COURT OF APPEALS
DECISION
DATED AND FILED

December 4, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP170-CR **Cir. Ct. No. 2003CF6137**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT G. TIKKURI,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: PAUL R. VAN GRUNSVEN, Judge.[1] *Affirmed in part; reversed in part and cause remanded for further proceedings.*

Before Curley, P.J., Wedemeyer and Kessler, JJ.

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[1] A petition for leave to appeal was filed with this court on January 23, 2007, and briefs were ordered filed. This court, *sua sponte*, formally grants the leave to appeal.

¶1 CURLEY, P.J. Scott G. Tikkuri filed a motion for leave to appeal a nonfinal order denying his motion to dismiss due to prosecutorial misconduct and denying his motion to allow third parties to testify regarding his and the alleged victim, Cynthia F.'s, sexual practices.

¶2 Tikkuri seeks an evidentiary hearing to determine whether his retrial is barred by double jeopardy due to alleged prosecutorial misconduct. In the event that his request for double jeopardy protection is denied and his case is retried, Tikkuri requests that this court hold that the rape shield exception allowing for evidence of a complaining witness's past conduct with the defendant include testimony from third-party witnesses.

¶3 We conclude that when Tikkuri voluntarily dismissed his appeal from the trial court order rejecting his postconviction double jeopardy challenge and opted for a retrial instead, he waived his argument related to double jeopardy protection arising out of alleged prosecutorial misconduct. As a result, he will be retried. We further conclude that the trial court erroneously exercised its discretion in excluding testimony from third-party witnesses and that Tikkuri is entitled to a pretrial hearing so that the court can review whether the third-party testimony is material and sufficiently probative to outweigh any prejudice. Accordingly, we remand for further proceedings consistent with this opinion.

I. BACKGROUND.

¶4 Tikkuri originally was charged with one count of substantial battery and one count of battery while armed, as a habitual criminal, arising out of an incident that occurred on October 20, 2003, involving his then-girlfriend Cynthia F. The charges against Tikkuri were later amended to add fourteen counts

of battery while armed and one count of second-degree sexual assault, all as a habitual criminal.[2]

¶5 Prior to trial, a motion hearing was held to determine whether Tikkuri would be allowed to submit evidence relating to Cynthia F.'s sexual conduct. Tikkuri sought to submit such evidence to establish Cynthia F.'s history of engaging in "rough sex," which he argued had a bearing on the critical issue of consent. In an offer of proof, the trial court heard testimony from Lisa Silver regarding her eyewitness account of one instance of Tikkuri and Cynthia F. engaging in sexual activity predating the incident at issue. However, after hearing Silver's testimony, the trial court rejected the offer of proof and excluded any evidence of Cynthia F. and Tikkuri's prior sexual history from being offered at trial.

¶6 At trial, Cynthia F. testified that on the night of the incident, among other things, Tikkuri beat her with a belt, cut her with a box cutter, and burned her with a cigarette between two separate instances of anal rape. She testified that what transpired was not consensual. Eventually, Cynthia F. was able to leave the apartment, and once she was outside, she flagged down a parking attendant and requested that the police be called because she had just been beaten and raped. Cynthia F. admitted to purchasing and using crack cocaine earlier on the evening of the incident. On cross-examination, she also admitted that she initially lied to the police officer who interviewed her regarding her cocaine purchase earlier that night.

[2] Tikkuri incorrectly states in his brief that sixteen criminal counts were added. The additional battery counts were based on Cynthia F.'s allegation that Tikkuri struck her with a belt once for each of the fifteen months the two were involved in a relationship.

¶7 Tikkuri's trial attorney failed to impeach Cynthia F. with her two prior convictions. Once the jury was excused, the prosecutor requested that defense counsel be prohibited from making any reference to Cynthia F.'s prior convictions; in response, Tikkuri's attorney stated that there was no other way he wanted to get Cynthia F.'s prior convictions into evidence. As a result, the jury never heard about Cynthia F.'s prior convictions.

¶8 Tikkuri's account of what transpired differed significantly from Cynthia F.'s account. According to Tikkuri, on the night of the alleged incident, he and Cynthia F. smoked crack cocaine and marijuana together for approximately an hour and a half. Afterward, the two had anal sex, during which Tikkuri admitted to striking Cynthia F. approximately four or five times with a belt. He stated that Cynthia F. consented to this activity and that it was something they had done before as part of their sexual routine. Tikkuri later acknowledged that at one point while they were having sex, Cynthia F. asked him to stop hitting her with the belt and that he immediately complied with her request.

