

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 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.

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Nos. 97-2374-CR, 97-3659-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RONALD SALMONS,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Marinette County: TIM A. DUKET, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Ronald Salmons appeals a judgment convicting him of five counts of second-degree sexual assault of a child, contrary to § 948.02(2), STATS., and an order denying postconviction relief. Salmons argues that the trial court erroneously exercised its discretion when it (1) denied Salmons' motion to introduce evidence of the victim's prior claims of sexual assault and

letters to her boyfriend describing her fantasies of sexual acts; (2) admitted "other acts" evidence; and (3) imposed an unduly harsh sentence. We reject his arguments and affirm the judgment and order.

M.H., who was age thirteen at the time of the assaults, testified to the following. One evening, along with two of her girlfriends, she went to Salmons' house to visit his two teenage sons. Although his sons were not at home, Salmons invited the girls in. They watched television for a while in Salmons' living room. While on the couch, Salmons touched M.H.'s breasts under her clothing. He moved her hand to touch his penis inside his boxer shorts, the only item of clothing he was wearing. Salmons also placed his fingers in M.H.'s vagina. Later, in the bathroom, he lifted her clothing and licked her breasts. He also exposed his penis. He took her to his bedroom and told her he would give her anything she wanted. He disrobed them both, and placed his penis in M.H.'s vagina. He also placed his penis in M.H.'s mouth.

Salmons sought to introduce evidence that M.H. had made prior false allegations of sexual assault against other individuals. After an in camera inspection of the records concerning the allegations, the trial court stated that it found no basis for Salmons' claim that the prior allegations were false. The court observed that one of the individuals had confessed. Another individual had denied the allegations, but the department conducting the investigation concluded that the allegations were wholly substantiated.

Salmons also sought to introduce evidence M.H. had written a number of letters to her boyfriend expressing sexual fantasies. The trial court

denied the exhibit, explaining that based on other testimony, the jury will learn that the victim has had other experiences of a sexual nature¹ and

those facts will protect the defendant from the jury assuming that she could only have gained this type of knowledge through contact with the defendant, and I just don't think because she has sexual urges or sexual desires and have expressed such in letters to a boyfriend about taking showers together, and what it would be like to perform fellatio on a male, I don't see how that makes it more likely, in this case, that she is lying

Salmons argues that the trial court erred when it denied his motion to introduce evidence of M.H.'s prior claims of sexual assault and her sexual fantasies. He contends that he should have had an opportunity to challenge M.H.'s credibility by confronting her with evidence of prior sexual assaults and the fantasy letters. We disagree.

Evidentiary issues are addressed to the discretion of the trial court. *State v. Pharr*, 115 Wis.2d 334, 343, 340 N.W.2d 498, 502 (1983). The record must reflect the trial court's reasoned application of the appropriate legal standard to the relevant facts of the case. *State v. DeSantis*, 155 Wis.2d 774, 777 n.1, 456 N.W.2d 600, 602 n.1 (1990). We review the record to determine whether it provides a rational basis for the trial court's discretionary determination. *Id.*

Section 972.11, STATS., proscribes the admission of evidence of a complainant's prior sexual conduct and permits evidence of prior untruthful allegations of sexual assault. *DeSantis*, 155 Wis.2d at 784-86, 456 N.W.2d at

¹ The jury was instructed: "[The] District Attorney and the defense attorney have stipulated to the following fact: [M.H.] has had sexual experiences, other than those allegedly occurring with the defendant which may explain the finding of Dr. Meyers."

605.² Before the court admits evidence of prior untruthful allegations, it must determine whether the evidence falls within the confines of § 972.11(2)(b)(3), STATS., that is, "whether the defendant has established a sufficient factual basis for allowing the jury to hear the evidence that the complainant made prior allegations of sexual assault that are untruthful." *DeSantis*, 155 Wis.2d at 786, 456 N.W.2d at 606. "[A] circuit court must be able to conclude from the proffered evidence that a reasonable person could reasonably infer that the complainant has made prior untruthful allegations of sexual assault." *Id.* at 788, 456 N.W.2d at 607. If the evidence does not meet this basic threshold, the court must conclude that the evidence is not admissible. *Id.*

Here, Salmons contends that he has met the threshold because "the allegations were reported to authorities and, at least one of the allegations contained a denial, and subsequently no charges were filed against the individuals who allegedly assaulted M.H." We are unpersuaded. The record fails to reflect that charges were not filed due to untrue allegations. To the contrary, the

² Section 972.11(2)(b), STATS., provides:

If the defendant is accused of a crime under s. 940.225, 948.02, 948.025, 948.05, 948.06 or 948.095, 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.

allegations were determined to be substantiated and one was supported by a confession. The lack of formal charges, in this case, has no bearing on the truth or falsity of the allegations. Because there is no showing of the allegations' falsity, they were properly excluded.

