COURT OF APPEALS
DECISION
DATED AND FILED

November 30, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1792-CR **Cir. Ct. No. 2011CF269**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NELSON I. HUMES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: MARY KAY WAGNER, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 PER CURIAM. Nelson Humes appeals a judgment convicting him after a jury trial of three counts of second-degree sexual assault of a child under

sixteen. The trial court ruled that the rape shield law, WIS. STAT. § 972.11(2) (2013-14)[1] barred evidence of other sexual conduct of the three victims. Humes contends the ruling violated his right to confrontation and prevented him from presenting his misidentification defense. We disagree and affirm.

¶2 Humes originally was charged with four counts of second-degree sexual assault of a child under sixteen. The complaint alleged that in 2011 he had sexual intercourse with fifteen-year-old C.G. sometime between February 11 and March 8 when she came to his house for a tattoo, with fifteen-year-old Je. S. (Je), on March 8, and with Je's sister, fourteen-year-old Jo. S. (Jo) on March 8 and 9. The Je count later was dismissed.

¶3 According to the complaint, Je, Jo, and C.G. skipped school on March 8. C.G. took them to Humes' house to get tattoos. Over the course of the next several hours, Humes, his brother, and a friend, all adults, and the girls drank beer and smoked marijuana. Sexual activity ensued. Later that evening, the girls, Humes' brother, and the friend went to the friend's apartment. More adult males arrived. The drinking, smoking, and sexual activity continued overnight. The girls did not return to Humes' apartment.

¶4 The complaint alleged that Je and C.G. engaged in sexual activity with nearly all of the men at the two locations. Humes intended to argue that, due to their admitted impairment, the girls misidentified him as one of the men engaged in sexual activity and sought to cross-examine them about their sexual

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

contact with the other men. The trial court concluded that the rape shield law barred the evidence.

¶5 At trial, C.G. testified that she and Humes had intercourse when she got the tattoo in February and "additional times" after that, and that she saw Humes and Jo having sex at Humes' apartment on March 8. Je testified that she, too, saw Humes and Jo having sex at Humes' apartment and that, at the second location, she saw Humes and Jo "go[] into a room and stay[] there." Jo testified that she had sexual intercourse with Humes at his apartment on March 8 and twice more at the second apartment, once in the shower and, later, in the bedroom where they spent the night. One of the men at the second location testified that he arrived there either late on March 8 or early on March 9, that Humes arrived "a couple hours after," that he saw Jo follow Humes into a bedroom, and that he later heard her say to C.G. and Je, "[T]hat was some good sex."

¶6 In stark contrast, Humes testified that there was no smoking or drinking going on at his apartment, that he never at any time had sex with Jo or C.G., that he did not go to his friend's apartment that night, and that the girls left about 3 p.m. on March 8, just before his father dropped off Humes' young son to spend the night. The father did not testify at trial.

¶7 The jury found Humes guilty on all three counts. His motion for a new trial was denied after a hearing. The issue on appeal is whether the court's evidentiary ruling violated Humes' right to confrontation and foreclosed the presentation of his defense.

¶8 The admission of evidence is a decision left to the trial court's discretion. *See* ***Michael R.B. v. State***, 175 Wis. 2d 713, 723, 499 N.W.2d 641 (1993). We will not find an erroneous exercise of discretion if the trial court

applied the facts of record to accepted legal standards. *See* ***State v. Kuntz***, 160 Wis. 2d 722, 745, 467 N.W.2d 531 (1991). Wisconsin's rape shield law generally prohibits the introduction of any evidence of the complainant's prior sexual conduct "regardless of the purpose." WIS. STAT. § 972.11(2)(c); ***State v. Ringer***, 2010 WI 69, ¶25, 326 Wis. 2d 351, 785 N.W.2d 448. At times, however, the statute must yield to the accused's right to present a defense. *See* ***State v. Williams***, 2002 WI 58, ¶69, 253 Wis. 2d 99, 644 N.W.2d 919. We review de novo whether applying the statute to a particular fact situation deprives a defendant of a constitutional right. ***Id.***

