

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

March 18, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

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**No. 98-1852-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CHRISTOPHER HAMILTON,**

**DEFENDANT-APPELLANT.**

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APPEAL from judgments and an order of the circuit court for Monroe County: STEVEN L. ABBOTT, Judge. *Affirmed.*

Before Eich, Vergeront and Roggensack, JJ.

EICH, J. Christopher Hamilton appeals from judgments convicting him of second-degree sexual assault, battery and second-degree recklessly endangering safety, and from an order denying his motion for postconviction relief. He argues: (1) that the trial court erred when it refused to declare the victim, D.S., whom he called to testify, to be a “hostile witness” so that he could

attempt to impeach her credibility through the use of prior inconsistent statements; and (2) that his trial counsel was ineffective for failing to make an offer of proof as to the nature of D.S.'s inconsistent statements.

While we agree with Hamilton that the trial court erred in denying his request that D.S. be declared a hostile witness subject to impeachment, our independent review of the evidence satisfies us that even if Hamilton had had the opportunity to question D.S. about her allegedly inconsistent statements, it would not have changed the outcome of the trial. The error was, therefore, harmless. It follows that trial counsel's failure to make an offer of proof with respect to those statements could not have prejudiced Hamilton's defense and thus his representation was not constitutionally ineffective. We affirm the judgments and order.

Hamilton and his girlfriend, D.S., the victim of the assaults, lived together, and she was the State's primary witness against him. She testified that, on the night of March 21, 1997, after she had refused his sexual advances, he began beating and choking her, releasing her only when she agreed to do as he asked. After being released, she went into the bathroom. According to D.S., Hamilton followed her there, and then to the kitchen, continuing to slap her, biting her, and attempting to rip off her clothes. D.S. testified that, after making her take off her clothes and put them on again several times, Hamilton pushed her onto the kitchen counter and forced vaginal and anal sex upon her. She said he then laid her face down on the kitchen floor, continuing to hit her, and again had both vaginal and anal intercourse with her. Then, pulling her to her hands and knees on the floor and continuing to slap and beat her, he again entered her both vaginally and anally.

D.S. testified that she again fled to the bathroom where Hamilton, yelling at her, bent her over the sink and again had both vaginal and anal sex with her, slapping her all the while. She said that he then took her into the living room, where he ordered her to lie on her back on the coffee table and, leaning his weight on her “so [she] was folded in half,” again assaulted her vaginally and anally. Finally releasing her, he continued to strike her and demanded that she perform fellatio on him, which she did, vomiting afterward.

Later in the evening, D.S. said she accompanied Hamilton to a convenience store to buy cigarettes and that, while he was in the store, she got into the driver’s seat and drove to the police station where she reported the assaults and was examined and treated by the emergency room staff.

Hamilton’s version of the events that night differed considerably. In his statement to the police after his arrest, he admitted having vaginal, anal and oral sex with D.S. but claimed that it was all consensual. He acknowledged that they were yelling at each other and fighting in several rooms of the residence, but said that, afterward, they simply “made love.” He said that, at one point when D.S. told him the anal intercourse was painful to her, he stopped.

In addition to battery and reckless endangerment, Hamilton was charged with three counts of second-degree sexual assault: oral, anal and vaginal. As indicated, D.S. testified for the State at his trial and was cross-examined by his attorney. During the defense’s case, Hamilton’s attorney called D.S. as a witness for the defense and, in an apparent attempt to impeach her credibility through the use of prior inconsistent statements, he began to question her about a statement she had made to one of the investigating police officers. The prosecutor objected, arguing that D.S., having been called by Hamilton as a defense witness, was not

subject to impeachment by him unless the court declared her to be a hostile witness. Hamilton’s attorney requested the court to do so, arguing that she was obviously “angry.” The court denied the request.

