COURT OF APPEALS
DECISION
DATED AND FILED

June 29, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3636-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALBERT C. ELDRIDGE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Oneida County: ROBERT E. KINNEY, Judge. *Affirmed.*

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

PER CURIAM. Albert Eldridge appeals a judgment convicting him of second-degree sexual assault and an order denying his postconviction motion.[1]

[1] The jury also convicted Eldridge of misdemeanor battery, but he does not appeal that judgment.

The incident occurred in a field near a parking lot across the highway from the Fox Hole Tavern where Eldridge and the victim had been drinking. Eldridge argues that (1) the trial court erroneously exercised its discretion when it denied him permission to impeach or present extrinsic evidence regarding a sexual relationship between the investigating officer and the Fox Hole's bartender; (2) the trial court should have instructed the jury on third-degree sexual assault; and (3) a new trial should be granted because the State failed to produce exculpatory evidence. We reject these arguments and affirm the judgment and order.

Several citizens observed sexual activity and notified the police. A police officer arrived on the scene and observed sexual activity and heard cries for help. The victim told the officer as he approached that she was being assaulted. She testified that Eldridge struck her on the back of the head, picked her up by her hair and the back of her shirt and dragged her to the other side of a tractor-trailer. He then struck her in the forehead area, tore her pullover knit sweater and threw her to the ground where he pinned her and pulled down her pants. She testified that she began screaming, and he put his hand over her mouth and threatened to kill her. He jumped off of her when the squad car appeared. Eldridge did not testify, but the defense contended that the intercourse was consensual.

During the investigation, Eldridge's mother attempted to contact the bartender. The bartender returned her phone call after making arrangements with the police to have the call recorded at the prosecutor's suggestion. Eldridge sought permission to impeach the investigating officer and the bartender and to present extrinsic evidence of a sexual relationship between them, their efforts to hide the relationship and the officer's alleged attempts to influence witnesses.

The trial court properly excluded all testimony relating to the officer's and the bartender's personal relationship. Eldridge describes the bartender as "one of the State's key witnesses." In fact, she was not called to testify. The relationship between the officer and the bartender does not provide any evidence of the officer's bias. The officer's participation in the plan to record Eldridge's mother's phone conversation with the bartender cannot be reasonably described as an attempt to influence a witness or any form of misconduct. The court did not restrict cross-examination on any matter that might actually show bias or self-interest.

The trial court properly refused to instruct the jury on third-degree sexual assault. A jury should be instructed on a lesser included offense only when there is a reasonable basis in the evidence for conviction on the lesser offense and acquittal on the greater offense. *See* ***State v. Carrington***, 134 Wis.2d 260, 262 n.1, 397 N.W.2d 484, 485 n.1 (1986). Second-degree sexual assault involves the use or threat of force or violence while third-degree merely requires nonconsent. Although the jury could have reasonably found that the intercourse was consensual, no reasonable view of the evidence would support a finding that it was nonconsensual and not the product of force or violence. The victim's testimony, her torn clothing and bruises support the finding that Eldridge used force and violence. While several defense witnesses testified that they saw no force or violence, they also believed the intercourse was consensual. The record contains no evidence to support a theory of nonconsensual, nonviolent intercourse.[2]

[2] In addition, any error in the refusal to instruct on third-degree sexual assault was harmless. The jury found Eldridge guilty of battery. That verdict establishes that the jury would have found that intercourse resulted from violent acts regardless whether third-degree sexual assault was offered. *See* ***State v. Dauer***, 174 Wis.2d 418, 433, 497 N.W.2d 766, 771-72 (Ct. App. 1993).

Finally, the State's failure to disclose the results of a DNA test until after the trial began provides no basis for retrial. The State's failure to divulge exculpatory evidence would provide grounds for reversal only if the evidence were material. Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *See* ***United States v. Bagley***, 473 U.S. 667, 682 (1985). Eldridge did not deny that intercourse had occurred. In fact, numerous defense witnesses testified that it occurred. The only issue at trial was whether the victim consented. The DNA test does not address that issue. Because the identity of the perpetrator has never been at issue and because the defense concedes that intercourse occurred, it is not probable that disclosure of DNA tests would have affected the verdict.

By the Court.—Judgment and order affirmed.

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