COURT OF APPEALS
DECISION
DATED AND RELEASED

May 14, 1997

NOTICE

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.

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

No. 96-2211-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES M. PIRK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Affirmed.*

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

PER CURIAM. James M. Pirk appeals from a judgment of conviction for first-degree sexual assault of a child, for which he was sentenced to twenty-five years in prison. On appeal, he contends that his right to present a

defense was violated by an evidentiary ruling. We conclude that the trial court properly excluded the evidence as irrelevant. Because we conclude that the evidence was properly excluded, we also reject Pirk's request for a new trial in the interests of justice.

Pirk was charged with sexually assaulting a five-year-old girl, for whose mother he was doing some work. On October 20, 1994, the mother found Pirk and her daughter in the basement of the family home. The next day, Aaron Greene, Pirk's cousin, baby-sat for the mother's children and briefly spoke with the girl in private. Greene testified that the girl told him about the assault; he then told the mother, and Pirk was ultimately charged with the crime.

At trial, Pirk sought to challenge Greene's credibility through the testimony of Kirsten Lueckfeld. Lueckfeld testified that Greene "lies all the time." Pirk's counsel then sought to have her testify that as part of a fantasy game called "Realms," Greene told her that "my brother was supposed to molest the little boy that lives downstairs from me when he turned seven and a half, and when he did, [Greene] would know about it, pull him into the Realms and kill him and he wouldn't wake up." The court excluded the testimony, stating that "[u]nless there's some expert testimony that can link up that kind of behavior, those kind of visions, enjoyment in those kind of games with a person who is in fact a sexual abuser, I, I have some question about the relevance overall, but I think before it can even be considered as relevant, there has to be some relationship between that

game playing and the actual event, and I think that takes some expert testimony." The jury ultimately convicted Pirk, and he appeals.

We begin by noting that whether the exclusion of evidence deprives a defendant of a right to present a defense is a question of constitutional fact which this court may determine without deference to the lower court. *See* ***State v. Pulizzano,*** 155 Wis.2d 633, 648, 456 N.W.2d 325, 331 (1990). Pirk first contends that the evidence was relevant to show that Greene had a motive to fabricate the offense. We cannot agree. Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. *See* ***State v. Brewer,*** 195 Wis.2d 295, 308, 536 N.W.2d 406, 412 (Ct. App. 1995). To be relevant, an item of proof need not prove the matter by itself; it need only be a single link in the chain of proof. *See* ***id.*** at 309, 536 N.W.2d at 412. Even so, we are unconvinced, as was the circuit court, of the relevance of a statement, made some year and a half before the crime charged here, concerning a fantasy-game vision having to do with the imagined sexual assault of some other child of a different sex.

The circuit court made its determination based on the facts of the case, the relevant law, and a process of logical reasoning; we conclude that its discretion was properly exercised. *See* ***State v. Walker,*** 154 Wis.2d 158, 192, 453 N.W.2d 127, 141 (1990). Pirk's constitutional right to present a defense is

therefore not violated because a defendant has no constitutional right to present irrelevant evidence. *See* ***id.***

Alternatively, Pirk contends that the evidence was relevant to show that Greene himself committed the sexual assault. Again, we cannot agree. This court has stated that there must be a legitimate tendency that the third person could have committed the crime before any proffered evidence of that person's guilt is relevant. *See* ***State v. Jackson,*** 188 Wis.2d 187, 195, 525 N.W.2d 739, 742 (Ct. App. 1994). This test asks whether the proffered evidence is so remote in time, place or circumstances that a direct connection cannot be made between the third person and the crime. *See* ***id.*** Because time, place and circumstances are all sufficiently remote, as we detailed above, we conclude that no legitimate tendency exists here to make this evidence relevant.

Finally, Pirk asks that this court exercise its discretionary power under § 752.35, STATS., and reverse the judgment in the interests of justice. Concluding, as we have, that the circuit court did not err in excluding this evidence, we decline Pirk's invitation.

By the Court.—Judgment affirmed.

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