The jury acquitted Hamilton on two of the sexual assault counts—oral and vaginal intercourse—finding him guilty on the anal intercourse count, and on the battery and reckless endangerment charges. He moved for a new trial, arguing in the alternative that: (1) the trial court erred when it prohibited him from impeaching D.S. with prior inconsistent statements; and (2) his trial attorney was ineffective for failing to make an offer of proof as to D.S.’s specific inconsistent statements. At the hearing on the motions, Hamilton’s attorney testified that because he considered D.S.’s credibility to be “critical,” he planned to use her prior inconsistent statements for impeachment purposes—particularly those regarding the alleged incidents of anal intercourse; and he testified as to the two or three specific statements he planned to use to that end.<sup>1</sup>

In its written decision denying Hamilton’s postconviction motions, the court agreed that it had erred in ruling that D.S. was not a hostile witness and thus not subject to impeachment. The court concluded, however, that the error was harmless because even if Hamilton had been given the opportunity to impeach D.S. for inconsistencies in her testimony, the result of the trial would not have been different.

Hamilton renews his arguments on appeal.

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<sup>1</sup> D.S. had been subpoenaed to testify at the hearing, presumably so that Hamilton’s postconviction counsel could ask her the “impeaching” questions his attorney had been prohibited from asking at trial. At the conclusion of the hearing, the court granted the State’s motion to quash the subpoena, reasoning that “the statements and the testimony of the transcripts all speak for themselves,” and that additional testimony from D.S. was therefore not relevant.

We accept the trial court's acknowledgment of its error in barring Hamilton from attempting to impeach D.S.'s testimony after calling her as a witness for the defense.<sup>2</sup> Generally, an error is harmless if there is no reasonable possibility that it contributed to the conviction. *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985). A "reasonable possibility" is one which is sufficient to undermine confidence in the outcome of the proceeding. *State v. Patricia A.M.*, 176 Wis.2d 542, 556, 500 N.W.2d 289, 295 (1993). The burden of proof is on the beneficiary of the error, here the State, to establish that the error was not prejudicial. *Dyess*, 124 Wis.2d at 544 n.11, 370 N.W.2d at 232 n.11.

The trial court based its ruling on its belief that D.S.'s inconsistent statements were not "material inconsistencies." Hamilton disagrees. He points to three specific inconsistencies which, he claims, are material and would have affected the verdict had the jury been aware of them. First, he says that D.S. testified at trial to five separate acts of anal intercourse, while at the preliminary hearing, she stated that only three such acts occurred. A close reading of the preliminary hearing transcript, however, reveals that, on her direct examination, D.S. testified as to five separate anal contacts (two in the kitchen, one on the carpet outside the kitchen, one in the bathroom, and one in the living room). It was only toward the conclusion of her cross-examination, when defense counsel asked, in summary, how many times Hamilton entered her anally, that she responded: "Three." Second, Hamilton points to D.S.'s testimony at trial that

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<sup>2</sup> The State agrees that this was error. However, it asks us to sustain the court's ruling on different grounds: the trial court's general powers to control the examination of witnesses so as to protect them from harassment or undue embarrassment. *See* § 906.11(1), STATS. We decline to do so for two reasons. First, the State never made any such argument to the trial court, so the defense never had an opportunity to respond. Second, evidentiary rulings are committed to the sound discretion of the trial court, and the State's argument, in effect, asks us to exercise the trial court's discretion for it; and this we may not do.

Hamilton forced her to engage in anal intercourse on the kitchen counter, and contrasts that with her earlier statements to a police officer and Hamilton's probation officer, where she never specifically mentioned an incident of anal intercourse on the kitchen floor. Finally, Hamilton says that D.S.'s trial testimony that he forced her to have anal intercourse over the bathroom sink during their second trip to the bathroom, differs from her statement to his probation officer in which she referred only to vaginal intercourse as having taken place in the bathroom. He also argues generally that there were other inconsistencies in D.S.'s testimony with respect to which type of intercourse occurred first, vaginal, anal or oral.