We also conclude that the trial court correctly excluded M.H.'s letters regarding sexual fantasies. Salmons argues that the introduction of the letters is relevant to show M.H.'s capability and proclivity to fantasize. While "written expressions of sexual desires are not conduct or behavior" within the meaning of § 972.11, STATS., *State v. Vonesh*, 135 Wis.2d 477, 490, 401 N.W.2d 170, 176 (Ct. App. 1986) (Gartzke, J. concurring), we conclude that the trial court properly excluded them as irrelevant. As the trial court observed, the jury would hear that M.H. had prior sexual knowledge. Therefore, unlike *Vonesh*, the letters would be unnecessary to show prior knowledge from sources other than the alleged assault. *Cf. id.* at 490-91, 401 N.W.2d at 177. Also, Salmons concedes: "Standing alone, the letters do not necessarily show that M.H. used the fantasies described in the letters to describe the allegations against Salmons." We agree that the description of sexual fantasies in the letters are not unique and do not closely parallel the allegations made against Salmons. Further, we reject Salmons' contention that the letters' probative value is enhanced by the evidence of M.H.'s prior allegations of unrelated assaults. The record fails to support Salmons' argument that the excluded evidence is relevant.

Salmons further argues that the trial court's ruling violates his constitutional rights to due process and to confront witnesses.³ Whether the

³ Because of our disposition of this issue, we do not address the State's contention that Salmons waived his constitutional argument.

application of § 972.11, STATS., in a particular case deprives the defendant of constitutional protections is a question of constitutional fact that this court determines independently of the trial court. *State v. Pulizzano*, 155Wis.2d 633, 643, 456 N.W.2d 325, 329 (1990). The constitution grants Salmons the right to present *relevant* evidence not substantially outweighed by its prejudicial effect. *Id.* at 644, 456 N.W.2d at 330 (emphasis added). "[G]enerally evidence of a complainant's prior sexual conduct is irrelevant or ... substantially outweighed by its prejudicial effect." *Id.* Despite the general rule that such evidence is inadmissible, "in the circumstances of a particular case evidence of a complainant's prior sexual conduct may be so relevant and probative that the defendant's right to present it is constitutionally protected." *Id.* at 647, 456 N.W.2d at 331.

Such is not the case here. The record discloses no basis to conclude that M.H.'s prior allegations of sexual assault were false, and the trial court correctly determined that they were irrelevant. The same is true with respect to M.H.'s letters to her boyfriend. Because the evidence offered is not relevant to the offenses charged, Salmons' constitutional argument is without merit.

Next, Salmons argues that the trial court erroneously admitted "other acts" evidence. The objected to testimony was that of a twenty-three-year-old woman who testified that when she was sixteen years old, she would babysit for Salmons' children. On two or three occasions, Salmons asked if she had sex with her boyfriends and told her that he would have sex with her. On one occasion, he grabbed her buttocks. The trial court ruled that the evidence was admissible under *State v. Friedrich*, 135 Wis.2d 1, 398 N.W.2d 763 (1987), to prove motive and intent. The trial court explained that although the evidence was prejudicial and damaging, it was not unfairly damaging in light of its demonstration of motive and

intent. The trial court twice instructed the jury on the proper use of the testimony, once directly and once again at the close of the evidence.

Under the applicable standard of review, the issue is "not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record." *State v. Kuntz*, 160 Wis.2d 722, 745, 467 N.W.2d 531 (1991.) To be admitted, the evidence must be offered for an acceptable purpose under § 904.04(2), STATS., including motive and intent.⁴ *State v. Sullivan*, 216 Wis.2d 768, 771, 576 N.W.2d 30, 33 (1998). Also, the other acts evidence must be relevant to an issue in the case. *Id.* In addition, the probative value must not be substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by consideration of undue delay, waste of time or presentation of cumulative evidence. *Id.* at 789, 576 N.W.2d at 39.

Here the trial court properly exercised its discretion in accordance with the correct legal standards. While we have some substantial reservations about the probative value of the evidence to show that the sexual contact charged in this case was done with the intent and motive to obtain sexual gratification, the balancing of probative value versus prejudice is a matter uniquely submitted to the

⁴ Section 904.04(2), STATS., provides:

OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

trial court for its determination. *See State v. Fishnick*, 127 Wis.2d 247, 261-63, 378 N.W.2d 272, 280 (1985). The trial court weighed the evidence and determined that the probative value outweighed the prejudicial effect. Based upon our standard of review, we affirm the court's determination.⁵

Finally, Salmons argues that the trial court unreasonably exercised its discretion at sentencing. We disagree. Salmons was sentenced to a total of twenty-five out of a possible fifty years' incarceration for five separate counts of sexual assault. At sentencing, the trial court took into consideration the seriousness of the offenses, Salmons' age and background, protection of the public, and deterrence. These are appropriate factors. *See State v. Larsen*, 141 Wis.2d 412, 427, 415 N.W.2d 535, 541 (Ct. App. 1987). We review sentencing discretion with great deference. *State v. Harris*, 119 Wis.2d 612, 622, 350 N.W.2d 633, 638 (1984). The record reflects that the trial court reasonably exercised its discretion in accordance with proper legal factors. Because Salmons offers no basis to overturn the judgment and order denying postconviction relief, we affirm.

By the Court.—Judgment and order affirmed.

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

⁵ Salmons does not argue that his motive and intent to obtain sexual gratification were stipulated.

