COURT OF APPEALS
DECISION
DATED AND FILED

October 1, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP582-CR **Cir. Ct. No. 2005CF247**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHNNIE L. SALLY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Portage County: THOMAS T. FLUGAUR, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Bridge, JJ.

¶1 PER CURIAM. Johnnie Sally appeals a judgment of conviction for second-degree sexual assault of a child. He also appeals an order denying postconviction relief. Sally argues that the circuit court erroneously exercised its discretion by (1) denying his request for new counsel and (2) prohibiting him from

introducing evidence concerning a rape-kit examination of the victim and evidence of the victim's prior sexual conduct. We reject Sally's arguments and affirm.

BACKGROUND

¶2 The criminal complaint alleged that on October 25, 2005, Sally sexually assaulted the fourteen-year-old victim in a rural area after "hanging out" with her and others at a residence in Stevens Point. The following morning, the victim told a friend about the assault. The friend in turn told another friend's father, who drove the victim to the hospital. The victim was later interviewed that same day by the police. Sally was subsequently charged with one count of second-degree sexual assault of a child.

¶3 Two days before trial, Sally's counsel asked the circuit court about withdrawing as counsel. Based on the conversation she had with the court and the assistant district attorney about withdrawing, counsel did not file a motion to withdraw because the court indicated it would not be willing to allow her to withdraw at that late date. On the morning of his jury trial, Sally requested new counsel. The circuit court denied the request. Prior to trial, Sally had also sought to introduce evidence of the victim's prior sexual conduct to counter a crime lab report indicating the presence of unidentified sperm found in the vaginal secretion swab collected from the victim during a rape-kit examination. Sally explained that, if the jury was going to learn about the sperm found in the rape-kit examination, it should also learn about the victim's consensual sex with an individual named Pierre Myles shortly before the alleged assault. The State, however, indicated that it was not going to introduce "evidence of the sex assault kit or the medical records" and would agree to an order suppressing the evidence. Sally withdrew his motion.

¶4 Sally presented a modified version of his rape shield motion on the first day of trial. Seeking permission to introduce evidence of both the sperm from the rape-kit examination and the victim's sex with Myles, Sally stated:

> I feel that it is exculpatory that one spermatozoa head was identified. I guess I'm also going to renew my motion with regard to Pierre Myles.
>
> … She will testify or she would testify if the Court allows it in that she had sex with Pierre Myles to make Aaron Sally angry and, in fact, it worked.[1]
>
> And, again, that goes directly to her motive about why she is lying about all of this and trying to get Johnnie in trouble.

(Footnote added.)

¶5 The circuit court disallowed evidence of the rape-kit examination, but withheld ruling on evidence involving the "motives for who had sex with who, when, and retaliatory intercourse." The court stated that it wanted to "get into the trial" and have a "better context in how this fits into the defense."

¶6 While questioning the victim at trial, Sally renewed his motion to introduce evidence that the victim had sex with Myles on the theory that the victim was angry at Sally's son for having sex with the victim's best friend. Sally argued that the victim was angry because Sally's son, Aaron Sally, had cheated on her, and also because Sally made his son break up with her, which "absolutely [went] to [the victim's] motive to falsify, her motive to make up this entire story." The circuit court rejected Sally's request, finding the evidence irrelevant and, further, that there was no foundation for the assertion that Sally made his son break up

[1] Sally's son, Aaron Sally, testified at trial that he had an emotionally close and romantic relationship with the victim during October 2005.

with the victim.[2] Sally was subsequently convicted, and a postconviction motion was denied. Sally now appeals.

DISCUSSION

¶7 Sally first argues that the circuit court improperly denied his request to discharge his attorney. The denial of a defendant's request for new counsel is within the circuit court's discretion. ***State v. Lomax***, 146 Wis. 2d 356, 359, 432 N.W.2d 89 (1988). When evaluating this discretion, we consider a number of factors, including (1) the adequacy of the court's inquiry into the defendant's complaint; (2) the timeliness of the motion; and (3) whether the alleged conflict between the defendant and the attorney was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case. ***Id.*** Further, the circuit court should consider such factors as whether the defendant has changed lawyers before and whether the request is for legitimate reasons rather than mere delay. ***State v. Jones***, 2007 WI App 248, ¶13, 306 Wis. 2d 340, 742 N.W.2d 341.

¶8 Here, Sally's attorney first asked the circuit court about the possibility of withdrawing two days before trial, but did not file a motion. On the first day of trial, Sally addressed the court and requested a new attorney. The court made the required inquiries into Sally's complaint, and the record supports the court's reasoned determination that allowing new counsel on the date scheduled for the commencement of trial was not in the best interests of the administration of justice. The court rejected Sally's claim that there was a

[2] The victim testified at trial that Sally's son did not break up with her but, rather, she broke up with him for cheating on her.

breakdown in the attorney-client relationship and found nothing to indicate his attorney had not effectively represented him. The court also reasoned that Sally's case was its "oldest," and had been delayed several times. The court gave Sally every opportunity to provide his reasons for requesting a new attorney at that late date, and properly concluded that Sally's justifications were insufficient and his attorney could continue to represent him in all respects.

¶9 At the postconviction hearing, the court reaffirmed its decision, explaining that it had "spent a significant amount of time" inquiring into Sally's complaints, but did not "hear any significant reason or a substantial complaint as to why a new attorney had to be appointed." The court stated that, after inquiry, it viewed Sally's request as "a ploy for just another adjournment." We conclude that the court did not erroneously exercise its discretion in denying Sally's request.

