**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

May 7, 1997

**NOTICE**

**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.**

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

**No. 96-0564-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**RUSSELL MARTIN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Russell Martin appeals from a judgment convicting him of three counts of second-degree sexual assault contrary to § 940.225(2)(e), STATS., 1987-88.[1] On appeal, Martin seeks a new trial because evidence was admitted contrary to the prohibitions of the rape shield law, § 972.11, STATS.,

[1] The charges arose from incidents in 1987.

1995-96.[2] He also contends that a mistrial should have been granted due to the admission of other prejudicial evidence. We are unpersuaded and affirm.

Carl S., a thirteen-year-old residing at the Episcopalian seminary known as Nashotah House,[3] alleged that he had sexual contact with Martin. Martin was a seminarian pursuing a Master of Divinity degree at Nashotah House at the time of the alleged sexual contact.

At trial, Carl S. testified that one evening in the fall of 1987, Martin invited him to his house to watch a movie. During the course of the evening, he and Martin had sexual contact, including oral sex at Martin's home and in Martin's car in the refectory parking lot.

Martin argues on appeal that the cumulative effect of certain evidence presented at trial violated § 972.11, STATS., the rape shield law. Under this statute, evidence of the victim's prior sexual conduct is inadmissible at trial and shall not be referred to in the jury's presence with the exception of: (1) evidence of the victim's past conduct with the defendant; (2) evidence of specific instances of sexual conduct showing the source or origin of semen, to determine the degree of sexual assault or the extent of injury suffered; and (3) evidence of the victim's prior untruthful allegations of sexual assault. *See* § 972.11(2)(b).

Martin points to the following testimony as having been improperly admitted into evidence because it was evidence of Carl S.'s prior sexual conduct and did not fall within the exceptions to § 972.11, STATS.: (1) Carl S. testified that

[2] The trial was held in June 1995.

[3] Carl S.'s stepfather was a seminarian at Nashotah House.

he was friends with and spent a great deal of time with Gene Maxey, a seminarian at Nashotah House; (2) Carl S.'s mother testified that she had filed a civil action involving "the abusers" of Carl S.;[4] and (3) Maxey testified that he had sexual contact with minors at Nashotah House.[5] Maxey's testimony was offered to rebut Martin's defense that Nashotah House screened seminarians for potential sexual abusers. Martin argues that this evidence permitted the jury to infer that Carl S. had been sexually abused by Maxey at Nashotah House, contrary to the § 972.11 prohibition of evidence of a victim's prior sexual conduct.

The admissibility of evidence is within the trial court's discretion. *See* ***State v. Lindh,*** 161 Wis.2d 324, 348, 468 N.W.2d 168, 176 (1991). The exercise of discretion contemplates a process of reasoning which depends on facts that are of record or reasonably derived inferences from the record and a conclusion based on a logical rationale founded on proper legal standards. *See* ***Christensen v. Economy Fire & Cas. Co.,*** 77 Wis.2d 50, 55-56, 252 N.W.2d 81, 84 (1977).

In assessing Martin's claim that the evidence recited above permitted an inference regarding Carl S.'s prior sexual conduct, we examine the chronology of evidentiary rulings in the trial court. Martin's attempt to exclude what he characterizes as rape shield evidence began with his objection to the State's inquiry of Carl S. as to whether there were adult seminarians at Nashotah House with whom he spent a lot of time. Martin's objection was overruled in an

[4] Carl S.'s mother was asked whether there was a lawsuit against Nashotah House. She identified the defendants as Nashotah House "and bishops who sent people to the seminary, the abusers of our son."

[5] Maxey was properly precluded from testifying that he had sexual contact with Carl S. Carl S. was one of Maxey's victims.

unrecorded sidebar.[6] On cross-examination by Martin, Carl S.'s mother testified regarding a lawsuit against "the abusers" of her son. The foregoing evidence came into the record before the trial court's rape shield law ruling precluding the State from presenting evidence that Carl S. was abused by others at Nashotah House. The State wanted to present such evidence to help the jury understand why Carl S. waited several years to report Martin's assault.

