

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 4, 2008

David R. Schanker
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. 2007AP2728-CR

Cir. Ct. No. 2005CF699

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARRYL L. SALTERS,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Darryl Salters appeals a judgment convicting him of sexual assault as a persistent repeater. He also appeals an order denying his postconviction motion in which he alleged ineffective assistance of trial counsel based on counsel's failure to call seven witnesses. He argues: (1) he did not

receive proper notice of the prior convictions that support the repeater enhancer; (2) his right to a jury trial was violated because the existence of the prior convictions was not determined by the jury; and (3) he was denied effective assistance of counsel. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 Salters was convicted of sexually assaulting N.C., a prison food service employee. She testified that Salters sexually assaulted her in the basement of the kitchen area at the prison. He pushed her to the floor and sucked her breasts. She struck him, causing him to bleed from his mouth, and she cried out for help from a guard two stories above the basement. A guard responded. The guard testified that as he approached the elevator area, he heard N.C. yell, “He’s trying to rape me, please help.” When the guard unlocked the door, he observed N.C. with scratch marks on her arms and chest area, and her shirt was out of place with part of her shoulder showing. Salters’ shirt was also torn, his upper lip was bloody, he had scratch marks on his arms, and both of their shirts had blood stains. Salters also had scratch marks on his arms.

¶3 The defense contended the sexual contact was consensual, and N.C. cried rape when she feared her consensual sexual conduct would be discovered by a guard. Salters did not testify. However, another prisoner, Antron Kent, testified that N.C. and Salters had a “real friendly relationship.” He said Salters never got in trouble, and he was allowed to eat things other inmates were not allowed to eat. The jury convicted Salters of sexually assaulting N.C. and, based on Salters’ prior convictions for sexual assault of children, the court sentenced Salters as a habitual

criminal to life imprisonment without the possibility of parole or extended supervision.

¶4 At the postconviction hearing, Salters identified three additional inmates and four prison employees who he contends his trial counsel should have called as witnesses. They would have confirmed that N.C. was friendly and flirtatious with Salters, that N.C. violated prison rules by touching their arms or shoulders, and by speaking with Salters behind closed doors. They would have testified N.C. did not appear traumatized after the assault. Salters' trial attorney testified he did not call one of the witnesses because the witness indicated he would not testify. He also believed the proffered testimony would not have been admitted and that it was cumulative to Kent's testimony. The trial court found that much of the proffered testimony would have been inadmissible. The court would not allow any testimony regarding inappropriate behavior with inmates other than Salters. The closed door meeting was deemed irrelevant and immaterial.

¶5 N.C.'s co-workers would have testified that she violated prison rules by her friendly association with Salters. One fellow employee would have testified that N.C. did not appear to be traumatized after the incident. The trial court concluded that the testimony would not have been admissible because much of it was hearsay, irrelevant, and its minimal probative value was substantially outweighed by its prejudicial effect. The fellow employee's assessment that N.C. did not appear traumatized was consistent with N.C.'s testimony that she attempted to appear "controlled" and "calm" even though she was "jittery inside." The court concluded Salters' trial counsel was not deficient and Salters suffered no prejudice from his counsel's failure to call these witnesses.

DISCUSSION

¶6 Salters received adequate notice of the crimes the State intended to use to establish he was a persistent repeat offender. The Information specified two counts of second-degree sexual assault of a child and gave the dates the crimes were committed and the dates of the convictions. Salters complains that the State did not indicate the county in which the offenses occurred. No law requires the State to specify the county. An allegation of habitual criminality should identify the nature of the offense and the date of conviction. *See State v. Gerard*, 189 Wis. 2d 505, 515-16, 525 N.W.2d 718 (1995). The notification provided by the Information in this case complies with the requirements of WIS. STAT. § 973.12(1)¹ and Salters' due process rights. *See State v. Stynes*, 2003 WI 65, ¶15, 262 Wis. 2d 335, 665 N.W.2d 115.

¶7 Salters was not entitled to have the jury determine his persistent repeater status. Penalty enhancers based on previous convictions are not matters that must be submitted to the jury. *See State v. Saunders*, 2002 WI 107, ¶44, 255 Wis. 2d 589, 649 N.W.2d 263.

¶8 Salters has not established ineffective assistance of trial counsel for failure to call other inmates or prison employees. To establish ineffective assistance, Salters must prove deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Counsel is not ineffective for failing to call witnesses whose testimony would not have been admissible. Testimony about friendly or flirtatious behavior, even if it violates prison rules, does not tend to

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

establish consent for sexual activity. Testimony about N.C.'s behavior with other inmates is barred by WIS. STAT. § 972.11. In addition, Salters has not established prejudice because none of the proffered testimony would have created reasonable doubt on the issue of consent. The injuries to N.C. and Salters and her cry for help that was heard by a guard two stories above her establish lack of consent. Salters' claim that she shouted because the security guard caught her having consensual sexual contact with Salters is not supported by any testimony. N.C. had no way of knowing where the guard was at the time she began to call for help and the guard was not close to discovering the sexual activity when he first heard her cry rape. None of the proffered evidence regarding N.C.'s conduct or demeanor before or after the assault would overcome the strong evidence of nonconsent.

By the Court.—Judgment and order affirmed.

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