¶10 Sally next argues that the circuit court erred by denying evidence of the rape-kit examination of the victim which found unidentified sperm. Sally contends the unidentified sperm corroborated his claim that the victim had sex with Myles to anger Sally's son, and fabricated the allegations against Sally as a further part of her scheme.

¶11 Sally submits alternative grounds for admission of the evidence: (1) admissibility under the rape shield law, WIS. STAT. § 972.11(2)[3]; or (2) the constitutional right to present a defense. Sally insists that his "bottom line" was that the jury was entitled to know the victim's "anger with Sally's son extended to

[3] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

her having sex with a friend of Aaron [Sally] and certainly could have included false allegations of sexual assault against Johnnie Sally as well."

¶12 To be deemed admissible under Wisconsin's rape shield law, WIS. STAT. § 972.11(2)(b), evidence must meet three criteria: (1) it must fit within the language of the statute; (2) it must be material to a fact at issue in the case; and (3) it must be of sufficient probative value to outweigh its inflammatory and prejudicial nature. ***State v. DeSantis***, 155 Wis. 2d 774, 785, 456 N.W.2d 600 (1990).

¶13 In order to fit within the language of the statute under the first criteria, the evidence must satisfy one of the following exceptions:

> 1. Evidence of the complaining witness's past conduct with the defendant.
>
> 2. Evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered.
>
> 3. Evidence of prior untruthful allegations of sexual assault made by the complaining witness.

WIS. STAT. § 972.11(2)(b).

¶14 Sally does not identify in his briefs which of the three statutory exceptions apply to the evidence of the rape-kit examination or the victim's prior sexual conduct, and we will not develop his arguments for him. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). Regardless, it is apparent that no statutory exception to the rape shield law applies. We note that Sally referenced the second exception when he presented his first rape shield motion, but he abandoned this argument when he abandoned the motion. In any event, the second exception had no application because "the degree of sexual

assault or the extent of injury suffered" was not at issue. We therefore conclude that the evidence does not fit within the language of the statute.

¶15 Moreover, neither the evidence of an unidentified sperm nor the victim's prior sexual conduct was material to the case. Because the sperm was never identified as anyone's, the most it could establish was that the victim had sexual contact with someone—it did not establish that the victim had sexual contact with Myles. In addition, Sally did not offer evidence showing that the victim had a plan to communicate either directly or indirectly to Sally's son about her sexual contact with a third party in an effort to anger him. Without such evidence, Sally's theory of admissibility falls flat because the theory depends on the victim thinking that Sally's son will learn about her actions. Rather, Sally's son testified at trial that the victim told him that she had told a friend about the incident with *Sally*, but "she didn't mean for [her friend] to tell her father." Similarly, the victim testified, "I didn't want to tell. I just wanted to go to family planning."

¶16 Lacking any materiality or probative value, all that either the sperm or the victim's prior sexual conduct evidence could have done was cause prejudice and jury confusion. This is underscored by Sally's rationale for admitting the evidence: establishing that the victim falsely accused him of sexual assault. Sally desired to turn the attention to the victim and use a consensual sexual encounter with a third party to support a theory that the victim lied about Sally's sexual assault, precisely the type of strategy the rape shield law guards against. *See* ***Michael R.B. v. State***, 175 Wis. 2d 713, 727, 499 N.W.2d 641 (1993) ("The [rape shield] law was enacted in large measure to protect victims of sexual assault from themselves becoming the focus of scrutiny during trial and thereby misleading or confusing the jury with collateral issues.").

¶17 Finally, there was overwhelming evidence of Sally's guilt, and any conceivable error in prohibiting introduction of the evidence was therefore harmless. First of all, Sally had sex with the victim by his own admission. The victim described the sexual assault at trial and verified that she was fourteen years old at the time of the assault.[4] The victim's statements made following the sexual assault were substantially the same as her testimony at trial eighteen months later. Police found fresh tire tracks at the location the victim described in her statement. Sally stated to police that he threw a condom out of the car, and a condom box and a wrapper from a condom were found at the scene where the victim said she was assaulted. Evidence was introduced at trial that Sally and the victim were possible contributors to DNA found on the condom wrapper. On this record, we conclude it is clear beyond a reasonable doubt that Sally would have been convicted even if the court had allowed evidence of the rape-kit examination and the victim's prior sexual conduct.

¶18 Sally next insists that "such evidence, even if not admissible within the framework of Sec. 972.11[2](b), Wis. Stats., should have been admissible under the United States and Wisconsin Constitutions to safeguard Johnnie's right to present a defense." An overview of the conflict between the State's interest in its evidentiary rules and the defendant's constitutional right to present a defense was provided in ***State v. Pulizzano***, 155 Wis. 2d 633, 642-48, 653-55, 456 N.W.2d 325 (1990). Sally has not made the required showings under ***Pulizzano***, which makes clear that the constitutional right to present evidence only extends to "relevant evidence not substantially outweighed by its prejudicial effect." ***Id.*** at

[4] The State did not have to prove either injury or lack of consent.

646. Irrelevant, prejudicial, and confusing evidence of unidentified sperm and the victim's prior sexual conduct was not evidence that Sally had a constitutional right to present.

¶19 Finally, Sally argues that the circuit court's errors were sufficient to warrant a new trial. Because we conclude that the court did not err, we need not reach this issue. Sally was not denied a fair trial.

By the Court.—Judgment and order affirmed.

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