COURT OF APPEALS
DECISION
DATED AND FILED

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Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-2537-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID WATTS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN J. DiMOTTO, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. David Watts appeals from the judgment of conviction, following a jury trial, for five counts of first-degree sexual assault and one count of kidnapping, and from the trial court order denying his motion for postconviction relief. He argues: (1) that the trial court "eviscerated [his] rights to

confrontation and to present a defense" by excluding DNA evidence establishing that semen found on the victim's clothing came from someone else; (2) that the trial erred in denying his request to introduce the victim's shirt in order to show the jury that no buttons were missing and no button holes were stretched; (3) that the trial court erred in refusing to admit photos of the scene where he encountered the victim, taken by a security surveillance camera; and (4) that the prosecutor's closing argument was improper. We affirm.

I. BACKGROUND

On the night of January 20, 1996, the victim, a nineteen-year-old woman, closed the Southridge Shopping Center store where she worked, and went to her car in the parking lot. As she sat in her car listening to the radio, smoking, and defrosting the windows, she opened the driver's side window about three inches. Watts drove up in a pickup truck and stopped about one parking space away from her. In their trial testimony, the victim and Watts provided drastically different versions of what then occurred.

The victim testified that Watts reached through her car window, grabbed the back of her head by her hair, hit her in the head and threatened her, indicating that he had a gun and a knife. When she tried to roll up the window, she accidentally rolled it down. Watts then pulled open her shirt, touched her breasts, and touched her vaginal area. He then pulled her from her car, threw her into his truck, drove her to another parking lot, continued to threaten her, and sexually assaulted her three more times. He then ordered her to dress, get out of the truck, and turn around so she would not see him drive off. The victim got out, observed the truck license plate, and ran to a nearby gas station where she reported the assaults to the clerk.

Watts testified that after finishing work at a restaurant near Southridge, and while preparing to go to his second job, he consumed approximately thirty-eight cans of beer and drove through the Southridge lot where he was attempting to make money by helping motorists start cars and get out of snow banks. He said the victim called him over and asked him for a ride to buy cigarettes. He observed her car running, so he asked why she would need a ride. She replied that sometimes her car engine cuts off. While he was leaning on her car with his hands on the car roof, the victim "came up from between the seats" with some object he could not identify and, when he grabbed her, she stuck him in his finger with something. She then opened her car door, hitting him in the leg with it. Because he was "high from the beer," he did not leave but, instead, pushed her away. When she continued to ask for a ride, he finally relented but warned that if she tried anything else, he would push her out of his truck.

Watts testified that while the victim was riding with him to get cigarettes, she offered "some honey for some money," and proposed "a blow job for $40." He said she then initiated sexual contact with him, further offered sex for $100 and, when he declined, asked that he take her back to Southridge. He refused and then ordered her out of the truck. He denied assaulting the victim.

Several other witnesses testified, corroborating the victim's account. Two, in particular, Kari Albanese and Ron Ostrowski, offered powerful testimony providing overwhelming support for her version.

Albanese, the gas station clerk, testified that the victim entered the station with a bloody nose and "messed up hair," and was so hysterical, shaky, and upset that she had to dial the phone for the victim to call her parents and 911. She also had to write down the license plate number the victim reported to her.

Albanese also testified that the victim told her that her car was at the Southridge lot, with the motor running, the door open, and her purse on the front seat. Ostrowski, a Greendale Police Officer, testified that he went to the Southridge lot where he found the victim's car with the driver's side door open, the window half-way down, the radio on, the motor running, and the victim's purse on the front seat.

Additional evidence corroborating the victim's account and undermining Watts's version included: a stipulation that testing of trace evidence confirmed that six of the victim's head hairs and one of her pubic hairs was found in Watts's truck; and weather records showing that both the snow depth and snowfall on January 20 were zero.

II. DISCUSSION

Watts first challenges three of the trial court's evidentiary rulings. To properly frame his arguments, it will be helpful to clarify exactly what the trial court excluded and allowed.

