

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 19, 1999

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. 98-1628-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BASIL RICHMOND,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Waukesha County: DONALD J. HASSIN, JR., Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Basil Richmond has appealed from judgments convicting him of three counts of second-degree sexual assault of a child in violation of § 948.02(2), STATS. He has also appealed from an order denying his motion for postconviction relief. We affirm the judgments and the order.

Richmond's first argument is that the trial court erred when it excluded evidence that C.P., the victim of these offenses, made contradictory statements about whether she was a virgin at the time they occurred. Richmond contends that this testimony was relevant to C.P.'s credibility and the credibility of Raymond Rivera, who testified that Richmond told him that he had sexual intercourse with C.P. and that she was a virgin at the time. Richmond contends that the exclusion of this evidence violated his constitutional right to confrontation.¹

Whether the exclusion of evidence violated a defendant's right to confront witnesses or present a defense is a question of constitutional fact. *See State v. Jackson*, 216 Wis.2d 646, 655, 575 N.W.2d 475, 480 (1998). When reviewing such a question, we will uphold the trial court's findings of fact unless clearly erroneous, but independently apply those facts to the constitutional standard. *See id.*

Evidence that is otherwise excluded by § 972.11(2)(b), STATS., the rape shield law, may be admissible if the evidence is so relevant and probative that the defendant's right to present it is constitutionally protected. *See State v. Pulizzano*, 155 Wis.2d 633, 647, 456 N.W.2d 325, 331 (1990). The defendant must show that the proffered evidence is relevant to a material issue, that it is necessary to the defendant's case, and that its probative value outweighs its prejudicial effect. *See id.* at 651-52, 456 N.W.2d at 333.

¹ Richmond contended in the trial court that exclusion of the evidence would violate his right to confrontation, regardless of the protections afforded by § 972.11(2)(b), STATS., the rape shield law. Because his objection raised the right to confrontation, we reject the State's contention that he waived this issue.

Richmond sought to elicit evidence that in a court proceeding in Nevada, C.P. testified that she was not a virgin at the time of these alleged offenses. He argued that this testimony was relevant to C.P.'s credibility because when these offenses were reported to the police, C.P. told an officer that she was a virgin.

Whether or not C.P. was a virgin at the time of these alleged assaults was a collateral issue because a sexual assault obviously can occur regardless of whether the victim is a virgin. Consequently, the issue was not directly relevant to whether Richmond assaulted C.P. Moreover, even if relevant to C.P.'s general credibility, it cannot be deemed necessary to Richmond's case or of sufficient probative value as to outweigh its prejudicial nature. Richmond conducted a thorough and detailed cross-examination of C.P. The evidence revealed to the jury that C.P. did not report the assaults when they occurred in 1992, that she lied to her father when he asked her in 1992 whether a sexual assault had occurred, and that she did not report the assaults until 1996, when her father confronted her after overhearing her discussing them in a telephone conversation. Because other evidence was presented establishing that C.P. had lied and was recalcitrant in making a complaint, the additional evidence that she may have lied regarding her virginity had little meaningful impeachment value. It was not of such importance and weight as to render it admissible contrary to § 972.11(2)(b), STATS., and its exclusion did not deprive Richmond of his right to confront C.P.

Contrary to Richmond's contention, testimony that C.P. made inconsistent statements regarding her virginity was also inadmissible to impeach the credibility of Rivera. Rivera testified that several months after the alleged assaults, Richmond told him that he had sexual intercourse with C.P. and that she was a virgin at the time. As noted by the trial court, Rivera was not testifying to

any personal knowledge of whether C.P. was or was not a virgin. He was merely relating what Richmond had told him. The fact that C.P. may not have been a virgin at the time of the assaults did not make it more or less probable that Rivera was truthfully relating what Richmond told him. Consequently, the evidence regarding C.P.'s inconsistent statements regarding her virginity was irrelevant to Rivera's testimony and credibility. See § 904.01, STATS. Richmond therefore had no constitutional right to present it in violation of § 972.11(2)(b), STATS.

Richmond's next argument is that his trial counsel rendered ineffective assistance when he failed to interview C.P.'s fiancée. To establish a claim of ineffective assistance, an appellant must show that counsel's performance was deficient and that it prejudiced the defense. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To satisfy the prejudice prong, the defendant must show that his or her trial counsel's errors were so serious as to deprive the defendant of a fair trial whose result is reliable, and that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. See *State v. Flynn*, 190 Wis.2d 31, 47, 527 N.W.2d 343, 349 (Ct. App. 1994). We need not analyze counsel's performance absent a showing that any alleged deficiencies prejudiced the defendant's case. See *id.* at 48, 527 N.W.2d at 349.

Richmond contends that he was prejudiced by counsel's failure to interview C.P.'s fiancée because her fiancée was allegedly the only person to whom C.P. confided that the assaults had occurred. However, despite having a postconviction hearing, Richmond presents no record of what information counsel would have gained if he had interviewed C.P.'s fiancée. He submitted no affidavit or testimony; he merely asserts that any information regarding statements C.P. made to her fiancée would have been relevant to her credibility.

A defendant who alleges a failure to investigate on the part of his or her counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case. *See id.* at 48, 527 N.W.2d at 349-50. The defendant must base a challenge to counsel's representation on more than speculation. *See id.* at 48, 527 N.W.2d at 350. Because Richmond has made no showing of what information would have been derived from interviewing C.P.'s fiancée or how it would have altered the outcome of this case, his claim of ineffective assistance of counsel must be rejected.

Richmond's final argument is that the evidence was insufficient to support his convictions. The test on appeal for the sufficiency of the evidence is not whether this court is convinced of the defendant's guilt beyond a reasonable doubt, but whether the trier of fact, acting reasonably, could be so convinced by evidence that it had a right to believe and accept as true. *See State v. Poellinger*, 153 Wis.2d 493, 503-04, 451 N.W.2d 752, 756 (1990). "The credibility of the witnesses and the weight of the evidence is for the trier of fact." *Id.* at 504, 451 N.W.2d at 756 (quoted source omitted). We must view the evidence in the light most favorable to the verdict, and if more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the trier of fact. *See id.* A jury verdict "will be overturned only if, viewing the evidence most favorably to the state and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt." *State v. Alles*, 106 Wis.2d 368, 376-77, 316 N.W.2d 378, 382 (1982) (quoted source omitted).

To convict Richmond of second-degree sexual assault in violation of § 948.02(2), STATS., the jury had to find that he had sexual intercourse or sexual contact with C.P. and that she had not yet reached the age of sixteen when the

intercourse or contact occurred. Evidence of three acts of sexual intercourse and contact was clearly established by the testimony of C.P.

Richmond contends that no rational trier of fact could have believed C.P.'s testimony because she testified that the assaults occurred while Richmond was staining her parents' house and while she was home alone. Richmond relies on testimony from his coworker that they were always together when working on the house, and that they were not allowed to enter the home because the stain was messy. However, Richmond's coworker admitted on cross-examination that he and Richmond separated when one of them went to the bathroom, and that he left the work site at 2:30 p.m. each day and could not account for Richmond after that. In addition, three other witnesses, including C.P.'s father and brother, testified that Richmond frequently worked alone and that he entered the house on occasion.

Because C.P.'s testimony was not patently or inherently unreliable and because the jury was entitled to believe her explanation for why she initially denied that the assaults occurred and delayed reporting, no basis exists to disturb the convictions.

By the Court.—Judgments and order affirmed.

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