¶9 At some point thereafter, Tikkuri testified that the two got into a verbal and physical altercation and that during the struggle, he inadvertently burned Cynthia F.'s forehead with his cigarette. Beyond using the belt during intercourse, however, Tikkuri said he did not strike Cynthia F. with it at any other time that night. During cross-examination, the prosecutor properly impeached Tikkuri with four prior convictions.

¶10 During his closing argument, the prosecutor stated:

> But, obviously, this all comes down to what Mr. Tikkuri says and what [Cynthia F.] said, so let's go through it piece by piece. First, let's talk about what Mr. Tikkuri said. Mr. Tikkuri has four criminal convictions. Doesn't mean he's guilty of these crimes, but it does mean

> that you need to judge his credibility when Mr. Tikkuri took the stand and testified. He has four criminal convictions.

Later in his closing argument, the prosecutor again stated, "So we're left with his four convictions." A jury subsequently found Tikkuri guilty of all seventeen charges.

¶11 Represented by a different attorney, Tikkuri filed a motion for postconviction relief. At the postconviction hearing, the trial court concluded that it erred with respect to the rape shield law when it precluded testimony from Tikkuri and Cynthia F. about their prior sexual practices. He then granted Tikkuri's motion for a mistrial solely on those grounds. The trial court denied Tikkuri's motion for dismissal based on prosecutorial misconduct.

¶12 Tikkuri's postconviction attorney subsequently filed a notice of appeal from that portion of the trial court's order denying Tikkuri's motion to dismiss based on prosecutorial misconduct. Tikkuri later voluntarily withdrew that appeal, and his postconviction counsel advised the trial court that Tikkuri was eager to move forward with the retrial.

¶13 Before the trial court that was to handle the retrial, Tikkuri renewed his double jeopardy challenge and motion to dismiss.[3] The court denied Tikkuri's

[3] The Honorable Marshall B. Murray presided over the trial and postconviction proceedings. The Honorable Paul R. Van Grunsven presided over the proceedings relating to Tikkuri's retrial and issued the nonfinal order that is the focus of this appeal.

There were a number or proceedings before the court to determine whether *res judicata* should apply with respect to pretrial rulings made by the initial trial court. With the exception of the evidentiary issue pertaining to evidence offered by third parties as to the sexual tendencies of Tikkuri and Cynthia F., which is addressed later in this opinion, the other issues have been resolved.

request and further clarified that while it would allow Cynthia F. and Tikkuri to testify regarding their sexual practices, it would not allow third-party witnesses, including Silver and Tikkuri's mother, to so testify, with the exception of police officers who may be called to offer testimony to impeach Cynthia F.[4]

¶14 Tikkuri now seeks an evidentiary hearing to address the alleged prosecutorial misconduct to the extent that it impacts double jeopardy. In the event that his case is not dismissed on those grounds, Tikkuri asks that we summarily reverse the trial court's pretrial order barring evidence from third parties as to the sexual tendencies of Tikkuri and Cynthia F. Additional facts are provided in the remainder of this opinion as needed.

II. ANALYSIS.

A. Tikkuri waived his double jeopardy challenge arising out of alleged prosecutorial misconduct.

¶15 Although he raises other instances of alleged prosecutorial misconduct, Tikkuri's argument largely focuses on the prosecutor's closing argument referencing the fact that Tikkuri had four prior convictions.[5] According

[4] The court noted that Cynthia F. told the police that she engaged in anal sex with Tikkuri on three occasions prior to the incident at issue. As a result, the court concluded that if Cynthia F. testified contrary to those statements at the retrial, her testimony could be impeached with testimony from the police officers. No issues were raised in this appeal with respect to this ruling.

[5] To support his claims of prosecutorial overreaching and excessive zeal, Tikkuri relies on the following:

(continued)

to Tikkuri, the prosecutor misled the jury "on the core issue of credibility" when he implied that Cynthia F. had no prior convictions and that her credibility differed from Tikkuri's in that respect. Tikkuri contends that he "is entitled to an evidentiary hearing to determine whether the prosecutor, as corroborated by his other tactics before, during and after trial, acted with a culpable state of mind in the sense of an intent to prejudice Tikkuri and create another chance to convict." Tikkuri acknowledges that the prosecutor did not expressly state that Cynthia F. did not have prior convictions; however, he contends that the prosecutor's "arguments clearly presented that inference as the unavoidable truth."