A. Semen

In pretrial proceedings, the prosecutor disclosed that "a very, very small amount [of semen was found] by the foot of the [victim's] nylon, a very minuscule amount on the tip of the belt that was part of a vest that [she] was wearing, … and in the crotch of her panties." DNA testing of the semen, however, excluded both the victim's boyfriend and Watts as the source. The State, in a motion *in limine*, sought to preclude the defense from introducing the test results. Defense counsel opposed the motion, contending that the DNA test evidence was necessary to: (1) support Watts's assertion that although the victim was in his

truck, he did not sexually assault her; (2) support the defense theory that the victim had falsely accused Watts in an effort to conceal her other sexual activity or possible pregnancy from her boyfriend; and (3) impeach the victim's statement to police that Watts may have ejaculated on her clothing.

The trial court correctly concluded that the evidence was barred under Wisconsin's rape shield law. *See* § 972.11(2)(b), STATS.[1] Watts does not challenge that ruling. The trial court then carefully carried out a confrontation clause analysis, *see generally* ***State v. Pulizzano***, 155 Wis.2d 633, 645-57 456 N.W.2d 325, 330-35 (1990),[2] and concluded that the evidence was relevant to

[1] Section 972.11(2)(b), STATS., states as follows:

> (b) If the defendant is accused of a crime under s. 940.225, 948.02, 948.25, 948.05, 948.06 or 948.095, any evidence concerning the complaining witness's prior sexual conduct or opinions of the witness's prior sexual conduct and reputation as to prior sexual conduct shall not be admitted into evidence during the course of the hearing or trial, nor shall any reference to such conduct be made in the presence of the jury, except the following, subject to s. 971.31 (11):
>
> 1. Evidence of the complaining witness's past conduct with the defendant.
>
> 2. Evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered.
>
> 3. Evidence of prior untruthful allegations of sexual assault made by the complaining witness.

[2] In ***State v. Pulizzano***, 155 N.W.2d 633, 456 N.W.2d 325 (1990), the supreme court explained:

> The constitutional right to present evidence is grounded in the confrontation and compulsory process clauses of Article I, Section 7 of the Wisconsin Constitution and the Sixth Amendment of the United States Constitution….
>
> The rights granted by the confrontation and compulsory process clauses are fundamental and essential to achieving the constitutional objective of a fair trial. The two rights have been appropriately described as opposite sides of the same coin and together, they grant defendants a constitutional right to present evidence. The former grants defendants the right to "effective"

(continued)

Watts's defense, *see* § 904.01, STATS. Finally, the trial court, carefully balancing whether the probative value of the test evidence was substantially outweighed by the danger of unfair prejudice, *see* § 904.03, STATS., concluded:

> In this particular case, while the evidence bears some relevance, it is so minimal that it is substantially outweighed by the danger of unfair prejudice and cannot be admitted in this trial.
>
> I say that because there is evidence of inconsistent statements made by the complainant ….
>
> The defense has the opportunity to challenge the credibility of the complainant and does not need to use evidence of minimal relevance which is substantially outweighed by the danger of unfair prejudice.
>
> The unfair prejudice, in essence being the jury saying there's semen on her from someone else, it didn't come from a sexual assault, it came at an earlier time, and therefore, is really a character[/]moral's issue and is not a credibility issue, therefore, the Court finds that the evidence, while it has minimal relevance, its relevance is substantially outweighed by the danger of unfair prejudice and, quite frankly, I think it misleads the jury and it confuses the issues.
>
> This is not a case of identification such that the origin of the semen has heightened relevance.
>
> Mr. Watts admits he was there in the vehicle. The complainant admits he was in the vehicle, that's not in dispute.
>
> What happened in the vehicle is in dispute and the presence of semen is not relevant to an extent that it's going to help the jury decide the credibility issue in this case.
>
> In fact, I believe the jury would be misled by this evidence, I believe it confuses the true issue and its

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> cross-examination of witnesses whose testimony is adverse, while the latter grants defendants the right to admit favorable testimony. *The right to present evidence is not absolute, however. Confrontation and compulsory process only grant defendants the constitutional right to present relevant evidence not substantially outweighed by its prejudicial effect*.

Id. at 645-46, 456 N.W.2d at 330 (citations omitted) (emphasis added).

> probative value is substantially outweighed by the danger of unfair prejudice.

