COURT OF APPEALS
DECISION
DATED AND RELEASED

January 23, 1996

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0403-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PERRY E. BLANKS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed*.

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. Perry E. Blanks appeals from a judgment of conviction, after a jury trial, for two counts of first-degree sexual assault of a child. *See* § 948.02(1), STATS. He raises two issues for our review: (1) whether the trial court erroneously exercised its discretion by excluding evidence under § 972.11, STATS. (the "Rape Shield" statute); and (2) whether the trial court erroneously exercised its discretion in denying his motion for mistrial when

members of the jury allegedly saw him in shackles and electronic restraints. We reject both of his arguments and affirm.

LaChicquita L., a five-year-old child, reported that during February 1994, Blanks sexually assaulted her. She alleged both penis-to-mouth contact and hand-to-vagina and anus contact. The State charged Blanks in a two-count information, the first count premised on the penis-to-mouth contact, and the second on the hand-to-vagina and anus contact.

Prior to trial, Blanks moved the court to allow the admission of evidence concerning LaChicquita L.'s alleged prior sexual conduct. The State was set to introduce medical testimony on her injuries, including external bruising of her genitals and anus, and damage to her hymen. Blanks proffered evidence to show other causes for injuries to LaChicquita, and for other bases for her knowledge of sexual conduct—namely, evidence that LaChicquita L. had told Blanks's mother about sexual contact with her child cousins, including kissing and insertion of pencils into her vagina. After an evidentiary hearing, at which LaChicquita's mother testified, the trial court excluded the evidence under § 972.11, STATS. A jury later convicted Blanks of both counts.

"A trial court possesses wide discretion in determining whether to admit or exclude evidence, and we will reverse such determinations only upon an erroneous exercise of that discretion." ***State v. Evans,*** 187 Wis.2d 66, 77, 522 N.W.2d 554, 557 (Ct. App. 1994). "The trial court properly exercises its discretion if its determination is made according to accepted legal standards and if it is in accordance with the facts on the record." ***Id***. Section 972.11, STATS., which excludes as a matter of law evidence of a victim's sexual history or past conduct, provides, in relevant part:

> **(2)**(a) In this subsection, "sexual conduct" means any conduct or behavior relating to sexual activities of the complaining witness, including but not limited to prior experience of sexual intercourse or sexual contact, use of contraceptives, living arrangement and life-style.

> (b) If the defendant is accused of a crime under s. 940.225, 948.02, 948.025, 948.05 or 948.06, any evidence concerning the complaining witness's prior sexual conduct or opinions of the witness's prior sexual conduct and reputation as to prior sexual conduct shall not be admitted into evidence during the course of the hearing or trial, nor shall any reference to such conduct be made in the presence of the jury, except the following, subject to s. 971.31(11):
>
> 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.
>
> (c) Notwithstanding s. 901.06, the limitation on the admission of evidence of or reference to the prior sexual conduct of the complaining witness in par. (b) applies regardless of the purpose of the admission or reference unless the admission is expressly permitted under par. (b) 1., 2. or 3.

The trial court concluded that the evidence Blanks wished to introduce was inadmissible under § 972.11, because it did not fall within the three exceptions provided by paragraph (2)(b). The trial court was correct. Positing an alternative source of an injury is not an exception under § 972.11(2)(b)2, STATS. This subdivision "is written narrowly to allow evidence of specific instances of sexual conduct only insofar as they may show a source of semen, pregnancy or disease and only for the limited purpose of determining the extent of injury or degree of assault at issue." ***Michael R.B. v. State,*** 175 Wis.2d 713, 729, 499 N.W.2d 641, 648 (1993). As the Supreme Court has stated: "We do not doubt the soundness of [the defendant's] claim that information tending to prove an alternate source of [a child victim's] physical condition and sexual knowledge would be relevant to his defense. Nonetheless, ... Wisconsin's

rape shield law ... prohibits the admission of [such] evidence relating to [the victim's] sexual history." ***Id***. at 727, 499 N.W.2d at 647. Accordingly, as a matter of law, the proffered evidence was inadmissible under § 972.11, STATS. *See* ***id***. at 730, 499 N.W.2d at 648 (rejecting assertion that "testimony should be admitted to show an alternate source of [victim's] physical condition").

Notwithstanding the proscriptions of § 972.11, STATS., a defendant's confrontation and compulsory process rights may require that evidence of a victim's prior sexual conduct be admitted. ***State v. Pulizzano,*** 155 Wis.2d 633, 647-48, 456 N.W.2d 325, 331 (1990).

> [T]o establish a constitutional right to present otherwise excluded evidence of a child complainant's prior sexual conduct for the limited purpose of proving an alternative source for sexual knowledge, prior to trial the defendant must make an offer of proof showing: (1) that the prior acts clearly occurred; (2) that the acts closely resembled those of the present case; (3) that the prior act is clearly relevant to a material issue; (4) that the evidence is necessary to the defendant's case; (5) that the probative value of the evidence outweighs its prejudicial effect. If the defendant makes that showing, the circuit court must then determine whether the State's interests in excluding the evidence are so compelling that they nonetheless overcome the defendant's right to present it.

Id. at 656-57, 456 N.W.2d at 335.

The trial court in the present case essentially concluded that the defendant had not established that the prior acts clearly occurred, and that the acts alleged to have occurred were not similar to the charged conduct. The court concluded that, in the strongest light, the prior conduct was "a very vague allegation of children playing show and tell." Further, the court concluded that Blanks had not "met" the "standard" that the acts "closely resembled" the

charged conduct. Thus, the court determined that Blanks had no constitutional right to present the evidence. We agree.

We need only discuss the first ***Pulizzano*** factor because we, like the trial court, conclude that Blanks has not shown that the alleged events clearly occurred. Blanks's only evidence of the alleged similar sexual contact between LaChicquita L. and her cousins, including the alleged insertion of pencils into her vagina, was offered by Blanks's mother in his offer of proof. She testified that LaChicquita L. told her and LaChicquita L.'s mother about the conduct with her cousins. LaChicquita's mother, however, denied that LaChicquita ever said anything about the pencil incident and that she only talked about her cousin kissing her on her cheeks. From this scant and conflicting testimony, the trial court could conclude that Blanks's contention was nothing more than a "very vague allegation of children playing show and tell." Blanks did not meet his showing under ***Pulizzano***; thus, he had no right to present the evidence.

Blanks next contends that the trial court erroneously exercised its discretion by denying his motion for a mistrial. Blanks argued that members of the jury saw him wearing electronic bracelet restraints, and saw him once in the courthouse hallway wearing handcuffs. He argued that this violated his constitutional right to a fair trial and asked for a mistrial. The trial court denied his request. We agree with the trial court.

Whether Blanks's constitutional right to a fair trial was violated raises an issue of "constitutional fact" that we review *de novo*. *See, e.g.*, ***State v. Woods***, 117 Wis.2d 701, 715-16, 345 N.W.2d 457, 465 (1984). The court in this case took steps to conceal the fact that Blanks was wearing electronic restraints in court. *See* ***State v. Grinder,*** 190 Wis.2d 541, 552-53, 527 N.W.2d 326, 330 (1995) (denial of fair trial did not occur because trial court took steps "to conceal the shackles from view of the jury"). Further, "[c]ourts have generally found brief and inadvertent confrontations between a shackled accused and one or more members of the jury insufficient to show prejudice." ***Harrell v. Israel,*** 672 F.2d 632, 637 (7th Cir. 1982). Blanks has not shown sufficiently how his right to a fair trial was prejudiced in this case.

By the Court.—Judgment affirmed.

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