¶16 We do not get to the merits of Tikkuri's double jeopardy claim because we conclude that this argument was previously waived. In this regard, the State argues that Tikkuri twice waived his right to appellate review of his double jeopardy challenge by: "(1) failing to interpose a contemporaneous objection at trial; and (2) choosing to voluntarily dismiss the appeal from the judgment of conviction challenging the trial court's order denying his motion to dismiss on double jeopardy grounds, and opting for the alternative of a retrial instead." Because we conclude that Tikkuri waived his double jeopardy challenge when he

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> (1) when Tikkuri failed to plead as charged, the prosecutor added 16 [sic] criminal counts, bringing to 17 the total counts against Tikkuri for allegedly battering and sexually assaulting his girlfriend, and that the prosecutor gave inconsistent reasons for doing so; (2) the prosecutor allowed the seating of a juror who felt bias against Tikkuri "creeping inside" and failed to acknowledge this problem when it was raised in the post-conviction motion; (3) the prosecutor filed an abusive response to the post-conviction motion; and (4) when the post-conviction motion was partially granted and partially denied, the prosecutor improperly engaged in *ex parte* contact in order that his version of the written order on the post-conviction motion would be entered.

voluntarily dismissed his initial appeal, we need not address whether waiver resulted due to Tikkuri's failure to interpose a contemporaneous objection at trial. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (unnecessary to decide nondispositive issues).

¶17 This petition for review requires that we determine the impact that Tikkuri's earlier voluntary dismissal of his double jeopardy challenge has on his present appeal. This determination requires a review of the statute governing voluntary dismissals. *See* WIS. STAT. RULE 809.18 (2003-04).[6] "Interpretation of a statute and its application to undisputed facts are questions of law which this court reviews de novo." *See* ***Tannler v. DHSS***, 211 Wis. 2d 179, 183, 562 N.W.2d 735 (1997).

¶18 Pursuant to WIS. STAT. RULE 809.18, "[a]n appellant may dismiss a filed appeal by filing a notice of dismissal in the court or, if the appeal is not yet filed, in the circuit court." The Wisconsin Supreme Court, in adopting RULE 809.18, evidenced its intention to put fairness to respondents and judicial economy ahead of any potential public interest in the advancement of an appeal that the appellant seeks to dismiss. ***State v. Lee***, 197 Wis. 2d 959, 969, 542 N.W.2d 143 (1996). An appellant need not obtain the consent of either the court or the parties prior to filing a notice of dismissal, ***id.*** at 967, and upon voluntarily filing such notice, "is returned to the position occupied prior to appeal and is bound by the order or judgment appealed from," ***id.*** at 968.

[6] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶19 Tikkuri initially filed a notice of appeal stating that he was appealing from the order "which denied the Rule 809.30(2)(h) motion to hold an evidentiary hearing, and to dismiss the amended information with prejudice on double jeopardy and due process grounds." Tikkuri expressly stated that he was not appealing the vacatur of the judgment of conviction and order for a new trial. He later voluntarily dismissed this appeal. As a result, he was returned to the position he occupied prior to the filing of his appeal and accordingly, is bound by the order that denied his motion to dismiss based on prosecutorial misconduct and granted his request for a new trial. ***Lee***, 197 Wis. 2d at 968.

¶20 Tikkuri had an opportunity to pursue this claim, which was initially rejected on direct postconviction review. He then commenced an appeal from that part of the postconviction order denying his claim of prosecutorial misconduct, only to later dismiss the appeal and pursue retrial instead.[7] Then, before the court that was to preside over his retrial, Tikkuri renewed his double jeopardy challenge

[7] Tikkuri admits that he agreed to proceed with a new trial in March 2006. However, he contends that when the State subsequently advanced a *res judicata* argument, "it appeared for several months that the successor court was going to employ law of the case and concurrent jurisdiction theories to follow the State's lead" and preclude Tikkuri from receiving a truly new trial. Due to this course of events, Tikkuri contends that he "changed course when trial was imminent and after enduring a threat that his 'retrial' might be conducted on a novel and unfair theory such as 'law of the case.'" Tikkuri concedes that the "threat" has since been withdrawn; nevertheless, he analogizes his circumstances to those that were present in ***State v. Lettice***, 205 Wis. 2d 347, 556 N.W.2d 376 (Ct. App. 1996) (***Lettice I***) and ***State v. Lettice***, 221 Wis. 2d 69, 585 N.W.2d 171 (Ct. App. 1998) (***Lettice II***), and concludes that he is not foreclosed from seeking dismissal.

