

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 2, 2007

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. 2006AP1411-CR

Cir. Ct. No. 2002CF1166

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH J. BONG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: GERALD C. NICHOL and RICHARD G. NIESS, Judges. *Affirmed.*

Before Dykman, Lundsten and Peterson, JJ.

¶1 PER CURIAM. Joseph Bong appeals a judgment convicting him of one count of armed burglary of a room within a building, one count of armed robbery by use of threat of force, and three counts of first-degree sexual assault by use of a dangerous weapon, all as a repeat offender. He also appeals a

postconviction order denying his claims of evidentiary error and ineffective assistance of counsel. We affirm.

BACKGROUND

¶2 The charges arose out of allegations that an intruder entered the bedroom of Patricia M., a visually impaired person, while she was sleeping on September 4, 1997, and sexually assaulted her at knife point in several ways. Patricia testified that she retreated into a closet after the assaults. She testified that the intruder removed the bottom fitted sheet from her bed, disabled the bedroom phone, and stole money from her backpack. Patricia said the intruder indicated during the assault that he already knew Patricia was visually impaired, asked about her teenaged daughter, and appeared to have known the door would be unlocked, which led Patricia to believe that her assailant knew either her or her daughter.

¶3 Patricia called 911. The police took the remaining top bed sheet and other items, and transported Patricia to a hospital to have a sexual assault examination and get stitches for a knife cut on her hand. The nurse observed two cuts on Patricia's face, one on her neck, one on her hand, and a red bruise on her inner thigh close to the vagina, and noted that Patricia was "controlled, cooperative, quiet, trembling, and tearful." There was also a one-centimeter abrasion on the outer edge of her anus, but no discernible trauma to Patricia's vaginal tissue and no seminal fluid. The police did not recover any fingerprints from any of the items Patricia said the intruder had touched. The bed sheet taken from Patricia's house was not tested for DNA until June of the following year.

¶4 About a month after the reported assault, the investigating detective informed Patricia that he believed she made up the entire story. According to Patricia, during a two-hour interview, the detective repeatedly asked Patricia why

she made up the story and told her she would be detained on suicide watch unless she admitted making up the story. Patricia testified that she finally agreed that she made it all up. She testified that she did not think the police would let her leave until she did. Over time, Patricia became increasingly certain that her assailant was a person named Dominic Pena, her daughter's boyfriend at the time and the former boyfriend of her sister.

¶5 Over three and a half years after the reported assault, the police discovered a "match" to Bong from the biological samples on Patricia's bed sheet. Patricia's daughter Misty recognized Bong as someone she had known since high school. Misty had dated Bong's cousin Lonnie Elvord at one time and was also a friend of another one of Bong's cousins, John Quamme. Elvord testified he was aware that Patricia collected money from vending machines and kept it in a vinyl bag. He also said he had either brought Bong along with him or picked him up from Misty's house once or twice while Bong was living with him. Misty told investigators that Quamme had mentioned to her that Bong was someone she should consider a suspect, although Quamme denied making any such comment.

¶6 The defense theory at trial was that either Pena committed the assault or Patricia fabricated the incident to gain attention or sympathy and blamed Pena to try to undermine his relationship with her daughter.¹ A critical element of the defense strategy was to show that Bong's DNA got onto Patricia's bed sheet as the result of an alleged sexual encounter he had with Misty in her mother's bedroom. Bong did not testify, however, and Misty denied that she had ever been

¹ Initially, Patricia told police she suspected Pena.

in her mother's bedroom with Bong. In fact, Misty said that she had only met Bong twice and, to her knowledge, he was never at her house.

¶7 Bong countered Misty's testimony with the testimony of Ben Donahue, who had been a good friend of Bong for fourteen years. Donahue said that sometime toward the end of summer in 1997, he saw Misty performing fellatio on Bong in a "back room" at Misty's house, apparently in exchange for marijuana. Donahue did not further describe the room where this alleged incident occurred.

¶8 Bong unsuccessfully sought to introduce a prior statement Misty made to one of the investigating agents. Misty told Special Agent Elizabeth Feagles that she had intercourse with Bong on one occasion at the residence Bong shared with Quamme. Misty was still in high school and Bong was on "the bracelet" at the time. Thus, counsel explained, the sexual encounter between Bong and Misty at Quamme's house could have been as late as three and a half months before Patricia's assault.