The State responds that even if these inconsistencies had been brought to the jury's attention, it would not have made a difference in the outcome of the trial because the proffered statements—which are concerned only with where in the residence the anal intercourse occurred, the exact number of times it occurred, and which type of intercourse occurred first—while not entirely consistent, do not constitute material inconsistencies. The trial court reached a similar conclusion, stating in its decision that because Hamilton had conceded that he had vaginal, oral and anal intercourse with D.S. that night—maintaining, as indicated, that all of the encounters were consensual—the issue was not where, or how many times, or in which order the acts of anal intercourse occurred, but rather whether D.S. had consented to them. And the State points out that there is nothing in these allegedly inconsistent statements that bears in any way on the question of D.S.'s consent to any of the acts of anal intercourse.

Hamilton stresses that, in his opinion, the crucial issue in the case was credibility—his and D.S.'s—and he claims that the jury's not guilty findings on the vaginal and oral intercourse charges “strongly suggest[] that the jury simply

did not believe important aspects of D.S.’s testimony.” He says that impeachment of D.S. on her inconsistent statements would have further eroded her credibility in the jurors’ eyes—especially on the issue of anal intercourse—and thus may well have affected the ultimate verdict.

We are not persuaded. As the trial court explained, it is just as likely, if not more so, that the jury acquitted Hamilton on the oral and vaginal intercourse counts because, as D.S. acknowledged, it was “fairly common” for them to have sex after an argument because that was the only way that Hamilton would feel that she “truly forgave him.” There was also evidence before the jury (a) that, when Hamilton asked D.S. to make love that night, and she said “Okay,” (b) that when Hamilton told D.S. to perform fellatio on him, she said yes, and (c) that, according to Hamilton, D.S. “didn’t stop [him] from having oral sex with her either.” Throughout her testimony, however, D.S. denied ever agreeing to anal sex; and we have no reason to doubt the jury’s ability to appreciate and understand that distinction. D.S. testified, for example, that she and Hamilton had attempted anal sex only on one occasion in the past, and that at that time “I told him to stop and he did.”

Not only did D.S. testify that she and Hamilton had attempted anal sex on only one prior occasion—which they discontinued after it became painful for her—but her position that the anal intercourse on the night in question was nonconsensual is borne out by the extensive medical testimony offered by the State. Dr. Howard Schumaker, the emergency room physician who examined her that night, noted many significant abrasions, bruises and handprints on her body. In particular, Schumaker noted that her anal area was “extremely inflamed and tender,” that there was “obvious” pain to the touch, and that the sphincter muscles

did not have their normal tone. According to Schumaker, D.S.'s injuries "fit perfectly" with her description of Hamilton's actions.

From this evidence, the jury could reasonably believe that the State had failed to meet its burden of proof with respect to the vaginal and oral intercourse counts, but had met it with respect to the charge of nonconsensual anal intercourse. It thus appears that the accuracy of D.S.'s statements with respect to where, and even how many times, the anal intercourse occurred would not have made a difference in the outcome of the trial. We are satisfied that the trial court's error in barring Hamilton's "impeachment" evidence was harmless.<sup>3</sup>

*By the Court.*—Judgments and order affirmed.

Not recommended for publication in the official reports.

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<sup>3</sup> That conclusion necessarily resolves Hamilton's argument that his trial counsel was ineffective for failing to make an offer of proof with respect to the alleged inconsistent statements. To prevail on such a claim, the defendant must show that trial counsel's performance was deficient *and* that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Because we have held that Hamilton was not prejudiced by the court's ruling excluding the evidence, he could not have been prejudiced by counsel's failure to make the offer of proof.

Finally, Hamilton argues that there is a reasonable possibility that impeachment of D.S. might have made a difference on the battery and reckless endangerment charges. Specifically, he argues that if the jurors concluded that D.S. was not credible, they may have determined that the injuries she received were all part consensual sexual activity, and acquitted on those charges. We reject this argument. First, we do not believe that bringing these statements to the jury's attention would have affected their judgment on D.S.'s overall credibility. Beyond that, the record is replete with medical evidence of the many physical and sexual assaults perpetrated upon D.S. on the night in question. This uncontradicted evidence is wholly inconsistent with Hamilton's assertions that, had he been able to impeach D.S.'s credibility with the three or four inconsistencies in her testimony, the jury might have concluded that all of her injuries were the result of consensual sexual activity. Even a glance at the medical and photographic evidence will dispel any such assertion.





