COURT OF APPEALS
DECISION
DATED AND FILED

November 16, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP556-CR **Cir. Ct. No. 2007CF1236**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CRAIG D. MILLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: MARC A. HAMMER, Judge. *Judgment affirmed; order reversed and cause remanded with directions*.

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

¶1 PER CURIAM. Craig Miller appeals a judgment convicting him of second-degree sexual assault of a child as party to a crime and an order denying his motion for postconviction relief. Miller argues he was entitled to a new trial

based on newly discovered evidence. The trial court denied Miller's motion, finding that, regardless of newly discovered evidence, Miller's own testimony established a factual basis for his conviction as party to a crime. We conclude the trial court erred by applying an improper legal standard for party-to-a-crime liability. We therefore reverse and remand for reconsideration of Miller's motion using the proper legal standard.[1]

BACKGROUND

¶2 On November 16, 2007, Craig Miller, Bruce Johnson, and another man identified as "Drey"[2] checked into a Green Bay motel room with two minor females, seventeen-year-old Tia and fifteen-year-old Tianna. On the way to the motel room, the men obtained a large quantity of alcoholic beverages. Once in the room, Tianna consumed enough alcohol to become "very drunk."

¶3 Because of her intoxication, Tianna was not exactly certain what happened in the motel room. She recalled that she was naked, but could not remember how her clothes were removed. She remembered lying on a bed with all three men "on top of her." She stated that Johnson had vaginal intercourse with her on the bed while Drey put his penis in her mouth. After that, Tianna said she got out of the bed, put her clothes back on, and went into the bathroom. Drey followed her into the bathroom and had vaginal intercourse with her there. Miller

[1] Miller also argues he was entitled to a new trial in the interest of justice. Because we remand to the trial court for reconsideration of Miller's newly discovered evidence claim, we do not address his interest of justice claim. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (cases should be decided on the narrowest possible grounds).

[2] At various points in the record, this individual is referred to as "Drey," "Dru," and "Drew." For clarity, we will refer to him as "Drey" throughout this opinion. He was never identified or located.

also had vaginal intercourse with her in the bathroom. Tianna told police she did not consent to any sexual activity and all the sexual contact in the motel room was forced. Miller denied having any sexual contact with Tianna.

¶4 Two days later, Tianna was examined by a sexual assault nurse. A police officer present at the examination collected the clothes Tianna had been wearing during the alleged assaults.

¶5 An amended information charged Miller with one count each of first-degree sexual assault and second-degree sexual assault of a child, both as party to a crime. A three-day jury trial was held in September 2008. Barbara Sylvester, a DNA analyst at the Wisconsin State Crime Laboratory, testified regarding her analysis of the clothing and biological samples collected from Tianna. Sylvester stated she found semen in only one location, the crotch of Tianna's underwear. Sylvester testified she had excluded Miller as the source of the semen. Sylvester also found DNA mixtures from at least two individuals on the crotch, button, and zipper fly of Tianna's blue jeans and on the inside surfaces of her brassiere cups. Miller was not one of the possible contributors to the DNA on the crotch of Tianna's jeans. Sylvester testified that she could not exclude Miller as a possible contributor to the DNA on the button and fly of Tianna's jeans and that Miller was a possible contributor to the DNA on Tianna's brassiere cups. The jury found Miller guilty of first-degree sexual assault and second-degree sexual assault of a child, both as party to a crime.

¶6 Sometime after trial Sylvester supplemented her report, identifying the source of the semen from Tianna's underwear. Sylvester compared the semen to a DNA sample from Jose, Tianna's boyfriend. She concluded that "[t]he occurrence of the DNA mixture from the [underwear] … is approximately 29

trillion times more probable if it is a mixture of DNA from [Tianna] and [Jose] than if it is a mixture of DNA from [Tianna] and another unknown, unrelated individual." Sylvester also concluded Jose was a possible major contributor to the DNA mixture from the crotch of Tianna's blue jeans and a possible minor contributor to the mixture on the button and fly. When confronted with these results, Tianna admitted she had consensual sexual intercourse with Jose sometime between the alleged assaults and the sexual assault examination.

¶7 Miller filed a postconviction motion seeking a new trial or sentence modification. Miller contended he was entitled to a new trial because the post-trial DNA analysis was newly discovered evidence. He argued:

> Mr. Miller's jury heard that semen was present on the victim's panties. The jury did not know whose semen it was. The natural inference, given the allegations of multiple incidents of vaginal intercourse, would be that the semen belonged to another assailant. There was unidentified semen and an unidentified alleged co-actor, "Drey." If the jury made the reasonable inference that the semen was "Drey's," and that the semen was left by "Drey's" sexual assault, then Mr. Miller was guilty as a [party to a crime] even if his own semen was not present.
>
> The semen was not from any of the three alleged assailants, nor was it the product of an assault. The jury should have heard that.

Alternatively, Miller requested a new trial in the interest of justice.

¶8 The trial court denied Miller's newly discovered evidence claim. The court granted a new trial in the interest of justice on the first-degree sexual assault charge, but not on the second-degree sexual assault of a child charge. The court also denied Miller's request for sentence modification. Miller now appeals,

arguing the trial court should have granted a new trial on the second-degree sexual assault of a child charge.[3]

DISCUSSION

¶9 Miller contends Sylvester's post-trial DNA analysis is newly discovered evidence entitling him to a new trial. The decision to grant or deny a new trial based on newly discovered evidence is committed to the discretion of the trial court. ***State v. Boyce***, 75 Wis. 2d 452, 457, 249 N.W.2d 758 (1977). A trial "court erroneously exercises its discretion when it applies an incorrect legal standard to newly-discovered evidence." ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42.

