

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 9, 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. 98-2009-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID J. DIETZMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County:
GREG GRAU, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. David Dietzman appeals a judgment convicting him of three counts of sexually assaulting a minor and one count of causing the child to expose her pubic area. He argues that the trial court violated his constitutional right to call witnesses when it excluded evidence that the victim's

father had seriously beaten her sister two years earlier.¹ We conclude that the proffered evidence was properly excluded because it is irrelevant.

The thirteen-year-old victim was living with her grandmother. She testified that Dietzman assisted her in “running away” to her mother’s home by giving her a ride. Dietzman stopped along the way and persuaded the victim to expose her pubic area and touch his penis. The victim did not report the assaults at that time, and hid from her father who was looking for her. Later that day, she asked Dietzman for another ride because she did not want her mother to get in trouble for helping her run away. During that trip, Dietzman again pulled onto a dirt road and asked the victim to remove her clothes. He then performed several sex acts with her and stopped when she screamed in his ear because of the pain. Dietzman then arranged for the victim to stay with friends for the night. The next night, he picked her up and took her to the home of another couple where she spent the night. Again she told no one of the sexual incidents. On the third night, she again accompanied Dietzman to her mother’s home. The next day, she accompanied Dietzman as he drove a truck to Missouri. She was picked up by the police as a runaway in Missouri and told them nothing of the sexual assaults. Upon being returned to Wisconsin accompanied by her father, she was placed in a foster home. She first reported the sexual assaults to her foster mother.

The defense attempted to present evidence that the victim’s father had severely beaten her sister as punishment for running away. The defense

¹ Dietzman’s precise argument on appeal, that the victim had a motive to make false accusations to deflect her father’s anger toward Dietzman, was not expressly argued to the trial court. Likewise, the constitutional dimension of the argument was not presented to the trial court. We will address the merits of the argument made on appeal even though they may not have been properly preserved.

argued that this evidence provided a motive for the victim to fabricate her charges against Dietzman. Dietzman argues that the victim's father's violent reaction to the previous runaway situation provided a motive for her to "soften the blow by accusing Mr. Dietzman of assaulting her" and that her father's anger "would likely be tempered or directed at Mr. Dietzman if she was the victim of an ugly assault."

This court reviews the trial court's evidentiary rulings with deference, reversing only if the trial court erroneously exercised its discretion. *See State v. Jackson*, 216 Wis.2d 646, 655, 575 N.W.2d 475, 479 (1998). This court independently reviews whether a defendant's rights to confrontation and to present witnesses have been violated. *See State v. Dodson*, 219 Wis.2d 65, 69-70, 580 N.W.2d 181, 185 (1998); *State v. Kevin L.C.*, 216 Wis.2d 166, 172-73, 576 N.W.2d 62, 66 (Ct. App. 1998).

The right to present a defense does not include the right to present irrelevant evidence. *See State v. Cardenas-Hernandez*, 219 Wis.2d 516, 536, 579 N.W.2d 678, 687 (1998). Relevance has two facets: first, whether the evidence relates to a fact or proposition that is of consequence to the determination of the action; and second, whether the evidence has probative value -- that is, whether it has a tendency to make the consequential fact or proposition more or less probable than it would be without the evidence. *See State v. Sullivan*, 216 Wis.2d 768, 772, 576 N.W.2d 30, 38 (1989).

The proffered evidence regarding the victim's father's violent reaction to her sister's running away is not relevant. While a motive to fabricate the story is a matter of consequence, the proffered evidence does not tend to establish a motive for the victim to fabricate the story she told. She did not report the sexual assaults while in her father's presence during the return trip from

Missouri. Rather, she waited until she was in foster care to report the assaults. More significantly, the story as a whole would not tend to reduce or redirect her father's anger. She did not contend that she was abducted. Rather, she willingly ran away with a man who had previously sexually assaulted her. It would not be reasonable to believe that her father's violent reaction to running away would be reduced by her story that she repeatedly sought rides with Dietzman knowing of his willingness to assault her. The story would more likely have exacerbated her father's anger. Because presenting evidence of the severe beating her father administered to her sister would not tend to establish any motive for falsely accusing Dietzman, the trial court properly excluded that evidence.

By the Court.—Judgment affirmed.

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