DISCUSSION

Misty's Prior Sexual Conduct

¶9 The first issue on appeal is whether the trial court erroneously exercised its discretion or violated Bong's due process right to present a defense when it barred Bong from asking Misty whether she had sex with Bong on one occasion at Quamme's house when she was in high school and Bong was on electronic monitoring, as she had told Special Agent Feagles.

¶10 We will uphold the trial court's decision so long as the court rationally applied the proper standard of law to the facts of record. *Martindale v.*

Ripp, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. However, whether an evidentiary decision deprives a defendant of the right to present a defense is a constitutional question which we review *de novo*. See *State v. Heft*, 185 Wis. 2d 288, 296, 517 N.W.2d 494 (1994).

¶11 The admissibility of evidence is subject to multiple layers of analysis. First, evidence is not admissible unless it is relevant—meaning that it has a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable.” WIS. STAT. §§ 904.01 and 904.02 (2005-06).² Next, evidence which has some relevance may still be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” WIS. STAT. § 904.03. In addition, regardless of relevance or probative value, evidence of “other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith,” although such other acts evidence may still be used to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. WIS. STAT. § 904.04(2)(a).

¶12 A defendant’s right to present a defense may in some cases require the admission of testimony which would otherwise be excluded under applicable evidentiary rules. See *State v. Pulizzano*, 155 Wis. 2d 633, 648, 456 N.W.2d 325 (1990). The right to present a defense through the testimony of favorable

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

witnesses and the effective cross-examination of adverse witnesses is grounded in the confrontation and compulsory process clauses of the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution. *Id.* at 645. In order to warrant a new trial, a defendant must show that a violation of the confrontation clause or compulsory due process clause “completely” prohibited him from exposing a witness’s bias or motive for testifying falsely, or deprived him of material evidence so favorable to his defense as to “necessarily” prevent him from having a fair trial. *See United States v. Manske*, 186 F.3d 770, 778 (7th Cir. 1999); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982).

¶13 Bong contends that Misty’s prior sexual act with Bong at Quamme’s house is relevant. Specifically, he claims the prior sexual act bolsters the credibility of Donahue’s assertion that he saw Misty performing fellatio on Bong at Misty’s house, while at the same time undermining the credibility of Misty’s assertions that she only met Bong twice, never invited him to her house, and never had sex with him in her mother’s bedroom. In short, Bong reasons that the jurors might have been more likely to believe that a sexual encounter between Bong and Misty took place in a back bedroom of Misty’s house, as Donahue said and Misty denied, if they knew Misty admitted she and Bong had a prior sexual encounter.

¶14 We will assume for the sake of argument that the proffered evidence has at least some relevance under WIS. STAT. § 904.02, given Bong’s obvious need to show that his semen could have been deposited on Patricia’s bed sheets at some time other than the alleged assault, such as during a sexual encounter with Misty. We are not persuaded, however, that the probative value of the excluded evidence was great enough to survive a challenge under WIS. STAT. § 904.03.

¶15 As Judge Niess’s postconviction decision points out, even if the jury had accepted all of Donahue’s testimony and rejected all of Misty’s testimony, that does not place Bong in Patricia’s bedroom during the relevant time period. There was nothing in Donahue’s description of the “back room” where he allegedly witnessed a sexual act between Bong and Misty that would identify the bedroom as Patricia’s rather than Misty’s. For instance, Donahue did not describe the location of the room in relation to the other bedroom or mention anything about the color of the bedding or the fact that the bed consisted of a mattress on the floor with no box spring or bed frame. Moreover, Patricia testified that she routinely kept her bedroom door locked when she was not in it because she sometimes kept money from her vending machine route in there. Donahue did not describe seeing Misty unlock any door, or provide any possible explanation for why Misty would have taken Bong into her mother’s bedroom rather than her own.

¶16 In addition, Patricia testified that she last washed her sheets about two weeks before the assault, which occurred on September 4, 1997. Therefore, in order to provide a plausible alternative explanation for his semen, Bong needed to show that any sexual contact he had with Misty occurred within a time frame roughly two weeks before the assault. Donahue’s testimony that he saw a sexual act occur sometime “towards the end of the summer” in 1997 was too vague to say with any certainty what week he was talking about.