¶9 A defendant's constitutional right to present evidence is limited to the presentation of "relevant evidence not substantially outweighed by its prejudicial effect." *See* ***State v. Pulizzano***, 155 Wis. 2d 633, 646, 456 N.W.2d 325 (1990); WIS. STAT. § 904.03. The defendant must make an offer of proof showing that: (1) the prior acts clearly occurred, (2) the prior acts closely resembled those in the present case, (3) the prior acts are clearly relevant to a material issue, (4) the evidence is necessary to the defendant's case, and (5) the probative value of the evidence outweighs its prejudicial effect. ***Pulizzano***, 155 Wis. 2d at 656.

¶10 Humes' offer of proof was insufficient. As to Jo, he pointed to no evidence that sex with anyone but him "clearly occurred" and did not explain how Je's and C.G.'s conduct with other men could influence their identification of him as the one they saw having sex with Jo, particularly since C.G. knew him from before. While the complaint indicates that one of the men at the second location told police he heard C.G. and Je say on March 9 that Jo had been "tossed around like a rag doll by several guys" the night before, a close friend of Humes' told police he heard only C.G. and Je, not Jo, "brag about having sex with different guys." None of the three girls' statements to police contained any reference to Jo

having sex with anyone but Humes and he made no offer of proof that either C.G. or Je would testify that they saw Jo engaging in sexual activity with anyone but him. And whereas Jo positively identified the other men in photo arrays, only in regard to Humes, because she "didn't want to get him in trouble," did she deliberately tell police she could not identify him with certainty. Finally, although Jo's sexual abuse evaluation indicated that "multiple adult males" perpetrated the alleged assaults, she did not fill out the form nor was she the source of the information. A detective filled it out very early in the investigation, when about all he knew was that the event involved the three girls and nine or ten men.

¶11 As to the other two girls, the charge that Humes assaulted Je was dropped and the allegation of an assault against C.G. was in connection with the tattoo event, which predated the March 8 and 9 sexual assaults. Thus, whether Je and C.G. had sex with any or all of the other men was not "clearly relevant" to a material issue, specifically, Humes' misidentification defense. For all three girls, the prejudicial effect of the sexual conduct evidence would have far outweighed any little probative value it might have had.

¶12 The court properly exercised its discretion in excluding the evidence under the rape shield law. The ruling did not foreclose Humes from arguing that the girls' impairment inhibited their ability to be certain that he had sex with Jo. He did not show that he had a constitutional right to present it and his right to present a defense was not violated.

¶13 As an alternative argument Humes briefly contends that the evidence could be reviewed "under the less stringent but similar 'other acts' test" set forth in WIS. STAT. § 904.04 because other-acts evidence is admissible when offered for a purpose such as identity. *See* § 904.04(2)(a). We decline for several reasons.

¶14 First, Humes did not make this argument below. "The general rule is that issues not presented to the circuit court will not be considered for the first time on appeal." ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997).

¶15 Second, Humes does not develop his argument under the ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998), analytical framework, "the definitive approach governing the admissibility of other act evidence." ***State v. Payano***, 2009 WI 86, ¶¶59-60, 320 Wis. 2d 348, 768 N.W.2d 832 (citation omitted). We will not develop parties' arguments for them. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).

¶16 Third, other-acts evidence is not automatically admissible if it fits a WIS. STAT. § 904.04(2) exception. It also must be relevant to an issue in the case and its probative value must not be substantially outweighed by the danger of undue prejudice. ***State v. Rutchik***, 116 Wis. 2d 61, 68, 341 N.W.2d 639 (1984). As explained, whether and with whom Je and C.G. had sex on March 8 and 9 is irrelevant to whether Humes had sex with Jo on those days.

By the Court.—Judgment affirmed.

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