

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 5, 2001

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-3413-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY A. PETERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Chippewa County: THOMAS J. SAZAMA, Judge. *Reversed and cause remanded with directions.*

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

¶1 HOOVER, P.J. Larry Peterson appeals a conviction for second-degree sexual assault, in violation of WIS. STAT. § 940.225(2)(a).¹ He also appeals an order denying postconviction relief. Peterson argues that he should be granted a new trial in the interest of justice because the real controversy was not fully tried. Alternatively, he contends that trial counsel provided him with ineffective assistance and the case should be retried. We agree that the real controversy was not fully tried and, therefore, reverse the conviction and order. We further remand to the trial court for a new trial.

BACKGROUND

¶2 Peterson was charged with one count of second-degree sexual assault for allegedly performing oral sex on a woman without her consent. The complainant, J.T., alleged that Peterson lifted her off a couch and carried her to a bedroom during the course of the assault. Peterson claims that he could not have done this because he suffers from severe back problems. Peterson's trial counsel, John Bachman, testified at the postconviction hearing that the main issue in the case was whether Peterson's back condition demonstrated that the assault was medically impossible as described by J.T.

¶3 The pertinent facts are as follows. Peterson, age fifty-three, and J.T., age fifty-eight, were both residents of a special care facility for handicapped and elderly persons. Peterson and J.T. knew each other well. J.T. stated that on the day of the alleged incident, she was lying prone on a couch because she had a bad headache. Peterson entered her apartment to check on her and talk to her. He said he wanted to "tuck her into bed." She reported that he then bent over, reached his

¹ All references to the Wisconsin Statutes are to the 1999-2000 version.

arms underneath her around her ribs like a bear hug, and lifted her up from the couch until she could see over his shoulder. She related that her feet could not make hard contact with the floor and that Peterson then "dragged" her to the bedroom, dropped her on the bed and sexually assaulted her. J.T. testified that she weighed about 150-160 pounds. She testified that she did not smell any alcohol on Peterson that night. In her report to the police, she failed to report that he had lifted and carried her.

¶4 Bachman collected Peterson's medical records and sent them to Dr. Mark Huffman, asking for an opinion about the medical probability of Peterson lifting and carrying J.T. Huffman responded:

Given the documentation of his last functional exam of his back; it would be unlikely given his history of chronic pain, and his work history, to suddenly be able to lift this amount of weight [160 pounds] and carry it the distance you noted [8-10 feet]. However, if Mr. Peterson had been drinking on the night of the alleged event, the "anesthetic" properties of alcohol may have prevented Mr. Peterson from "feeling" the effects of the lift or from feeling the chronic pain he had. Thus, without a current evaluation on file for Mr. Peterson, that objectively delineates his strength potential and functional capacity, I cannot offer an opinion to a reasonable degree of medical certainty stating that his history of back problems alone, was enough to make it improbable that he could lift that amount of weight.

Bachman did not provide a more recent functional capacity examination report or arrange for an examination to be performed.

¶5 Peterson asked a physician who had previously treated him to assist in his defense. Dr. Tuenis Zondag examined Peterson and wrote to Bachman, reporting that:

Based upon my findings today, I do not feel [second degree sexual assault] is physiologically possible for him to do the

type of lifting that has been explained based upon the abnormal findings we have. I feel at the present time that this gentleman's physical abilities are less than that. ... He can also major lift probably on a one time basis 20-25 pounds at best. This is not consistent with a human being trying to resist whose weight is greater than 100. His tolerance for carrying I feel presently would be in the 40-50 pound range.

¶6 At the postconviction hearing, Zondag testified consistently with his written statement: "Mr. Peterson would have carried her up one or two feet or actually would have just dropped to his knees because of the physical inability for his back to tolerate that type of level of lifting." He noted further that alcohol consumption "might have given him another foot or two, but it still would have prevented him, because I think the physical ability, because of his deconditioning and because of his back condition, is one that would not have happened." Zondag submitted that had Peterson attempted the lift, he would probably have been confined to his bed the following days, unable to get up. Neither the doctors' opinions nor Peterson's medical records were introduced at trial.

¶7 At trial, Bachman argued that the assault, as J.T. explained it, was physically impossible for Peterson. In closing argument, Bachman contended that a "middle-aged man who lives in a disability apartment" could not have lifted and carried a 160-pound person. However, as indicated, he presented no medical evidence to substantiate this argument. He did not introduce evidence describing Peterson's physical disabilities that qualified him to live in an apartment building restricted to handicapped and elderly persons.

¶8 The jury found Peterson guilty as charged, and the court sentenced him to fifteen years in prison. Peterson filed a postconviction motion that was

denied. He now appeals both the judgment and the order denying postconviction relief.