¶17 Given the low probative value of Donahue’s testimony, even if believed, additional evidence offered merely to bolster Donahue’s credibility would have even lower probative value.

¶18 In sum, we cannot conclude that the trial court erroneously exercised its discretion in barring evidence concerning Misty's prior sexual conduct. It was reasonable for the court to conclude that the probative value of Misty's admission that she had sex with Bong at someone else's house while she was still in high school was substantially outweighed by the risk of confusing the central issue at trial—namely, how Bong's semen got onto Patricia's bed sheet since the last time she washed her sheets.

¶19 In light of our conclusion that Misty's admission of prior sexual contact with Bong could be properly excluded under WIS. STAT. § 904.03, we need not address whether it could also be excluded under WIS. STAT. § 904.04(2)(a) as other act evidence to show that Misty acted in conformity with her prior sexual conduct, or under some analogy to the Rape Shield Law.

¶20 We also reject Bong's claim that the evidentiary ruling deprived him of his constitutional right to present a defense. The exclusion of Misty's admission of a prior sexual encounter with Bong at a third party's house did not completely prohibit Bong from impeaching Misty, or deprive him of material evidence so favorable to his defense as to necessarily prevent him from having a fair trial. *Manske*, 186 F.3d at 778. Bong was allowed to ask Misty whether she had sex with him in her mother's bedroom, and she denied it. Misty's excluded statement that she had sex with Bong once at another time and place was not inconsistent with her trial testimony, and therefore would have had no impeachment value. In contrast, Bong was allowed to present other evidence which more directly contradicted Misty's denial—namely, Donahue's testimony that he had seen Misty performing fellatio on Bong in a "back room" of the house. This allowed Bong to make the argument that there was an explanation for his semen on Patricia's bed sheet, other than him being Patricia's assailant. We have

already explained why the excluded evidence would not have significantly altered the strength of Bong's case. We therefore find no due process violation.

Counsel's Performance

¶21 Bong next argues that trial counsel provided ineffective assistance in two respects: by failing to fully impeach Misty's testimony that Bong had never been to her house, and by failing to explain to Bong how his decision not to testify could affect the court's decision to exclude Misty's prior admission of a sexual encounter with Bong.

¶22 Claims of ineffective assistance of counsel present mixed questions of law and fact. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). We will not set aside the circuit court's findings about counsel's actions and the reasons for them unless those findings are clearly erroneous. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's constitutional right to the effective assistance of counsel is ultimately a legal determination, which this court decides *de novo*. *Id.*

The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them.

State v. Swinson, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12 (citations omitted).

¶23 Prior to trial, Misty told Special Agent Feagles that she met Bong when she was 14 or 15 years old through his cousin Quamme. This would have been about three or four years before the assault of her mother, about seven or eight years before the interview with Feagles, and about ten or eleven years before her trial testimony. She said she last saw Bong sometime during the summer or fall of 1996, when she was seeing Bong's other cousin Elvord. It is not clear from the statement whether this last encounter was also the time she had sex with Bong. Misty also told Feagles that she "was not certain if Bong was ever in her residence on Fairmont Avenue, but she thought that it was possible he did come to the house to pick up Elvord or herself."

¶24 At trial, Misty testified that she had only met Bong twice. She also said that, to her knowledge, Bong had never been to her house. On cross-examination, Misty admitted that she told Special Agent Feagles that she wasn't sure whether Bong had ever been to her house. She then agreed with defense counsel that it was possible that he had been there, but asserted that she had never invited him.

¶25 Bong now contends that counsel performed ineffectively by not asking Misty more specifically about her statement to Special Agent Feagles that it was possible Bong did come to the house to pick up Elvord or herself. Bong argues that the fact that he may have been to the residence to pick up Misty suggests she had a more substantial relationship with him than she indicated—and thus, again, would bolster Donahue's testimony that he saw Misty performing fellatio on Bong in a back room at Misty's house.