Prior to the State's rebuttal case, the parties and the court addressed the parameters of Maxey's testimony in rebuttal. The State argued that the testimony of various defense witnesses permitted an inference that a sexual abuser of minors would have been weeded out in the Nashotah House seminarian screening process. The State wanted Maxey to testify that although he was subject to that screening process, he was nevertheless admitted to the seminary where he sexually abused minors. The court found that Maxey's rebuttal testimony was relevant to (1) Martin's contention that Martin's moral character would not have permitted him to abuse a minor and (2) being accepted, supervised, trained and advanced through the Nashotah House seminary. Maxey then testified about the Nashotah House seminary screening process and admitted that while he was at Nashotah House he had sexual contact with minors.

Under § 972.11(2)(b), STATS., evidence of a victim's prior sexual conduct is inadmissible. The three instances of testimony Martin challenges do not reasonably support a general inference regarding Carl S.'s prior sexual conduct

[6] While sidebar conferences are commonplace in some courtrooms, appellate review is best served by counsel following the § 901.03(1)(a), STATS., procedure for stating objections and grounds on the record. If a matter is significant enough to warrant appellate review, it is too important to permit it to remain in an unreported state. *See* ***State v. Mainiero,*** 189 Wis.2d 80, 95 n.3, 525 N.W.2d 304, 310 (Ct. App. 1994).

or a specific inference that he had sexual contact with Maxey. The testimony was relatively isolated in the trial and was not emphasized in argument to the jury. The State's closing argument did not argue or make prominent any inference that Maxey assaulted Carl S. That Carl S. and Maxey spent time together does not support an inference that they had sexual contact. Maxey's testimony was clearly directed at rebutting Martin's defense. For these reasons, the evidence did not fall within the prohibition of § 972.11, and the circuit court did not misuse its discretion in admitting the evidence.

Martin next contends that the trial court should have granted his motion for a mistrial after Reverend Herbert Herrmann testified regarding the existence of a homosexual seminarian community at Nashotah House. He claims that this testimony was unfairly prejudicial and mischaracterized a statement made by Martin's wife regarding Martin's associations while at the seminary.

Whether to grant a motion for a mistrial is within the trial court's discretion. *See* ***State v. Bunch,*** 191 Wis.2d 501, 506, 529 N.W.2d 923, 925 (Ct. App. 1995). The trial court must determine, in light of the entire proceeding, whether the basis for the mistrial motion is sufficiently prejudicial to warrant a new trial. *See* ***id.*** We conclude that the trial court did not misuse its discretion in denying the motion for a mistrial and took the appropriate steps to address whatever prejudicial effect arose from Herrmann's testimony.

On direct examination by the State, Herrmann was asked whether Mrs. Martin ever expressed a concern to him about her marriage. Herrmann testified that Mrs. Martin expressed "a concern that [Martin] was associating more and more with the single seminarian students that I guess had known questionable alternate lifestyles." Martin objected on the grounds that this testimony was an

attempt to depict Nashotah House as having an active gay population and that such testimony was prejudicial and might lead the jury to infer that Martin was homosexual and that he assaulted Carl S.

The court conducted voir dire of Herrmann to better understand his testimony. The court asked Herrmann whether Mrs. Martin used words like "known alternate lifestyles" or "homosexual" in her conversation with him or whether Herrmann was relating something other than what Mrs. Martin told him. Herrmann responded that before he and Mrs. Martin spoke, he was aware of "alternate lifestyles" and homosexuality at Nashotah House and that his testimony included inferences he drew from Mrs. Martin's comment.

The court denied Martin's motion for a mistrial on the ground that Herrmann's testimony did not undermine the fairness of the trial when considered as a whole. However, the court struck the question and answer and instructed the jury to disregard Herrmann's testimony in this regard. The court then clarified with Herrmann that he could only testify about what Mrs. Martin told him and admonished him not to add his interpretation to his testimony.[7]

We assume the jury heeded the instruction to disregard the evidence stricken by the court. *See* ***State v. Lukensmeyer,*** 140 Wis.2d 92, 110, 409 N.W.2d 395, 403 (Ct. App. 1987). Such instructions go far to cure any adverse effect arising from the presentation of such evidence. *See* ***State v. Fishnick,*** 127 Wis.2d 247, 262, 378 N.W.2d 272, 280 (1985). The trial court had a logical basis for

[7] Mrs. Martin later testified that she remarked to Herrmann about the pressures a couple faces when one spouse is in a seminary program and that both spouses need to adjust to the new situation.

denying the motion for a mistrial and took appropriate steps to clarify Herrmann's testimony and address any potential prejudice.

*By the Court.*—Judgment affirmed.

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