The circumstances at issue in the ***Lettice*** cases are distinguishable in a number of regards, the most important of which, for our purposes, being that in those cases the defendant did not appeal the prosecutorial misconduct issue and later voluntarily dismiss the appeal, as Tikkuri did in this case. Because we conclude that a waiver resulted from Tikkuri's voluntary dismissal of his appeal, as a result, we do not address the merits of his prosecutorial misconduct claim and further discussion of ***Lettice I*** and ***II*** is unnecessary.

based on alleged prosecutorial misconduct. Once again his challenge was denied and from that nonfinal order, he appealed to this court.

¶21 However, by dismissing the initial appeal, we conclude that Tikkuri previously abandoned his double jeopardy claim and was bound by the order granting his request for a new trial. *See* ***Lee***, 197 Wis. 2d at 968. Although we have discretion to reinstate an appeal after a voluntary dismissal, *see* ***State v. Thiel***, 171 Wis. 2d 157, 159, 491 N.W.2d 94 (Ct. App. 1992), we see no reason to exercise that discretion here, where even if we were to get to the merits of this claim, there is nothing in the record that leads us to conclude the prosecutor engaged in misconduct. Our decision is further supported by the fact that even if Tikkuri somehow could have resurrected his appeal from the postconviction order denying his request for relief due to alleged prosecutorial misconduct, his timeframe for doing so has long since passed. *See* WIS. STAT. § 809.30(2)(j) (requiring that notice of appeal from the trial court's order on the motion for postconviction or postdisposition relief must be filed within twenty days of the entry of the order on the postconviction or postdisposition motion). As a result, we do not further address the merits of whether the alleged prosecutorial misconduct necessitates an evidentiary hearing.

B. Testimony from third parties as to Tikkuri and Cynthia F.'s sexual practices may be admissible.

¶22 In the event his request to dismiss this case was denied, Tikkuri asked that we "summarily revers[e] the pretrial order that bars evidence clearly admissible under an exception to the rape shield law." Tikkuri contends that the trial court improperly refused to admit evidence from third parties pertaining to his prior sexual relationship with Cynthia F. He further contends that our review of this issue is appropriate under WIS. STAT. § 808.03(2)(a) (2005-06), which states:

> A judgment or order not appealable as a matter of right … may be appealed to the court of appeals in advance of a final judgment or order upon leave granted by the court if it determines that an appeal will:
>
> (a) Materially advance the termination of the litigation or clarify further proceedings in the litigation.

We agree that resolving this issue will clarify further proceedings in this litigation. *See* ***id.***

¶23 "A circuit court has broad discretion in determining the relevance and admissibility of proffered evidence." ***State v. Oberlander***, 149 Wis. 2d 132, 140, 438 N.W.2d 580 (1989) (citation and internal quotation marks omitted). In our review, "[t]he question on appeal is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record." ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983) (citation and internal quotation marks omitted; brackets in ***Pharr***). As a result, it is of no consequence whether this court agrees with the ruling of the trial court; rather, our focus is on "whether appropriate discretion was in fact exercised." ***Id.*** Where there is a reasonable basis for the trial court's determination, we will find that the court properly exercised its discretion. ***Id.*** In this regard, "there should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth." ***State v. Hutnik***, 39 Wis. 2d 754, 764, 159 N.W.2d 733 (1968).

¶24 Even if the trial court exercises its discretion based on a mistaken view of the law, we will affirm so long as "the facts and their application to the proper legal analysis support the lower court's conclusion." ***State v. Sorenson***, 143 Wis. 2d 226, 250, 421 N.W.2d 77 (1988). Based on the limited facts before

us, however, we are unable to determine if their application to the proper legal analysis would support the trial court's conclusion.