Significantly, however, the trial court did *not* exclude *all* reference to the DNA test results. Instead, carefully considering the relevance of the evidence during the trial, the trial court guided the parties to develop a stipulation that foreclosed any reference to any *other* semen source but also informed the jury that *Watts's* semen had not been found on the victim's clothing. The stipulation stated:

> [I]tems of evidence were submitted for scientific analysis to the Wisconsin State Crime Lab and Laboratory Corporation of America.
>
> Clothing of David Watts was examined, and no trace evidence from [the victim] was found.
>
> *Clothing of [the victim] was examined, and no trace evidence of David Watts was found.*
>
> The truck of David Watts was examined, and no trace evidence of David Watts was found.
>
> Six head hairs and one pubic hair, consistent with [the victim], were found in the truck.
>
> Saliva samples from [the victim] were examined, and no trace evidence of David Watts was found. If called to testify, expert medical or forensic witnesses would state that chances of finding trace evidence of David Watts in the saliva samples of [the victim] would be minimal.

(Emphasis added.)

B. Shirt

The victim testified that Watts "pulled open" her shirt and touched her breasts as she sat in her car. Thus, the defense sought to introduce the shirt: "to show that there's no buttons missing. [sic] The button holes are not stretched. And if he were to have pulled it open, these type of buttons, button holes here definitely would have been at least one off, or the button hole stretched." [sic] The State objected, but the trial court concluded that the evidence was relevant and

admissible. Although, ultimately, the shirt was not introduced, defense counsel informed the jury of the parties' stipulation: "that the over blouse, the black shirt that [the victim] testified to that she wore over her black suit shirt, that there was [sic] no buttons missing, and that there were no buttonhole stretches apparent in that piece of clothing."

C. Photos

Greendale Police Detective Robert Malasuk testified that he had examined a videotape from the Southridge security cameras that panned the mall parking lot. He explained that the video did not provide a continuous view, but rather, provided "periodic flashes" of various areas of the lot. Defense counsel acknowledged that the video quality was "horrible" but sought to introduce photos. The photos, according to defense counsel, were "some shots they were able to freeze of our still frames" showing the victim's car and Watts's truck and, in defense counsel's estimation, allowing "for the jury to make the decision whether he is standing there with his arms on the vehicle … standing like he had indicated with his arms folded on the top of a vehicle." The trial court examined the photos and concluded:

> [W]ithout dispute from either the state or the defense, the photos do depict the vehicle of [the victim], the truck of Mr. Watts, they're in close proximity to one another. From my view of the photographs, it would appear that his vehicle is about one stall away from [the victim's] vehicle, as she testified. So, to an extent, that would provide some corroboration for her testimony. It also appears to have something standing at the driver's door side of [the victim's] vehicle, and I think everyone is willing to concede that that is Mr. Watts standing there. But you really can't tell it's a human being, although everyone, I think, concedes that he was standing at that door. In fact, [the victim] said he was standing at the door, and I assume he's going to say he was standing at the door. Whether or not he has his hands on the top of the vehicle, by the door

> frame, as I believe he's going to testify, or not, as [the victim] testified, you can't tell, and the photograph does not give any assistance in that regard. A jury, in looking at that photograph, would have to speculate, in fact, as to whether that is a human being, although there's a concession, I think, that it's him. They would have to totally speculate as to what he was doing with his body at that point in time.

Thus, the trial court determined that the photos "would not aid the jury in securing a clear idea of a material situation" and "would not do a better job than the testimony of witnesses." Accordingly, the court concluded that "the relevance of those photos is negligible" and that their relevance was "substantially outweighed by the danger of this jury being totally confused and misled, because those photos are so unclear." Watts does not dispute that trial testimony did indeed address exactly what defense counsel claimed the photos could convey.

Generally, a trial court has "wide discretion in determining whether to admit or exclude evidence." ***State v. Evans***, 187 Wis.2d 66, 77, 522 N.W.2d 554, 557 (Ct. App. 1994). On review, we determine whether the trial court exercised discretion in light of the facts of record and in accord with the appropriate legal standards. *See* ***id.*** Whether the trial court's determination denied a defendant the right to present a defense is "a question of constitutional proportion, however, and as such involves 'constitutional facts' which this court may review *de novo*." ***Michael R. B. v. State***, 175 Wis.2d 713, 720, 499 N.W.2d 641, 644 (1993). We conclude that the trial court properly exercised discretion.

We have carefully reviewed the record, including the excluded photos, and the trial court's analysis of each of the three evidentiary matters at issue in this appeal. In each instance, the trial court's evaluation was factually accurate and thorough, and legally sound. In each instance, the trial court's analysis and conclusion reflected complete understanding of the facts and

fastidious application of the law. Rather than merely repeat the trial court's analyses, we additionally observe three things.

