

**COURT OF APPEALS
DECISION
DATED AND FILED**

OCTOBER 6, 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. 98-3435-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KYLE J. GIERACH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Kyle J. Gierach appeals from a judgment convicting him of second-degree sexual assault by use or threat of force contrary to § 940.225(2)(a), STATS., and from an order denying his postconviction plea

withdrawal motion.¹ Because we conclude that the circuit court did not erroneously exercise its discretion in denying Gierach's plea withdrawal motion, we affirm.

¶2 Gierach pled no contest to second-degree sexual assault by use or threat of force. Upon reading the presentence report and the victim impact statement, Gierach learned that the victim contended she had contracted a sexually transmitted disease (STD) as a result of the assault.² Gierach, who denied having sexually assaulted the victim and denied having an STD, contended that the victim's STD claim was relevant and admissible on the question of whether he committed the assault. Therefore, Gierach sought to withdraw his plea and proceed to trial on his claim that he did not commit the assault.

¶3 The State objected to the plea withdrawal motion because the evidence Gierach wanted to present—the victim's STD status—was barred under § 972.11, STATS., the rape shield law, and otherwise irrelevant to the question of whether the assault occurred. The circuit court agreed, reasoning that Gierach had pled no contest to a crime with an element of use or threat of force, not to a crime with an element of causing an STD, *cf.* § 940.225(2)(b), STATS. (intercourse or contact which causes disease to a sexual or reproductive organ is second-degree sexual assault). The court reasoned that evidence of whether the victim contracted an STD was not relevant to whether Gierach assaulted her by use or threat of force. In addition to deeming the evidence irrelevant, the court considered the

¹ Gierach does not challenge his other conviction for second-degree sexual assault of a child under sixteen years of age.

² Gierach asserted other grounds in support of his plea withdrawal motion which are not relevant to the issues raised in this appeal.

prejudice emanating from evidence that the victim has an STD and the fact that STD evidence is governed by § 972.11(2)(b), which prohibits evidence of a victim's sexual activity except for certain enumerated exceptions. The court concluded that Gierach had not established a fair and just reason to withdraw his no contest plea.

¶4 A motion to withdraw a plea prior to sentencing is addressed to the discretion of the circuit court.³ See *State v. Garcia*, 192 Wis.2d 845, 861, 532 N.W.2d 111, 117 (1995). We review the court's resolution of the motion for an erroneous exercise of its discretion. See *id.* A court properly exercises its discretion when it applies the controlling legal principles to the facts of record in a rational mental process. See *State v. Robinson*, 146 Wis.2d 315, 330, 431 N.W.2d 165, 170 (1988). A defendant has the burden to show by a preponderance of the evidence that there is a fair and just reason to withdraw the plea. See *Garcia*, 192 Wis.2d at 862, 532 N.W.2d at 117.

¶5 We agree with the circuit court that the evidence Gierach sought to present was irrelevant and inadmissible under § 972.11, STATS. The evidence does not fall under § 972.11(2)(b)2, which permits evidence of an STD to determine the degree of sexual assault or the extent of injury to the victim. We view this statute as strictly limiting STD evidence to this purpose. See *Michael R.B. v. State*, 175 Wis.2d 713, 728-29, 499 N.W.2d 641, 648 (1993). Here, the charge against Gierach, sexual assault by use or threat of force, see

³ Although Gierach raised the same grounds for plea withdrawal after he was sentenced, we review the circuit court's presentencing denial of plea withdrawal. If Gierach did not meet his burden under the standard applicable to presentencing plea withdrawal requests, he surely cannot meet the higher burden on postsentencing plea withdrawal requests, for example, manifest injustice. See *State v. Krieger*, 163 Wis.2d 241, 249, 471 N.W.2d 599, 602 (Ct. App. 1991).

§ 940.225(2)(a), STATS., does not require proof of any matter relating to disease or extent of harm. Gierach's proposed use of this evidence to address the victim's credibility falls outside of the limited use permitted by the legislature. *See State v. Mitchell*, 144 Wis.2d 596, 612, 424 N.W.2d 698, 703-04 (1988). Therefore, Gierach's proposed evidence of the victim's STD status was barred under § 972.11.

¶6 Evidence barred under § 972.11, STATS., may nevertheless be admissible if “in the circumstances of a particular case evidence of a complainant's prior sexual conduct may be so relevant and probative that the defendant's right to present it is constitutionally protected.” *State v. Pulizzano*, 155 Wis.2d 633, 647, 456 N.W.2d 325, 331 (1990). This is not such a case because the proffered STD evidence does not satisfy the requirements of relevance and probative value under *Pulizzano*. As held above, the evidence is not relevant to whether Gierach committed the sexual assault, for example, the evidence does not make it “more probable or less probable than it would be without the evidence.” *Michael R.B.*, 175 Wis.2d at 724, 499 N.W.2d at 646 (quoted source omitted). The victim could have contracted the disease prior to the assault or she might have been mistaken that she contracted an STD from Gierach. The absence or presence of an STD in either of the involved persons is not probative of whether the assault occurred.

¶7 Gierach claims that the exclusion of the STD evidence denied him his Sixth Amendment right of confrontation. We disagree. The exclusion of irrelevant evidence does not violate a defendant's right to confront witnesses or to present a defense. *See State v. Walker*, 154 Wis.2d 158, 192, 453 N.W.2d 127, 141 (1990).

By the Court.—Judgment and order affirmed.

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