ANALYSIS

¶9 This court has discretionary authority to reverse a judgment of conviction and remand for a new trial in the interest of justice. *Vollmer v. USF&G*, 156 Wis. 2d 1, 4, 456 N.W.2d 797 (1990). WISCONSIN STAT. § 752.35 provides:

In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

¶10 Thus, a new trial may be ordered in either of two ways: (1) whenever the real controversy has not been fully tried; or (2) whenever it is probable that justice has for any reason miscarried. Separate criteria exist for determining each of these two distinct situations. *Vollmer*, 156 Wis. 2d at 19. This court may reverse when the real controversy has not been fully tried without finding the probability of a different result on retrial. *Id.* One of the means by which the controversy may not have been fully tried is when the jury did not have

an opportunity "to hear important [testimony] that bore on an important issue of the case." *State v. Hicks*, 202 Wis. 2d 150, 161, 549 N.W.2d 435 (1996).²

¶11 In this case, the jury was not given any evidence regarding Peterson's back condition, although it was undisputed that he satisfied the requirements necessary to live in an apartment designated for handicapped or elderly persons. Hoffman stated that if Peterson had been drinking, the anesthetic properties of alcohol could have allowed Peterson to lift with less pain, but J.T. conceded that she did not smell any alcohol on Peterson that night. If the jury had heard the medical testimony, the evidence could have reasonably cast doubt on J.T.'s version of the events. J.T. unequivocally testified that Peterson lifted her off the couch and carried her into the bedroom, to demonstrate J.T.'s lack of consent. If Peterson was physically unable to carry her as she described, then the jury should have been given the opportunity to evaluate her credibility in light of that evidence.

¶12 Peterson insisted to Bachman that the medical evidence be introduced and even tried to fire him when he discovered that Bachman had not obtained a medical expert and had not filed his medical records.³ The court denied Peterson's request. We note that the trial court was somewhat misled regarding the significance of the medical evidence because Bachman advised the court that

² In *State v. Hicks*, 202 Wis. 2d 150, 159, 549 N.W.2d 435 (1996), the supreme court applied WIS. STAT. § 751.06. This statute is identical to WIS. STAT. § 752.35, except that it applies to the supreme court instead of the court of appeals. Cases interpreting reversal under WIS. STAT. § 751.06 are equally applicable as interpretations of the court of appeals' power of reversal under WIS. STAT. § 752.35. *Vollmer v. USF&G*, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990).

³ Peterson also claimed that Bachman had not investigated J.T.'s motives for falsifying a claim.

he was ready to proceed even without medical evidence. We conclude that the real controversy has not been fully tried and reverse and remand the judgment and order for a new trial.⁴ See WIS. STAT. § 752.35.

By the Court.—Judgment and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

⁴ We agree with the concurrence that Bachman's performance was prejudicially ineffective. However, because we reverse in the interest of justice, we deem it unnecessary to undertake an exhaustive analysis of this issue. See *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983). Bachman admitted that Peterson's lifting ability was a critical issue in the case. Because the lack of medical evidence caused the real controversy not to be tried, it was prejudicial.

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¶13 CANE, C.J. (*concurring*). I agree with the majority that the real controversy was not tried because the medical evidence was not made available at trial. However, I concur on the additional basis that this medical evidence was not made available at trial because of ineffective assistance of counsel. The standard for ineffective assistance of counsel has been stated numerous times in cases and, therefore, I need not repeat it. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Here, defense counsel failed to present any evidence of Peterson's medical condition that would have shown he was physically incapable of lifting and dragging J.T. From the beginning, defense counsel knew that Peterson's medical condition was critical to his defense. The evidence existed and counsel had more than sufficient time and opportunity to have the medical evidence available for trial. Although counsel took the initial steps to gather this medical information, it is undisputed that he failed to follow through in presenting it at trial because of poor planning and mismanagement.

¶14 Additionally, counsel concedes that he could have had Peterson's medical records admitted into evidence and that it was a mistake for him not to do so. The medical records, which include CAT scans, surgical descriptions and other clinical observations, established the severity of Peterson's back problems. If these medical records had been presented at trial, counsel would have been able to substantiate Peterson's defense that he was incapable of lifting and dragging J.T.

¶15 This case came down to a credibility contest between Peterson and J.T., as there were no other witnesses and no physical evidence. J.T. claimed that

Peterson forcibly lifted and dragged her from her couch to the bed in the bedroom and there sexually assaulted her. On the other hand, Peterson claimed that J.T. voluntarily accompanied him into the bedroom under her own power and consented to sexual activity. How J.T. got from the couch in the living room to the bed in the bedroom was extremely relevant to the issue of consent, as well as credibility. Under these circumstances, the absence of this critical medical evidence prejudiced Peterson. Therefore, I would reverse and remand the matter for a new trial because of ineffective assistance of counsel.

