

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

July 31, 1997

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. 96-3673-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL B. BORHEGYI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Oconto County: LARRY L. JESKE, Judge. *Affirmed.*

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

PER CURIAM. Michael Borhegyi appeals his conviction for burglary, false imprisonment, and second-degree sexual assault by use of force, after a trial by jury. Borhegyi claims that the trial court erred by refusing to allow evidence that the victim had made false sexual assault accusations against others and was continuing to make them against him. According to Edward Burke, who

was Borhegyi's first trial counsel, John Kaquatosh told Burke that the victim had made false accusations against him personally and other men to mollify her husband over her extramarital affairs. On appeal, Borhegyi seemingly argues that he had a right to examine Burke about Kaquatosh's out-of-court statements and to adversely examine the victim and Kaquatosh about the false accusations. Borhegyi bases this right on the rape shield law, his confrontation and compulsory process rights under the United States and Wisconsin Constitutions, and his right to effective trial counsel. The rape shield law allows the admission of prior false accusations in certain circumstances, *see* § 972.11(2)(b)3, STATS., and Borhegyi's confrontation and compulsory process rights allowed Borhegyi to present relevant, nonprejudicial evidence. *See State v. Pulizzano*, 155 Wis.2d 633, 646, 456 N.W.2d 325, 330 (1990). Borhegyi also briefly mentions two other instances of ineffective trial counsel. We reject Borhegyi's arguments and therefore affirm his conviction.

According to Burke, Kaquatosh told him that the victim made such false allegations against both Kaquatosh and other men. In an offer of proof, Kaquatosh denied making such a statement to Burke and denied any knowledge of any false accusations. We need not address Borhegyi's claim that the false accusation evidence was admissible to help substantively refute the victim's rape charge. Borhegyi never attempted to introduce the evidence for that purpose. At trial, Borhegyi sought to introduce Burke's report of Kaquatosh's out-of-court statements solely to impeach Kaquatosh with a prior inconsistent statement; Borhegyi never sought to use it or the other evidence to substantively refute the victim. We will not consider arguments raised for the first time on appeal. *See Wirth v. Ehly*, 93 Wis.2d 433, 443, 287 N.W.2d 140, 145 (1980). Consequently, we will not consider Borhegyi's argument that the evidence was admissible to

refute the victim's rape charge. We also note that Kaquatosh's statements to Burke probably contained inadmissible hearsay. *See Caccitolo v. State*, 69 Wis.2d 102, 107, 230 N.W.2d 139, 142 (1975). Specifically, Borhegyi offered no evidence to show how Kaquatosh could have acquired nonhearsay knowledge of such false accusations.

We also reject Borhegyi's argument that the trial court erred by limiting Burke's testimony to impeach the state's witness, Kaquatosh. A trial court has wide discretion in determining whether to admit or deny evidence. *State v. Evans*, 187 Wis.2d 66, 77, 522 N.W.2d 554, 557 (Ct. App. 1994). Here, we are satisfied the trial court reasonably exercised its discretion by restricting the attempt to impeach the state witness Kaquatosh when it barred Burke from making any reference to prior false allegations of sexual assault. First, Burke's testimony would not impeach Kaquatosh's testimony that Borhegyi admitted committing the sexual assault against the victim. There is nothing inconsistent in these two statements. Stating that Borhegyi admitted committing the sexual assault is not inconsistent with stating that the victim made prior false allegations of sexual assault. Additionally, in that Borhegyi failed to show that the victim made prior false allegations of sexual assault, there was no justification to allow Borhegyi to present such information under the guise of impeaching the state's witness.

