

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 10, 2010

A. John Voelker
Acting Clerk of Court of Appeals

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.*

Appeal No. 2009AP988-CR

Cir. Ct. No. 2007CF264

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOSHUA DANIEL WHEELER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dunn County:
ROD W. SMELTZER, Judge. *Affirmed and modified.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Joshua Wheeler appeals a judgment, entered upon a jury's verdict, convicting him of repeated first-degree sexual assault of a child

contrary to WIS. STAT. § 948.025(1)(ar)¹ and repeated sexual assault of a child (with fewer than three violations of first-degree sexual assault) contrary to WIS. STAT. § 948.025(1)(b).² Wheeler argues the trial court erred by denying his motion to admit other crimes, wrong or acts evidence. We reject this argument and affirm the judgment.

BACKGROUND

¶2 Wheeler was charged with two counts of repeated sexual assault of his stepdaughter, Candace E. The first count alleged offenses occurring when Candace was between seven and twelve years old, and the second count alleged offenses when Candace was between thirteen and fifteen years old. The State alleged Wheeler's conduct had progressed from acts of fondling Candace's breasts, to inserting his finger in her vagina, to fellatio and cunnilingus, to penis-to-vagina intercourse, all occurring inside the family home and continuing until some point after Candace turned fifteen years old.

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² Although not an issue raised on appeal or that adversely affects Wheeler, we note that the judgment of conviction does not precisely reflect the jury verdict that found Wheeler guilty of one count of repeated first-degree sexual assault of a child contrary to WIS. STAT. § 948.025(1)(ar), and one count of repeated sexual assault of a child (with fewer than three violations of first-degree sexual assault) contrary to WIS. STAT. § 948.025(1)(b).

The current judgment indicates Wheeler was convicted of "first-degree sexual assault-intercourse with person under 12" contrary to WIS. STAT. § 948.02(1)(b), and repeated sexual assault of the same child (with fewer than three violations of first-degree sexual assault) contrary to WIS. STAT. § 948.025(1)(b). The judgment further indicates Wheeler was convicted after a trial to the court rather than pursuant to a jury's verdict. Because these appear to be clerical errors, upon remittitur, the court shall enter an amended judgment of conviction correctly describing Wheeler's convictions and the means by which he was convicted.

¶3 The trial court denied Wheeler’s pre-trial “motion to admit other crimes, wrongs or acts evidence by the alleged victim.” A jury ultimately found Wheeler guilty of the crimes charged and the court imposed concurrent sentences totaling twenty years’ initial confinement and ten years’ extended supervision. This appeal follows.

DISCUSSION

¶4 Wheeler argues the trial court erred by denying his motion to admit other crimes, wrong or acts evidence. Whether to admit evidence is addressed to the trial court’s discretion. *State v. Pharr*, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). An appellate court will sustain an evidentiary ruling if it finds the trial court examined the relevant facts, applied a proper standard of law and, using a demonstrative rational process, reached a conclusion that a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). A circuit court should delineate factors that influenced its decision. *State v. Hunt*, 2003 WI 81, ¶44, 263 Wis. 2d 1, 666 N.W.2d 771. Nevertheless, “[w]hen a circuit court fails to set forth its reasoning, appellate courts independently review the record to determine whether it provides a basis for the circuit court’s exercise of discretion.” *Id.*

¶5 Here, Wheeler sought to admit evidence that Candace—eighteen years old at the time of trial—had, at age eleven, made an “unsubstantiated” accusation of sexual assault against her then-thirteen-year-old cousin, Tyler M. Wheeler likewise sought to admit evidence that during an interview with a social worker at the time she made the allegations against her cousin, she did not report that Wheeler was also abusing her. Wheeler sought to admit the evidence in order

to challenge Candace’s credibility and establish there was an alternate source for her knowledge of sexual conduct.

¶6 The rape shield law, WIS. STAT. § 972.11(2)(b), generally limits the admission of evidence of a complainant’s prior sexual conduct because such evidence “has low probative value and a highly prejudicial effect.” *State v. DeSantis*, 155 Wis. 2d 774, 785, 456 N.W.2d 600 (1990). As Wheeler properly notes, one exception to this general proscription allows for the admission of “[e]vidence of prior untruthful allegations of sexual assault made by the complaining witness.” WIS. STAT. § 972.11(2)(b)3. Before it admits evidence of prior untruthful allegations, the circuit court must determine: “(1) whether the proffered evidence fits within § 972.11(2)(b)3; (2) whether the evidence is material to a fact at issue in the case; and (3) whether the evidence is of sufficient probative value to outweigh its inflammatory and prejudicial nature.” *DeSantis*, 155 Wis. 2d at 785.

