COURT OF APPEALS
DECISION
DATED AND FILED

August 9, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2835-CR **Cir. Ct. No. 2005CF161**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEITH E. RIVAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed.*

Before Vergeront, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Keith Rivas appeals a judgment convicting him of second-degree sexual assault. He contends that the evidence did not support the jury's finding that his victim did not consent to sexual intercourse with him. We disagree, and therefore affirm.

¶2 Rivas, Jeremy Marthaler, Mary Peasall and another man were together in a motel room. Marthaler agreed to wear a blindfold while Peasall performed oral intercourse on him. However, after Marthaler's eyes were covered, Rivas, rather than Peasall, performed the oral intercourse. Marthaler complained to police resulting in this sexual assault prosecution.

¶3 Rivas admitted to sexual intercourse with Marthaler and the trial focused on whether Marthaler consented to it. At points in his testimony Marthaler unequivocally stated that he only consented to intercourse with Mary, did not consent to intercourse with Rivas, and that he "thought for sure Mary was going to do it." He described himself as getting blindsided by what then happened. On the other hand, he also testified that before the event he overheard a conversation suggesting that he was being set up to have someone else suck his penis, and that "I didn't know for sure who was really going to be actually doing the deed."

¶4 On appeal, Rivas argues that the State did not sufficiently prove the absence of consent because Marthaler testified that he consented to intercourse while not knowing for sure whether it might occur with Rivas or Peasall. He also contends that it did not matter who Marthaler anticipated having sex with because under the definition of consent in WIS. STAT. § 940.225(4) (2005-06),[1] it is consent to the act that matters, and deception as to the actor will not negate that consent.

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

¶5 In reviewing the sufficiency of the evidence used to convict, we will reverse only if the evidence, viewed most favorably to the State, is so insufficient in force and probative value that no reasonable trier of fact could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Consent to a sexual act means "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact." WIS. STAT. § 940.225(4). The lack of consent to the sexual intercourse or contact was an element of Rivas's offense. WIS. STAT. § 940.225(2)(f).

¶6 The evidence was sufficient to find beyond a reasonable doubt that Marthaler did not consent to sexual intercourse with Rivas. Rivas was the key actor in setting up the sexual encounter. He insisted on an eye covering. He was overheard discussing the situation as a set-up. Under these circumstances, a person of average or better intelligence might have clearly understood that consent to blindfolded sex was something more than a consent to have sex only with Peasall. However, Marthaler's limited intelligence was clear from his demeanor and testimony.[2] A reasonable jury could have found, given his limitations, that Marthaler was gullible enough to believe Peasall's assurances, and to condition his consent on those assurances, notwithstanding all of the clues and indications to the contrary. In other words, a reasonable jury could accept Marthaler's statement that he "thought for sure Mary was going to do it," notwithstanding his articulated

[2] The trial court instructed the jury to consider the apparent intelligence of the witnesses, and, without objection or dispute, the State argued that the jury needed to consider Marthaler's limitations in evaluating his reaction to Peasall's offer of sex.

suspicions to the contrary, suspicions the jury could reasonably find were not fully processed at the time.

¶7 We also reject Rivas's contention that Marthaler could have provided a valid consent to intercourse even if he was deceived as to the identity of his sexual partner. Although WIS. STAT. § 940.225(4) does not expressly provide that consent must be to the actor as well as the act, the provision necessarily implies as much. We will not interpret a statute in derogation of common sense. *See* ***American Indus. Leasing Co. v. Geiger***, 118 Wis. 2d 140, 145, 345 N.W.2d 527 (Ct. App. 1984). Common sense tells us that one's consent to a sexual act with Party A does not preclude a jury's finding of no consent to sex with Party B pretending to be Party A.

By the Court.—Judgment affirmed.

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