¶25 WISCONSIN STAT. § 972.11(2)(b)1. provides an exception to the rape shield law, which under certain circumstances mandates the exclusion of "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," by excepting from the general rule, "[e]vidence of the complaining witness's past conduct with the defendant."[8] This exception, however, is subject to WIS. STAT. § 971.31(11), which states in pertinent part: "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." There is no language in WIS. STAT. § 972.11(2)(b)1. that restricts the evidence that can be offered to direct testimony from either the defendant or the complaining witness.

¶26 The legal standard that Tikkuri must satisfy to comply with the terms of WIS. STAT. §§ 972.11(2)(b)1. and 971.31(11) requires a three-part showing that: "(i) the proferred evidence relates to sexual activities between the complainant and the defendant; (ii) the evidence is material to a fact at issue; and (iii) the evidence of sexual contact with the complainant is of 'sufficient probative value to

[8] "Sexual conduct" is defined as "any conduct or behavior relating to sexual activities of the complaining witness, including but not limited to prior experience of sexual intercourse or sexual contact, use of contraceptives, living arrangement and life-style." WIS. STAT. § 972.11(2)(a).

outweigh its inflammatory and prejudicial nature.'" ***State v. Jackson***, 216 Wis. 2d 646, 658-59, 575 N.W.2d 475 (1998) (citations omitted).[9]

¶27 It does not appear from the record that the trial court applied ***Jackson***'s legal standard. In this regard, the court concluded that while Tikkuri and Cynthia F. could each be questioned about their sexual practices, testimony from third parties, including Silver, would be excluded. The court stated:

> I'm satisfied that Wisconsin law allows the defendant and alleged victim to testify on this area.
>
> As I said before, the testimony of Lisa Silver and Mary Tikkuri not only implicates hearsay concerns but raises concerns of substantial prejudice that outweighs any probative value of their testimony.
>
> I find that allowing Lisa Silver and Mary Tikkuri to testify on this issue raises concerns as to conclusion of issues, considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
>
> ….
>
> I am also concerned that allowing those two witnesses to testify in [sic] this issue could create a trial within a trial as to how these witnesses got this information; credibility of these witnesses and other factors that permit me to rule in the fashion that I have.

[9] The State relies on cases identifying the analytical framework that courts employ in determining the admissibility of "other acts" evidence, *see* WIS. STAT. § 904.04(2), to support its argument that the trial court did not erroneously exercise its discretion by excluding the testimony of third-party witnesses. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998); *see generally* ***State v. Muckerheide***, 2007 WI 5, ¶20, 298 Wis. 2d 553, 725 N.W.2d 930. Although the trial court referenced § 904.04 as one of the statutes it was balancing at the time of the hearing, the proper legal framework is the ***Jackson*** standard detailed above. *See* ***State v. Jackson***, 216 Wis. 2d 646, 658-59, 575 N.W.2d 475 (1998) (citations omitted).

After these statements, Tikkuri's attorney corrected the court that insofar as Silver's testimony is concerned there are no hearsay concerns given that she was an eyewitness. The following exchange took place:

> [Tikkuri's attorney]: --before we move to the next issue.
>
> Does the Court realize…
>
> You said that you would be concerned as to how those two witnesses got that information.
>
> They were eyewitnesses.
>
> That they had walked in on previous acts.
>
> THE COURT: You're telling me that those two witnesses personally observed the conduct that I'm addressing here?
>
> [Tikkuri's attorney]: Lisa Silver walked in on my client and the alleged victim committing a sexual act in her bedroom.
>
> THE COURT: Well, what about Mary Tikkuri?
>
> [Tikkuri's attorney]: Your Honor, I don't have it right in front of me and I don't want to mislead the Court.
>
> I don't believe she walked in on any acts but she would substantiate the product, if you will, of their sexual conduct that she found, that she personally found.

This appears to have been the extent of the information that the court had as to the nature of the testimony that the third parties would offer in this matter.

¶28 Based on our review of the record, we agree with Tikkuri that although the trial court stated that it was balancing WIS. STAT. §§ 904.04, 906.09, 972.11(2)(b)1. and 971.31(11), it offered no real explanation as to how those statutory sections were harmonized before it arrived at its conclusion that testimony from third-party witnesses would be excluded. We agree with Tikkuri's

argument that "[t]he court's reasons for excluding this third[-]party evidence are not clear. The court cites the potential for undue prejudice and needless presentation of cumulative evidence, but does not explain why, or even expressly conclude that either would result from presenting third-party evidence."