¶10 To obtain a new trial based on newly discovered evidence, a defendant must show by clear and convincing evidence that: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking [the] evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." ***State v. Love***, 2005 WI 116, ¶43, 284 Wis. 2d 111, 700 N.W.2d 62 (quoted source omitted). If the defendant proves these four criteria, the trial court must determine whether a reasonable probability exists that a new trial would produce a different result. ***Id.***, ¶44. A reasonable probability of a different outcome exists if "there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a

[3] Miller does not appeal the court's denial of his request for sentence modification. The State does not appeal the court's decision to grant a new trial in the interest of justice on the first-degree sexual assault charge.

reasonable doubt as to the defendant's guilt." ***State v. McCallum***, 208 Wis. 2d 463, 474, 561 N.W.2d 707 (1997).

¶11 In this case, the trial court concluded the post-trial DNA analysis satisfied the first four prongs of the test for newly discovered evidence. However, the court determined there was not a reasonable probability that a new trial would result in a different outcome because Miller "essentially conceded through his testimony that he engaged in the criminal activity subject to this [second-degree sexual assault of a child] conviction." The court explained:

> Miller established a factual basis for the conviction during his testimony. He admitted that he signed for the motel room. Miller also testified that he never asked the girls how old they were. Miller acknowledged that he was 22 years old on the night of the incident. Miller said he believed sexual intercourse took place between [Drey] and Tianna at the motel, and that [Drey] told him that he had sex with Tianna. He admitted it was possible that he saw someone touch Tianna when she was dancing. Finally, he admitted that he never did anything to stop the intercourse or sexual contact, and that he did not take any steps to help the girls leave[.] Given the defendant's testimony, it is not reasonably probable that he would not be convicted of Second Degree Sexual Assault of a Child as Party to a Crime. (Record citations omitted.)

The testimony outlined by the trial court does not establish that Miller directly committed the crime of second-degree sexual assault of a child. In fact, Miller testified he did not engage in any type of sexual contact with Tianna. Thus, the trial court appears to have concluded Miller's testimony established he was guilty as a party to the crime by intentionally aiding and abetting its commission. *See* WIS. STAT. § 939.05(2)(b).[4]

[4] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶12 We agree with Miller that the trial court applied an incorrect standard for party-to-a-crime liability. The trial court apparently determined Miller could be guilty of second-degree sexual assault of a child as party to a crime if he observed the assault and failed to stop it. However, our supreme court has held that a defendant's mere failure to stop a crime is not sufficient to convict the defendant as a party to that crime. *See* ***State v. Rundle***, 176 Wis. 2d 985, 990, 500 N.W.2d 916 (1993).

¶13 In ***Rundle***, the supreme court considered whether a father who did nothing to stop his wife's "constant and horrific" abuse of their young daughter was himself guilty of child abuse. ***Id.*** at 992. The state prosecuted Rundle as a party to the abuse, arguing he aided and abetted his wife's behavior by failing to stop it. ***Id.*** However, the court held that even though Rundle may have been guilty under a different statute that criminalizes failure to prevent child abuse, the evidence was insufficient to show he had aided and abetted his wife's crime. ***Id.*** at 1008. The court concluded:

> [T]he legislature intended that, in order to obtain a conviction under … [WIS. STAT. §] 939.05(2)(b) … the state must prove the elements of aiding and abetting. The state must prove (1) that the defendant undertook some conduct (either verbal or overt) that as a matter of objective fact aided another person in the execution of a crime; and (2) that the defendant had a conscious desire or intent that the conduct would in fact yield such assistance.

Id. at 990. The central holding of ***Rundle*** is that a defendant does not aid and abet the commission of a crime unless the defendant engages in some affirmative conduct, either verbal or overt, that helps another person to commit a crime. Merely standing by and failing to prevent criminal conduct is not a sufficient basis for party-to-a-crime liability.

¶14 If Rundle was not guilty as a party to the ongoing abuse he observed and failed to stop, neither does Miller's testimony establish a factual basis for the second-degree sexual assault of a child conviction. Miller testified it was "possible" someone had sexual contact with Tianna while she was dancing. Even if Miller observed that sexual contact and failed to intervene, his failure to act was not affirmative conduct. Similarly, even if he assumed sexual activity was occurring out of his sight in the bathroom, his failure to intervene was not a verbal or overt act that aided in the commission of a crime. Miller admitted he rented the motel room and purchased the alcohol, but these actions are so attenuated from the actual act of sexual assault that we do not think they fit into the category of evidence required for party-to-a-crime liability under ***Rundle***. There is no testimony that these acts were part of a plan to commit sexual assault. Miller's actions, either individually or in combination, simply are not connected directly enough to the sexual assault to make him liable as party to a crime.

¶15 We conclude the trial court applied an incorrect legal standard for party-to-a-crime liability when considering whether the new DNA analysis created a reasonable probability of a different result. We therefore reverse and remand with directions that the trial court reconsider Miller's motion for a new trial using the correct legal standard.

By the Court.—Judgment affirmed; order reversed and cause remanded with directions.

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