

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 21, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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. 97-2169-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MATTHEW J. BUMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Lafayette County: RUSSEL J. MITTELSTADT, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Higginbotham,¹ JJ.

PER CURIAM. Matthew J. Buman appeals from a judgment of conviction and from an order denying his postconviction motion. The main issues

¹ Circuit Judge Paul B. Higginbotham is sitting by special assignment pursuant to the Judicial Exchange Program.

are whether the trial court erred by denying his motion to admit evidence of a prior false accusation and whether his trial counsel was ineffective. We affirm.

The jury found Buman guilty of sexual assault and other charges related to an incident in February 1995. The victim, Lisa B., testified that she gave Buman a ride in her car, and he forced her to perform sexual acts.

I. EVIDENCE OF PRIOR FALSE ACCUSATION

On appeal, Buman first argues that the trial court erred by denying his motion to admit evidence suggesting that the victim had made a false accusation of nonconsensual sexual assault against another man. Buman moved for admission of testimony by an attorney and a police officer about the other man's statements, and testimony by that man's mother and a friend of Lisa's.²

The State argues that Wisconsin case law holds that evidence of a prior false accusation is limited to cross-examination of the complainant, and extrinsic evidence is not permitted. *See State v. Olson*, 179 Wis.2d 715, 721-25, 508 N.W.2d 616, 618-20 (Ct. App. 1993); *State v. Rognrud*, 156 Wis.2d 783, 457 N.W.2d 573 (Ct. App. 1990). The reasoning is that § 906.08(2), STATS., forbids use of extrinsic evidence to prove specific instances of conduct to attack a witness's credibility. In *Olson*, the court also held that the defendant's confrontation right and right to present a defense were not violated by the exclusion of extrinsic evidence. *Olson*, 179 Wis.2d at 724-25, 508 N.W.2d at 620.

² The man declined to testify that his sex with Lisa was consensual because Lisa was under the age of consent at the time it occurred.

Buman does not dispute the State's argument as to § 906.08(2), STATS. However, he argues that notwithstanding that provision, the extrinsic evidence must be admitted because to deny it is a violation of his rights to confrontation, compulsory process, and to present a defense.

Buman first argues that, unlike *Olson*, his extrinsic evidence was not a general attack on the victim's credibility, but was instead "substantive evidence" that the crime he was charged with did not occur.³ In making this argument, Buman relies entirely on cases from other jurisdictions. However, we see no significant difference between how the *Olson* defendant intended to use the evidence of a prior false accusation and how Buman intends to do so. We conclude that *Olson* controls this situation.

Buman also argues that his extrinsic evidence shows the victim's bias or motive to fabricate. We disagree. The extrinsic evidence does not show any bias against Buman or motive to fabricate that is specific to Buman and the facts of this case.

Although the above analysis resolves the question of whether the extrinsic evidence should have been admitted, it does not answer whether Buman should have been allowed to cross-examine Lisa about the alleged prior false accusation, since cross-examination about specific instances of conduct is permitted under § 906.08(2), STATS. The State argues that the cross-examination was properly denied under the rape shield statute, § 972.11(2), STATS.

³ Buman does not articulate a specific theory of relevance and admissibility for how the extrinsic evidence is "substantive." Other than an attack on the victim's credibility, the only other theory we see for the evidence to be relevant is for Buman to argue that in making the accusation against him, Lisa was acting in conformity with a trait of her character which leads her to make false accusations of sexual assault.

For evidence to be admissible under that statute, the proponent must make several showings, one of which is that the evidence is of sufficient probative value to outweigh its inflammatory and prejudicial nature. *See State v. DeSantis*, 155 Wis.2d 774, 785, 456 N.W.2d 600, 605 (1990). On cross-examination at the hearing on Buman's motion in limine, Lisa did not admit that she had made a prior false accusation. She testified that the prior episode was nonconsensual. Unless the jury were to find her description of the prior episode not credible, the probative value of this cross-examination would be negligible. There is no reason on this record to think the jury would not find her credible. Therefore, the cross-examination was properly denied. For the same reason, its exclusion did not violate Buman's rights to confrontation and to present a defense.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Buman argues that his trial counsel was ineffective by failing to make an appropriate legal argument for an *in camera* inspection of Lisa's confidential counseling records. To establish ineffective assistance of counsel, Buman must show that counsel's performance was deficient and that such performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). We affirm the trial court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the trial court. *See State v. Pitsch*, 124 Wis.2d 628, 633-34, 369 N.W.2d 711, 714-15 (1985).

Buman moved for access to Lisa's counseling records relating to her pregnancy which resulted from the sexual activity that Buman alleged was the subject of her prior false accusation. He sought evidence that the prior sex was

consensual or that Lisa's testimony at the motion in limine was not accurate. The trial court denied his motion.

In response to Buman's postconviction motion, the trial court obtained the counseling records and reviewed them.⁴ It found "no useful evidence of prior untruthful allegations." On appeal, Buman argues that we should review the records for exculpatory evidence, and that if such evidence exists he has been prejudiced by his counsel's performance.

The State appears to concede that trial counsel's performance was deficient. However, it argues that Buman cannot show prejudice because he ultimately received post-trial what he claims he should have received pretrial, that is, an *in camera* review of the victim's records. It argues that because the court found nothing exculpatory in the records after trial, there is no reason to believe that an *in camera* review before trial would have yielded a different result.

The State's argument overlooks the fact that Buman's goal was not just to have an *in camera* inspection, but to obtain access to the records. The trial court's pretrial inspection of the records, had there been one, would not have been the last word; Buman could have sought review of that ruling on appeal from a conviction. If this court would have reversed the judgment because of error in the trial court's pretrial ruling, then Buman has shown prejudice. Therefore, as a practical matter, to determine prejudice this court is now in the same position that we would have been if the issue had been properly presented before trial: we

⁴ It is preferable that *in camera* inspections be made pre-trial. Should a post-trial *in camera* inspection reveal exculpatory evidence, the only remedy is a new trial.

review the records to determine whether the trial court's ruling was erroneous and the conviction should be reversed.

The State expressly stated that it has no objection to our *in camera* review of the records. After reviewing the records, we do not agree with the trial court's conclusion that there is "no" potentially exculpatory evidence. However, the evidence is slight, and there is no definite evidence that the pregnancy resulted from consensual sex, or evidence that is in substantial conflict with Lisa's testimony at the hearing on the motion in limine. To preserve Lisa's confidentiality, we decline to discuss the records further.

III. DISCRETIONARY REVERSAL

Finally, Buman argues that because the jury did not hear the evidence we discussed in Part I of this opinion, the real controversy was not fully tried and we should exercise our power of discretionary reversal under § 752.35, STATS. This statute does not allow us to grant the relief Buman seeks. It does not give us the authority to order the admission of evidence that is otherwise inadmissible. Therefore, even if we were to reverse and remand, the result would only be another trial in which the jury does not hear the evidence.

By the Court.—Judgment and order affirmed.

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