¶29 The State relies on ***State v. Rognrud***, 156 Wis. 2d 783, 457 N.W.2d 573 (Ct. App. 1990), and ***State v. Olson***, 179 Wis. 2d 715, 508 N.W.2d 616 (Ct. App. 1993), to support its argument that the court properly exercised its discretion in excluding extrinsic evidence from third-party witnesses, Silver and Mary Tikkuri. We conclude that the State's reliance on ***Rognrud*** and ***Olson*** is misplaced.

¶30 In ***Rognrud***, the defendant appealed the trial court's ruling that precluded him from presenting evidence from third-party witnesses pertaining to three prior allegedly false accusations of sexual assault made by the complaining witness. ***Id.***, 156 Wis. 2d at 785. The three prior accusations arose out of events wholly unrelated to the incident at issue in ***Rognrud*** and did not involve the defendant. ***Id.*** at 786, 789, 791.

¶31 Likewise, in ***Olson***, the defendant appealed the trial court's decision to exclude extrinsic evidence that the complaining witness made a prior false allegation of sexual assault against another person. ***Id.***, 179 Wis. 2d at 718. At a pretrial hearing, the trial court heard testimony from third-party witnesses before it concluded that testimony of the prior incident was collateral to the issue on trial. ***Id.*** at 721-22.

¶32 The circumstances in ***Rognrud*** and ***Olson*** are different from the circumstances at issue here where Tikkuri's brief indicates that Silver's testimony will be based on her personal observation of Cynthia F. and Tikkuri consensually

engaged in sexual activity that involved Tikkuri slapping Cynthia F. on the buttocks. Similarly, with respect to his mother, Tikkuri's brief indicates that her anticipated testimony relates to "her knowledge of the sexual practices of the defendant and the alleged victim." Testimony regarding the sexual practices of Tikkuri and Cynthia F. is distinguishable from the third-party testimony excluded in ***Rognrud*** and ***Olson***, which pertained to prior accusations not involving the defendants in those cases.

¶33 Based on the limited evidentiary record before us as to what the third parties will testify to, we conclude that the State's reliance on ***Rognrud*** and ***Olson*** to support its argument that any such third-party testimony would "present largely cumulative testimony" is misplaced. Neither Silver nor Mary Tikkuri were called upon to make offers of proof for the court that was to preside over the retrial before it decided to exclude their testimony. It appears the court's opinion with respect to Silver's testimony was based on the offer of proof that was given prior to the first trial. Furthermore, the nature of Mary Tikkuri's anticipated testimony is unclear from the record before us.

¶34 Consequently, we conclude that the trial court's reasons for excluding testimony from third-party witnesses were the result of a mistaken view of the law. In light of the limited information before it, there was not an adequate basis for the court to determine that testimony from third-party witnesses would be cumulative given that Silver appears to be the only eyewitness to Tikkuri and Cynthia F.'s sexual practices. Moreover, there is no support for the court's conclusions with respect to Mary Tikkuri's testimony as it has yet to be established what exactly she intends to testify to.

¶35 A plenary new trial requires that Tikkuri be afforded the opportunity to present new offers of proof. *See generally* ***State v. Wurtz***, 141 Wis. 2d 795, 800, 416 N.W.2d 623 (Ct. App. 1987) (holding that "the subsequent trial court on remand is not limited to the discretionary decisions made by the original court, but is bound only to apply the law determined by the appellate court in reaching a reasoned conclusion"). Once the court applies ***Jackson***'s legal standard, it may turn out that Tikkuri's proffered evidence from third-party witnesses is inadmissible. However, this is a decision that is left to the trial court's discretion. ***Id.***, 216 Wis. 2d at 655.

¶36 Based on the foregoing, we conclude that prior to Tikkuri's retrial, a pretrial hearing should be held so that the trial court can review in detail whether the third-party testimony is material and of sufficiently probative value to outweigh its inflammatory and prejudicial nature, in accordance with ***Jackson*** and WIS. STAT. § 971.31(11).

By the Court.—Order affirmed in part; reversed in part and cause remanded for further proceedings.

Not recommended for publication in the official reports.