COURT OF APPEALS
DECISION
DATED AND FILED

March 13, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1587-CR **Cir. Ct. No. 2006CF271**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TOM O. WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Affirmed*.

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

¶1 PER CURIAM. Tom Williams, pro se, appeals a judgment of conviction, entered on a jury verdict, for second-degree sexual assault, by use of force. On appeal, Williams contends the court erroneously excluded evidence pursuant to the rape shield law, the victim perjured herself at trial, and the court

was biased against him. He also asserts portions of the court reporter's stenographic notes are missing, the court erred by excluding one of his witnesses, and his trial attorney was ineffective. We affirm.

¶2 The State argues that Williams never filed a postconviction motion and his arguments are not properly before us on appeal. *See* WIS. STAT. RULE 809.30(2)(h); *see also* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) (Issues not presented to the circuit court will not be considered for the first time on appeal.). Williams has failed to file a reply brief in response to this argument; therefore, we deem it conceded. *See* ***Charolais Breeding Ranches, LTD. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶3 However, even if we were to address Williams' arguments, they would fail on the merits. Williams first argues the circuit court erred by reversing its ruling regarding the admissibility of certain evidence. Specifically, on May 29, 2007, the court determined evidence regarding the victim's alleged prior untruthful allegation of sexual assault and preexisting sexual relationship with Williams would be admissible at trial. On appeal, Williams argues the court reversed this ruling on December 11, 2009. However, the court did not reverse its admissibility determination at this hearing. Rather, the court determined what *form* this evidence could take at trial. Relying on ***State v. Rognrud***, 156 Wis. 2d 783, 457 N.W.2d 573 (Ct. App. 1990), and WIS. STAT. § 906.08, the court determined that Williams could not prove the alleged untruthful allegation or preexisting relationship through extrinsic evidence. The court's determination was proper. *See* ***Rognrud***, 156 Wis. 2d at 788-89 (extrinsic evidence of false allegation not allowed).

¶4 Williams next asserts the victim's testimony was inconsistent, she perjured herself throughout trial, the prosecutor engaged in misconduct by convicting him through perjured testimony, and his trial counsel was ineffective for allowing the perjured testimony. Specifically, Williams contends the victim's testimony that she had not been in his apartment before and never had a previous sexual encounter with him was false and inconsistent. However, Williams' counsel challenged the victim on these points, and Williams' testimony contradicted the victim's. It is the jury that decides whether a witness is credible. ***State v. Whiting***, 136 Wis. 2d 400, 418, 402 N.W.2d 723 (Ct. App. 1987). Moreover, a prosecutor's presentation of a witness who contradicts prior testimony is not to be confused with eliciting perjured testimony. *See* ***id.*** Here, there is no evidence that the prosecutor knew or believed the victim's testimony to be untrue; therefore, the prosecutor did not obtain Williams' conviction through the presentation of perjured testimony. *See* ***id.***

¶5 Williams next contends the court was biased against him. Citing SCR 60.04, Williams argues the court engaged in inappropriate conduct because it interrogated him at a motion hearing, refused to adjourn the third day of trial, and allowed Williams' counsel to say he "ha[s] had the unfortunate experience" of defending Williams. However, the court is permitted to question witnesses,[1] *see* WIS. STAT. § 906.14(2), and judicial rulings alone almost never constitute bias, ***Liteky v. United States***, 510 U.S. 540, 555 (1994). Moreover, it does not appear that Williams' counsel was even discussing Williams when he stated he had an "unfortunate experience." Rather, while arguing that he should be permitted to

[1] The court asked Williams one question at the motion hearing: "How many different pair[s] of trousers do you wear with that belt?"

introduce other acts evidence at trial, Williams' counsel stated, by way of example, "I have had the unfortunate experience of sitting here defending a sexual assault case where the prosecutor brings in other victims' extrinsic evidence and puts that evidence on the stand before the jury, and it's allowed. That's how you prove other acts evidence." Williams' allegations do not show judicial bias. *See* ***State v. McBride***, 187 Wis. 2d 409, 416, 523 N.W.2d 106 (Ct. App. 1994) (Judicial bias is established if objective facts show the judge treated a party unfairly.).

¶6 Williams also objects to the court's statement that it was at a "disadvantage." Taken in context, the court stated it was at a "disadvantage" because it had not had time, and needed time, to review Williams' criminal record for conviction counting purposes. This is appropriate. *See* ***id.***

¶7 Williams also argues that portions of the court reporter's stenographic notes from a motion hearing are missing or inaccurate. In support, he refers to a comment the court made at the beginning of a continued motion hearing. There, the court observed that the minutes from the last hearing were not helpful to determine where the parties stopped and what issues the court still needed to address. This comment, however, does not mean that the court reporter's stenographic notes were missing. The prosecutor stated she had not requested a transcript and the court was only trying to determine what substantive issues still needed to be addressed, which it did before any witnesses were questioned. Further, the transcripts from both days of the motion hearing are in the record and Williams has not alleged that either transcription is deficient. *See* WIS. STAT. § 809.15(3) (party who believes that transcript is defective may move the circuit court to supplement or correct the record).

¶8 Williams next contends the court erred by refusing to allow Williams' landlord to testify that he had observed the victim at Williams' apartment building before the assault. The circuit court refused to allow the landlord to testify because it determined the evidence was extrinsic and disallowed by WIS. STAT. § 906.08. The court's determination was proper.

¶9 Finally, Williams argues his trial counsel was deficient for not eliciting testimony from the emergency room examining nurse that testing revealed semen from a source other than Williams was found on the victim's vaginal swab. The court excluded the semen evidence at a pretrial hearing because Williams was only accused of, and admitted to, digital penetration of the victim; therefore, the presence or absence of semen was irrelevant. Counsel was not deficient for abiding by the court's pretrial order.

By the Court.—Judgment affirmed.

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