Borhegyi has not shown that he received ineffective representation on the issue of the victim's prior false sexual assault allegations. Borhegyi may not sustain such a claim unless he shows both deficient performance by trial counsel and prejudice from the performance. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). At the postconviction stage of proceedings, Borhegyi needed to show that he had prior false sexual assault accusations by the victim that seriously undermined her rape charge. *See id.* Borhegyi states that trial counsel

should have adversely examined the victim—at least by offer of proof—about her alleged prior sexual assault accusations; he also seems to suggest that trial counsel should have proven her false accusations by other means possible. To meet the two *Strickland* criteria, Borhegyi needed to show that the evidence trial counsel overlooked was admissible. Evidence of false sexual assault accusations is inherently prejudicial, and trial courts may therefore exclude such evidence if it falls short of minimum probative value standards. See *State v. DeSantis*, 155 Wis.2d 774, 785-86, 456 N.W.2d 600, 605-06 (1990); see also *State v. Hungerford*, 84 Wis.2d 236, 257, 267 N.W.2d 258, 269 (1978). Proponents of such evidence must supply a threshold factual basis on probative value to make it admissible. See *DeSantis*, 155 Wis.2d at 785-86, 456 N.W.2d at 605-06; see also *State v. Johnson*, 181 Wis.2d 470, 482-83, 510 N.W.2d 811, 814-15 (Ct. App. 1993). If Borhegyi has no such evidence, he has no valid ineffective counsel claim.

Borhegyi's trial counsel had at least three ways to try to prove the victim's false accusations: (1) Kaquatosh's adverse examination; (2) Burke's testimony of Kaquatosh's out-of-court statements; and (3) the victim's adverse examination, initially by offer of proof. In the end, however, none of these would have produced admissible evidence. First, while trial counsel did adversely examine Kaquatosh at trial by offer of proof, Kaquatosh stuck to his in-court story that he knew of no such accusations, and counsel was unable to shake it; Borhegyi has not shown what more trial counsel could have done to extract a contrary admission from Kaquatosh. Second, Burke's report of Kaquatosh's out-of-court statements was too indefinite to have sufficient probative value; Kaquatosh gave Burke no information whatsoever about the time, place, cause, content, degree, manner, purpose, condition, or audience of any of the false accusations. Third,

while Borhegyi failed to call the victim as a postconviction witness, he had no basis to call her; Burke's and Kaquatosh's testimony gave Borhegyi insufficient threshold proof to subject her to such self-abasing questioning. Borhegyi therefore cannot show that her adverse examination by offer of proof at trial would have uncovered admissible evidence. In short, none of Borhegyi's potential prior false accusation evidence met minimum probative value standards, *see DeSantis*, 155 Wis.2d at 785-86, 456 N.W.2d at 605-06, and it was not admissible to refute the victim under the rape shield law, § 972.11(2)(b)3, STATS., the rules of evidence, or Borhegyi's constitutional rights to confrontation and compulsory process. It does not show defective performance or prejudice under *Strickland*.

Last, Borhegyi briefly mentions, without argument, two other instances of ineffective trial counsel. He complains that his trial counsel never requested (1) a theory-of-defense instruction on consent or (2) a separate instruction explaining to the jury how they could read the evidence to find him guilty of criminal trespass, while at the same time finding him not guilty of false imprisonment and second-degree sexual assault. We will not consider issues raised but not argued. *See Reiman Assoc. v. R/A Adver.*, 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981). In any event, we see no evidence that such instructions were necessary. The evidence at trial revealed to the jury the factors they should consider in reaching a verdict. The evidence made plain that Borhegyi was relying on consent as a defense, the trial court told the jury that nonconsent was an element, and Borhegyi's counsel made a closing argument based on consent. Consequently, Borhegyi did not need a specific theory-of-defense instruction to convey that idea to the jury. Further, Borhegyi's counsel argued during summation that Borhegyi may have committed criminal trespass, but not rape or false imprisonment. This adequately apprised the jury that it had

the power to find Borhegyi guilty of some charges and not guilty of others. In sum, we see no need for the missing instructions, and Borhegyi suffered neither deficient performance nor prejudice under the two-pronged *Strickland* standards.

By the Court.—Judgment and order affirmed.

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

