

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 29, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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. 97-2272-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM WILSON GORDON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County:
ROBERT J. KENNEDY, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. William Wilson Gordon has appealed from a judgment convicting him following a jury trial of two counts of second-degree sexual assault of a child in violation of § 948.02(2), STATS. The sole issue on appeal is whether the trial court erroneously exercised its discretion by denying Gordon's postverdict motion for a new trial. Gordon contends that the real

controversy was not fully tried and that a new trial is necessary to permit the jury to hear evidence from a posttrial medical examination of Gordon indicating that he is fully circumcised. We affirm the trial court's judgment.

At trial Misty D. testified that Gordon had penis-to-vagina contact with her. Sonya D. testified that in a separate incident, Gordon had penis-to-anus contact with her. Gordon testified and denied both incidents.

Misty further testified that Gordon's penis was uncircumcised, as did Gordon's fiancée. In addition, a police officer testified that he saw Gordon's penis at the hospital and that it was uncircumcised. However, Gordon and a defense medical expert, Dr. Daniel Icenogle, both testified that Gordon was fully circumcised.

Based upon this dispute in the testimony and upon the request of the prosecutor, Gordon agreed to a viewing of his genitals during a break in the trial. However, the doctor who did the visual examination subsequently stated that he could not give an opinion on circumcision without handling Gordon's penis. Gordon then refused to permit the doctor to touch his penis. The prosecutor subsequently argued to the jury that Gordon's refusal to permit the examination was tantamount to admitting that he was not circumcised.

After the return of the verdict, the trial court sua sponte issued an order directing that Gordon be taken to a doctor for a hands-on physical examination to determine whether he was circumcised, uncircumcised or partially circumcised. Although Gordon initially objected to the order, the doctor who subsequently conducted the examination concluded that Gordon had a complete circumcision. Gordon then moved for a new trial, but his motion was denied.

On appeal, Gordon argues that the trial court should have granted a new trial in the interest of justice pursuant to § 805.15(1), STATS., because the real controversy was not fully tried. Trial courts have discretion under § 805.15(1) to set aside a verdict and order a new trial where the real controversy has not been fully tried. *See State v. Harp*, 161 Wis.2d 773, 775, 469 N.W.2d 210, 211 (Ct. App. 1991). Their authority is comparable to this court's discretion under § 752.35, STATS. *See Harp*, 161 Wis.2d at 779, 469 N.W.2d at 212.

Situations where the controversy has not been fully tried have arisen in two ways: (1) when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue in the case; and (2) when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried. *See State v. Hicks*, 202 Wis.2d 150, 160, 549 N.W.2d 435, 439-40 (1996). The first ground has been interpreted to include situations where evidence was not before the jury because it was not yet in existence. *See id.* at 163-64, 549 N.W.2d at 441.

Gordon argues that a new trial is warranted because evidence that he is circumcised was crucial to discredit Misty's testimony that he was uncircumcised, and thus to discredit the credibility of her claim that sexual contact occurred. He contends that the result of the independent medical examination was important to this issue, but the jury was denied an opportunity to hear it because the examination had not yet been conducted at the time of trial.

We reject Gordon's claim that this matter was not fully tried. While Misty and Gordon's fiancée testified that Gordon was uncircumcised, both Dr. Icenogle and Gordon testified that he was circumcised. This case was thus distinguishable from *Hicks* where the crucial issue was identification. In *Hicks*,

the defendant presented no evidence at trial which was comparable to the posttrial DNA evidence, which tended to discredit the State's evidence and argument concerning identification. *See id.* at 171, 549 N.W.2d at 444. In contrast, the postverdict testimony offered here was simply that of one more medical witness who would have agreed with Gordon and Dr. Icenogle that Gordon was in fact circumcised. Because Gordon had already introduced evidence, including a physician's testimony, in support of his position at trial, it cannot be said that the postverdict evidence was important information on an issue that had not been fully tried.

In assessing whether a new trial is warranted, courts may also consider whether the actions of the defendant affirmatively contributed to the exclusion of evidence which, on appeal, he or she contends should be admitted in the interest of justice. *See State v. Gove*, 148 Wis.2d 936, 944, 437 N.W.2d 218, 221 (1989). In this case, Gordon was afforded an opportunity during trial to have the same type of independent medical examination which was conducted after the trial. He rejected the opportunity, even though the trial court cautioned him that his refusal would possibly lead the prosecutor to argue, or the jury to conclude, that he did so because the examination would reveal that he was not fully circumcised as he claimed. Because Gordon affirmatively elected to forego an independent examination during trial, the interest of justice does not demand that he be permitted to introduce the results of an examination conducted after trial. *See id.*

By the Court.—Judgment affirmed.

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