¶26 We see nothing deficient in counsel’s cross-examination of Misty, much less prejudicial. First of all, we do not see any point in Misty’s statement to Special Agent Feagles where she actually said that she had seen Bong more than the two instances she described. We do not view Misty’s statement to Feagles—that she was not sure if Bong might have come by her house to pick up Elvord or her—as inconsistent with her trial testimony that Bong might have been at her house in addition to the two times she could recall meeting him. As the State points out, it is entirely possible for someone to give a person a ride without actually entering that person’s house. It is also possible that the day Bong may have picked up Misty was the same day they had sex at Quamme’s house and the last time she saw him. Furthermore, even if there was a possible inconsistency in the number of times during high school that Misty met Bong, we are not persuaded that the fact that Bong may have picked up Misty sometime during 1996, when she was dating his cousin Elvord, would have lent significant support to Donahue’s account of what he says he saw.

¶27 Bong also contends that counsel was ineffective for failing to fully apprise him of the consequences of choosing not to testify. Specifically, Bong argues that if he himself had directly testified he had an ongoing sexual relationship with Misty and had oral sex with her in her mother’s bed³ within a few weeks of the alleged assault on Patricia, the court would then have been

³ The State points out that Bong’s affidavit to the trial court and testimony at the *Machner* hearing did not give specific dates for any alleged sexual encounters between him and Misty and did not even say that he and Misty had sex on Patricia’s bed. We agree with the State that Bong’s argument could be rejected on this basis. However, since trial counsel testified at the *Machner* hearing that Bong had made that assertion to him, we will assume for the sake of argument that Bong would have so testified.

required to admit Misty's prior statement that she and Bong had sex on one occasion while she was in high school.

¶28 Bong's argument on this issue suffers from the same flaw as his contention that Misty's prior statement to Feagles should have been admitted to bolster Donahue's testimony. That is, Misty's admission that she had a single sexual encounter with Bong at a third party's house sometime before the fall of 1996 (which she told Feagles was the last time she had seen Bong) had next to no probative value on the question whether she also had a sexual encounter with Bong in her mother's bed within the week or two before her mother was assaulted in September 1997. Moreover, since nothing in Misty's earlier statement to Feagles contradicted her testimony that she never had sex with Bong in her mother's bedroom, the prior statement had little if any impeachment value. Therefore, we disagree with Bong's premise that Misty's prior statement would have been admissible if only Bong himself had testified. Consequently, we conclude that counsel did not perform ineffectively by failing to advise Bong that Misty's prior statement would come in if Bong testified.

Discretionary Reversal

¶29 Finally, Bong asks this court to exercise its discretionary reversal power. WISCONSIN STAT. § 752.35 allows this court to reverse a judgment by the trial court "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." There are separate criteria for analysis under each of these two grounds for reversal. *State v. Wyss*, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985). We may conclude that the controversy has not been fully tried either when the jury was not given the opportunity to hear testimony relating to an important issue in the case, or when

the jury had before it improperly admitted evidence which confused a crucial issue. *Id.* The miscarriage of justice standard requires a showing that a different result would be substantially probable upon retrial. *Id.* at 736, 741. In either case, however, we will exercise our discretionary reversal power only sparingly. *See Vollmer v. Luety*, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990).

¶30 We are satisfied that the real controversy was fully tried and that Bong's conviction was no miscarriage of justice. The real controversy was whether Bong assaulted Patricia on the night of September 4, 1997. To resolve this controversy, the jury had to determine: first, whether an assault had actually occurred, notwithstanding Patricia's recantation when told that police did not believe her; and, if so, whether Bong was the perpetrator. The evidence supporting the occurrence of an assault was vigorously debated at trial, and the jury obviously found that Patricia's initial report was truthful and that the recantation was false.

¶31 Because Patricia was visually impaired and could not identify her attacker, the critical evidence at trial was a stain found on one of Patricia's bed sheets. Testing revealed that the stain contained a mixture of Bong's semen with Patricia's DNA. Since there was never any suggestion that Bong and Patricia had even met, much less had a consensual sexual relationship, Bong sought to explain that his semen resulted from a sexual encounter he had with Patricia's daughter. To succeed, the jury had to not only reject Misty's outright denial of any sexual encounter with Bong in her mother's bedroom, but to then find that Bong's semen had *coincidentally* mixed with a bodily secretion from Patricia on the sheet without any DNA contribution from Misty. In light of this DNA evidence, we do not consider it substantially probable that there would have been any different result at trial even if Bong had directly testified that he had sex with Misty on the

bed and Misty had testified that she had sex with Bong once while in high school and that Bong might have picked her up at her house when she was dating his cousin the year before the assault.

By the Court.—Judgment and order affirmed.

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