¶7 Noting that Candace’s allegations against Tyler were “unsubstantiated,” Wheeler argues the proffered evidence fits within WIS. STAT. § 972.11(2)(b)3. With respect to this first *DeSantis* determination, a defendant must “produce evidence at the pre-trial hearing sufficient to support a reasonable person’s finding that the complainant made prior *untruthful* allegations.” *Id.* at 788 (emphasis added). Here, Wheeler contends the trial court did not apply this standard when determining that Candace’s allegations against Tyler were not “untruthful.” Wheeler argues that the cumulative facts of this case support a reasonable person’s finding that Candace’s allegations against her cousin were untruthful. Specifically, Wheeler argues that although Candace now claims Wheeler was sexually assaulting her around the same time as Tyler, she did not

contemporaneously accuse Wheeler of the sexual assaults. Wheeler also points out that Candace sent recantation letters to her mother and county authorities.

¶8 At the pre-trial hearing, however, Wheeler offered insufficient evidence to support a reasonable person's finding that Candace lied about the allegations involving her cousin and there is nothing in the record to support that conclusion. Wheeler merely attached a copy of the police report to his motion and emphasized the investigator's conclusion that “[t]he allegations could not be substantiated at this point.” An unsubstantiated finding, however, is nothing more or less than what it purports.

¶9 Further, that Candace failed to contemporaneously accuse Wheeler does not reasonably suggest she lied regarding the allegations against her cousin. As an expert explained at trial, child sexual-assault victims commonly delay reporting such assaults, especially where the alleged perpetrator is a family member and authority figure, like a stepfather. *See, e.g., State v. Huntington*, 216 Wis. 2d 671, 696-98, 575 N.W.2d 268 (1998) (eleven-year-old complainant's “lengthy” delay in alleging sexual abuse by her stepfather is “consistent” with behavior of similarly situated victims). We likewise conclude that Candace's recantation of the allegations against Wheeler do not support a conclusion that she lied about the allegations against her cousin. As Candace explained at trial, she wrote the letters because she no longer wanted to live with her biological father. A retired prosecutor testified that Candace told her the recantations were untrue. The prosecutor further noted that in child sexual abuse cases, child complainants commonly attempt to recant allegations. Because Wheeler failed to produce evidence sufficient to support a reasonable person's finding that the complainant

made prior *untruthful* allegations, the trial court properly omitted the proffered evidence under the first ***DeSantis*** determination.³

¶10 Moreover, the court reasonably determined that the proffered evidence lacked sufficient probative value to outweigh its inflammatory and prejudicial nature. ***DeSantis***, 155 Wis. 2d at 785. WISCONSIN STAT. § 906.08(2) bars the use of extrinsic evidence to prove specific instances of a witness's conduct on a collateral matter for purposes of attacking or supporting the witness's credibility, other than evidence of criminal convictions, as provided in WIS. STAT. § 906.09. *See State v. Rognrud*, 156 Wis. 2d 783, 787, 457 N.W.2d 573 (Ct. App. 1990). Evidence that a sexual assault complainant made a prior untruthful allegation of sexual assault against someone other than the defendant in an unrelated situation is collateral to resolution of the charged crimes. *See id.* Here, evidence that Candace allegedly lied about the allegations against her cousin is purely character evidence of minimal probative value. It would not show any bias or motive on Candace's part to falsely accuse Wheeler. The court, therefore, properly concluded the proffered evidence lacked sufficient probative value to outweigh its inflammatory and prejudicial nature.

¶11 We likewise reject Wheeler's companion claim that the proffered evidence was relevant to establish an alternate source for Candace's knowledge of sexual conduct. To suggest that Candace's sexual knowledge arose from her encounters with Tyler is inconsistent with Wheeler's claim that Candace's sexual assault allegations against her cousin were false. We further note that the assaults

³ The court having considered the State's citation to supplemental authority and Wheeler's response, we conclude that further support for omission of the proffered evidence may be found in ***State v. Ringer***, 2010 WI 69, __ Wis. 2d __, __ N.W.2d __.

of Candace began years before the alleged assault by Tyler. Because the trial court properly omitted evidence regarding Candace's allegations against her cousin, we affirm the judgment.⁴

By the Court.—Judgment modified and, as modified, affirmed.

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

⁴ Alternatively, we agree with the State's assertion that any error was harmless for the reasons stated in its brief. Moreover, because Wheeler's reply brief does not address the State's harmless error analysis, he has conceded the argument. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted deemed admitted).

