COURT OF APPEALS
DECISION
DATED AND RELEASED

FEBRUARY 13, 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.

No. 95-1271-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN SAIVONG,

Defendant-Appellant.

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

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Steven Saivong appeals a judgment convicting him of first-degree sexual assault resulting in pregnancy and sexual assault of an eleven-year-old child. He also appeals an order denying his motion for postconviction relief.[1] Saivong argues: (1) the trial court improperly exercised

[1] The postconviction motion was denied pursuant to RULE 809.30(2)(i), STATS., because it was not decided within 60 days.

its discretion when it refused to allow an adjournment to give him an opportunity to find experts to testify on HLA and DNA test results and to assist defense counsel; (2) he was denied effective assistance of counsel when the public defender did not allocate the funds to hire an expert witness; (3) the trial court improperly excluded the testimony of Lamont Thao, executive director of the Hmong Association for Brown County, who would have testified that immigrants from Asia often understate the age of their children; (4) the State presented insufficient evidence as a matter of law; and (5) he should be granted a new trial in the interest of justice. We reject these arguments and affirm the judgment and order.

The victim testified that she was eleven years old at the time of the sexual assault. She knows her birthday because she was told by her mother. She was born in Laos and does not have a birth certificate or other writing to document her birth date. She testified that while her parents were out and she was babysitting, she awoke to find Saivong on top of her in bed. She fainted after he pulled down her shorts. She awoke to see Saivong, who she knew before the incident, pulling up his pants and exiting through a bedroom window to drive off in a van that his wife usually drives. When the victim was later informed that she was pregnant, she identified Saivong as the only person to have had sexual intercourse with her. HLA and DNA blood tests establish a high likelihood that Saivong is the father of her child.

The trial court properly exercised its discretion when it denied Saivong's motion for a continuance to give him an opportunity to seek expert assistance to combat the State's scientific evidence. The court had already granted the defense a two-month adjournment of trial to enable counsel to seek expert help. To date, Saivong has presented no evidence that an expert witness exists who would contradict the conclusions of the HLA or DNA tests. The trial court noted that Saivong's trial counsel was well informed in the area of DNA and HLA testing and competently cross-examined the State's experts without additional assistance. The trial court also noted the victim's substantial interest in putting this matter behind her. Saivong has not established any improper exercise of the trial court's discretion or any prejudice that arose from its decision to deny his request for a continuance. *See* ***State v. Wollman***, 86 Wis.2d 459, 468-70, 273 N.W.2d 225, 230-31 (1979).

Saivong has not established that he was ineffectively represented at trial due to the public defender's refusal to appropriate funds to hire an expert. To establish ineffective assistance of counsel, Saivong must show that his trial counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Saivong has neither alleged nor provided evidence that any expert witness would have presented testimony favorable to the defense on the issue of paternity. He has not identified any deficiency in his trial counsel's performance. Therefore, Saivong has not established any prejudice or undermined this court's confidence in the outcome of the trial. ***Id***. at 694.

The trial court properly excluded proffered evidence that immigrants from Asia frequently understate the ages of their children. The proffered witness, Executive Director of the Hmong Association, had no personal knowledge of the victim's age, did not know how many refugee families purposely understate the ages of their children, and could not state the number of years typically subtracted from the child's true age. His proffered testimony was too general and would invite unwarranted speculation by the jury. The trial court properly refused to allow this testimony on the ground that there was insufficient foundation to establish its relevancy.

The State presented sufficient evidence to support the convictions. The victim's testimony or the scientific evidence alone would have been sufficient to establish that Saivong had intercourse with the child resulting in pregnancy. The child's testimony established her age. Saivong argues that the jury's acquittal on the burglary charge demonstrates that it did not believe the victim's testimony and relied entirely on the scientific testimony. The victim testified that she did not see Saivong enter the house. She had no information regarding his manner of entry. The jury may have harbored doubt regarding his manner of entry and acquitted him of the burglary charge on that basis. Even if the verdicts are logically inconsistent, the verdict might reflect leniency or mistake by the jury in its analysis of the burglary charge rather than a mistake on the sexual assault charges. *See* ***State v. Mills***, 62 Wis.2d 186, 192, 214 N.W.2d 456, 459 (1974).

Saivong notes that the victim could not recall the exact date of the assault, provided inconsistent testimony as to the number of people at home at the time of the assault and did not report the assault until months later when

she learned she was pregnant. He contends that this evidence undermines the victim's credibility. The credibility of the witnesses and the weight to be given their evidence is solely for the jury to determine. *See* ***State v. Wilson***, 149 Wis.2d 878, 894, 440 N.W.2d 534, 540 (1989).

Finally, we conclude there is no basis for granting a new trial in the interest of justice. Saivong argues that justice has miscarried and that retrial would result in a different verdict. We have rejected all of the arguments upon which he bases his argument that justice has miscarried. There is no basis for believing that retrial would result in a different verdict.

By the Court.—Judgment and order affirmed.

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