COURT OF APPEALS
DECISION
DATED AND FILED

July 27, 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. 98-3358-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY JOSEPH DAKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Langlade County: ROBERT A. KENNEDY, SR., Judge. *Affirmed.*

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

PER CURIAM. Jeffrey Dake appeals a judgment convicting him of sexually assaulting S.A. on two occasions, and an order denying his postconviction motion. He argues that: (1) his trial counsel was ineffective for failing to adequately investigate and produce evidence that S.A. made an allegedly false accusation of sexual assault against her stepfather and because he failed to

timely file a motion to allow that testimony; (2) the trial court erroneously exercised its discretion and violated his right to confront witnesses and present evidence when it excluded evidence of S.A.'s accusations against her stepfather; (3) the court erroneously exercised its discretion when it denied Dake's motion for a new trial based on newly discovered evidence; and (4) this court should grant a new trial in the interest of justice. We reject these arguments and affirm the judgment and order.

Dake has not established any prejudice from his counsel's failure to timely file a motion and present evidence of S.A.'s accusations against her stepfather because the trial court would not have admitted that evidence. Responding to an offer of proof before trial, the trial court concluded that the proffered evidence's probative value was substantially outweighed by its inflammatory and prejudicial nature, and that it posed the risk of confusing the issues or misleading the jury. At the hearing on the postconviction motions, after hearing the testimony Dake sought to present, the court reaffirmed its initial ruling. Therefore, Dake has established no prejudice from his trial counsel's failure to present this evidence. *See* ***State v. Pitsch***, 124 Wis.2d 628, 642, 369 N.W.2d 711, 718 (1985).

The trial court properly excluded evidence of S.A.'s allegations against her stepfather on the ground that its minimal probative value was substantially outweighed by its inflammatory and prejudicial nature and the risk of confusing or misleading the jury. Dake contends that S.A. made false accusations against her stepfather in an effort to be removed from a home where she was unhappy. Because S.A. was also unhappy at her father's home, Dake argues that she falsely accused Dake for the same purpose. This rationale fails for two reasons. First, the accusations against her stepfather occurred after the assaults in

this case. Contrary to Dake's argument, S.A. did not have previous experience in which she succeeded in changing placement based on a sexual assault allegation. Second, there is no logical nexus between falsely accusing Dake and S.A.'s desire to leave her father's home. Unlike the situation with her stepfather, Dake was not a resident of S.A.'s father's household. There is no reason to believe that alleging sexual assault by Dake would accomplish S.A.'s wish to be placed outside her father's home. Therefore, the proffered evidence had little probative value.

When deciding whether to admit evidence of alleged false accusations, the trial court must determine whether the evidence has sufficient probative value to outweigh its inflammatory and prejudicial nature and the potential for confusing the issues or misleading the jury. § 904.03, STATS. *See* ***State v. DeSantis***, 155 Wis.2d 774, 785, 456 N.W.2d 600, 605 (1990). Here, the evidence that S.A. subsequently alleged sexual assault against her stepfather would require a trial within the trial to determine whether it was a false accusation. This would create a substantial danger of confusing the issues and misleading the jury. Dake's rights to call witnesses and confront his accuser do not include the right to present inflammatory, prejudicial, confusing or misleading evidence of little probative value. *See* ***Montana v. Egelhoff***, 518 U.S. 37, 42 (1996) (plurality opinion).

Dake presented two claims of newly discovered evidence: (1) evidence that S.A. had told a close friend that she was unhappy in her father's home and "would do something" to be placed elsewhere; and (2) witnesses who could explain how Dake acquired knowledge that S.A. told police that he offered her $20, either for a repeat act of intercourse or her silence. To warrant a new trial based on newly discovered evidence, Dake must show by clear and convincing evidence that he was unaware of this evidence until after the trial, he was not

negligent in failing to discover it, the evidence is material to an issue in the case, it would not be merely cumulative and there is a reasonable probability that the evidence would lead to a different result at a new trial. *See* ***State v. Brunton***, 203 Wis.2d 195, 200, 552 N.W.2d 452, 455 (Ct. App. 1996).

The decision to deny a new trial on the basis of newly discovered evidence is committed to the trial court's discretion. *See* ***State v. Kimpel***, 153 Wis.2d 697, 702, 451 N.W.2d 790, 792 (Ct. App. 1989). We will uphold the trial court's discretionary determination if it logically interpreted the facts and applied a proper legal standard to them. *See* ***State v. Rogers***, 196 Wis.2d 817, 829, 539 N.W.2d 897, 902 (1995).

Evidence that S.A. was unhappy at her father's home and told a friend she would do something to be placed elsewhere was not newly discovered and was not likely to result in an acquittal. Questions posed at the preliminary examination show that the defense was aware of S.A.'s statement that she wanted to get out of her parents' house. It is not likely that the jury would have acquitted Dake had they known of S.A.'s statement because false accusation of sexual assault by a nonresident of a household would not likely result in a change of placement.

The State presented evidence that Dake told an investigating officer that "he didn't even have $20" before the officer told him of S.A.'s allegation that he offered her $20 to have sex or to keep quiet. Dake argues that he has newly discovered evidence consisting of witnesses who would testify that they discussed S.A.'s allegation including the $20 in Dake's presence before his interview with the police, thus accounting for his knowledge of that detail. These witnesses do not constitute newly discovered evidence. By Dake's own account, he was present

when they had this discussion. Obviously, he knew of their existence before trial. His argument that he was unaware that the witnesses would come forward to testify until after the trial ignores his subpoena power. He has not established by clear and convincing evidence that the newly discovered availability of these witnesses did not come to his attention until after the trial.

Finally, we conclude there is no basis for granting a new trial in the interest of justice. This argument is premised substantially on Dake's contention that the jury should have heard of S.A.'s allegations against her stepfather. Having concluded that the trial court properly excluded that evidence under § 904.03, STATS., and ***DeSantis***, we conclude that there is no basis for concluding that justice has miscarried, that retrial would likely produce a different result or that the real controversy was not fully and fairly tried. *See* ***Vollmer v. Luety***, 156 Wis.2d 1, 19, 456 N.W.2d 797, 805 (1990).

By the Court.—Judgment and order affirmed.

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