennifer made to Cornelius.

¶13 Finally, Golomski testified that he made a copy of the surveillance video for the police. He indicated that they wanted a video from 10:00 p.m. to midnight to see if any people were at the pay phones or if anyone came into the store to buy anything. The trial court found that Golomski confused this case with another incident and that no surveillance video existed.

DISCUSSION

¶14 Picotte’s argument that the State lost or destroyed a potentially exculpatory surveillance video depends on his assertion that the video was turned over to the police by Golomski. As the arbiter of the witnesses’ credibility, *State v. Angiolo*, 186 Wis. 2d 488, 495, 520 N.W.2d 923 (Ct. App. 1994), the circuit court appropriately found that the video did not exist. Golomski was the only witness who testified to having seen the video. However, it would not make sense for the police to seek a video recording from 10:00 p.m. to midnight, hours before the sexual assault took place. The State had no record of the surveillance video. The record supports the court’s finding that Golomski confused the present case with another.

¶15 Picotte has not established ineffective assistance of counsel based on Singh’s failure to file a motion to dismiss based on the lost video. Counsel is not ineffective for failing to file a nonmeritorious motion. *See State v. Cummings*, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).

¶16 Picotte also failed to establish deficient performance or prejudice from Singh’s failure to investigate or challenge the State’s witnesses’ credibility. The details of the number of calls Jennifer made, whether they were truly “collect calls” and the exact time she was at various locations are of little significance and Singh appropriately chose not to focus the defense on these collateral inconsistencies. A sexual assault victim’s inability to remember insignificant details after the assault does not affect her credibility such that it would undermine our confidence in the outcome of the trial. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶17 Picotte has not established a basis for granting a new trial based on newly discovered evidence. Even when a defendant proves all of the elements of newly discovered evidence, he must also show a reasonable probability that had the jury heard the newly discovered evidence, it would have had a reasonable doubt as to the defendant's guilt. *State v. Plude*, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42. Picotte argues that Villers' newly discovered testimony would have provided a reasonable basis to doubt Picotte's guilt. Whatever help Villers' testimony might have given the defense regarding Jennifer's first contact with Cornelius after the assault, it would have been neutralized by Villers' account of what Jennifer told her about the assault. After hearing all of the postconviction testimony, the trial court indicated that it was more convinced of Picotte's guilt than it was at the close of the trial. New evidence regarding witnesses' credibility on insignificant, collateral matters, particularly when the witness would also have provided evidence favorable to the State, does not create a reasonable probability that the jury would have doubted Picotte's guilt. *See id.*, ¶33.

¶18 Finally, Picotte has not established a basis for granting a new trial in the interest of justice. Despite the lack of evidence relating to the State's witnesses' credibility on peripheral matters, we conclude the issues were fully and fairly tried, and there is no basis for believing a jury on retrial would reach a different result. *See State v. Cleveland*, 2000 WI App 142, ¶21, 237 Wis. 2d 558, 614 N.W.2d 543.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2009-10).