First, the trial court confronted what, at first glance, seemed a particularly difficult determination of the admissibility of DNA test evidence. By truly grasping the factual matters at issue, and by carefully moving through a step-by-step consideration of the rape shield law, confrontation principles, and the balancing test, the trial court helped the parties hammer out a stipulation that properly separated the evidence into two sections: the admissible, establishing that Watts's semen was not found on the victim's clothing; and the inadmissible, establishing that someone else's semen was.

Second, in evaluating the much less complicated questions involving the admissibility of the shirt and photo evidence, the trial court also carefully assessed the facts and law. In each instance, the trial court again provided proper rulings based, in part, on its understanding of other evidence (a stipulation regarding the shirt, and testimony regarding the positions of Watts and the vehicles). Thus, the trial court protected both Watts's right to present a defense and the jury's access to relevant evidence, unencumbered by other information which could have been confusing.

Third, in light of the fact that, in each of the three challenged areas, the trial court did indeed allow evidence closely corresponding to that which Watts asserts also should have been admitted, and in light of the overwhelming evidence corroborating the victim's account, any conceivable error in any of these rulings was harmless. The victim's account was totally plausible; Watts's version was utterly preposterous. Among other things, acceptance of Watts's version would have required rejection of the testimony of Albanese and Officer Ostrowski, and

also would have required the belief that the victim would have voluntarily gone for cigarettes with a stranger and left her car – motor running, door open, purse on the front seat. Thus, we conclude that any possible error in the exclusion of the challenged pieces of evidence was harmless. *See* ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985) (error is harmless if there is no reasonable possibility that it contributed to the verdict).

Finally, Watts argues that "[t]he trial court should have ordered a mistrial, or at a minimum admonished the prosecutor and ordered the jury to disregard" his comments in rebuttal closing argument. The comments at issue arose from defense counsel's redirect examination question of Watts asking, "If [the victim] would have came [sic] on to you like you stated she did and did not mention money, and rub [sic] you, would you have been interested?" Watts answered, "What man wouldn't?" In closing argument, defense counsel revisited this area and, among other things, stated:

> Why did [Watts] go over to that shed [in the parking lot where the second set of assaults occurred]? Because as he told you, maybe [the victim] was going to give him some [sex for] free. But as soon as she got over there, he testified she upped the ante to a hundred dollars. So yes, he would have been interested, but he did not sexually assault this woman.

In rebuttal, the prosecutor also addressed this subject, offering comments including:

> And you remember when [Watts] was on the stand yesterday, [defense counsel] asked him, well if she had not required money, would you have gone and gotten some free sex? I think that was the question. And Mr. Watts's answer was, what man wouldn't. What man wouldn't.
>
> Well, I'll tell you what man wouldn't. I think a man with some values, and some principles, and some morals wouldn't. Just meet someone in a parking lot who wants a cigarette and within 10, 15 minutes go engage in

> sex? That's what man wouldn't. A man of values. A man of principles. A man who had a reputation. A man of character. A man of stature would not place himself in a situation of such dangerousness. Who knows what could happen. That type of man wouldn't.

Watts argues that the prosecutor's rebuttal argument deprived him of due process rights because it constituted an impermissible attack on his sexual morality. Watts, however, failed to object to the prosecutor's remarks. Thus he waived this issue. *See* ***State v. Coulthard***, 171 Wis.2d 573, 590, 492 N.W.2d 329, 337 (Ct. App. 1992) (defendant waives review of challenge to prosecutor's closing argument by failing to object and move for mistrial).

Despite Watts's waiver of this issue, we have discretion to review the propriety of a prosecutor's closing argument "where the error is so plain or fundamental as to affect the substantial rights of the defendant," ***State v. Neuser***, 191 Wis.2d 131, 140, 528 N.W.2d 49, 53 (Ct. App. 1995), or where a new trial is warranted in the interest of justice under § 752.35, STATS. *See* ***id.*** We have reviewed the challenged argument in light of the full trial record. Even assuming, *arguendo*, that the prosecutor's comments may have been improper, we see no possibility that the error was "so plain or fundamental as to affect [Watts's] substantial rights," and we see no basis for a new trial in the interest of justice.

By the Court.—Judgment and order affirmed.

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