COURT OF APPEALS
DECISION
DATED AND FILED

January 9, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0348-CR **Cir. Ct. No. 98-CF-1184**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DERWIN D. JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed*.

Before Nettesheim, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Derwin D. Jones appeals from a judgment convicting him of first-degree sexual assault with a dangerous weapon and child enticement for purposes of sexual contact. On appeal, he argues that the State violated his Fifth Amendment right to remain silent when the prosecutor commented on his silence, the circuit court violated his right to confront his

accuser by prohibiting him from cross-examining (a) the victim about a sexually transmitted disease and (b) a fellow jail inmate about his motive to testify in favor of the State, and the circuit court erroneously declined to instruct the jury on a lesser-included offense of third-degree sexual assault. We reject Jones's claims and affirm.

¶2 The complaint alleged that on December 1, 1998, Jones encountered the sixteen-year-old victim on the street and forced her to accompany him to a nearby hospital by showing her the blade of a knife, grabbing her arm and threatening to kill her. Once at the hospital, Jones took her to a secluded women's restroom and sexually assaulted her. Jones contended that he had consensual sexual relations with the victim in exchange for money, which he did not give her. Jones denied using a knife.

¶3 At trial, the victim testified that Jones brandished a knife blade from his sleeve and was holding the knife while they were in the hospital restroom. After the assault, the victim left the hospital and went to find friends. One of those friends testified that the victim told him she had been sexually assaulted by Jones at the hospital and that Jones had brandished a knife. A police detective testified that the victim told him the same thing.

¶4 During his closing argument, the prosecutor stated, "You never heard a single person say that Derwin Jones didn't have a knife in that bathroom." Jones's counsel objected, and the court overruled the objection. The prosecutor continued, "The evidence in the record is [the victim] says there was a knife in that bathroom. That's why she went in there." After the prosecutor finished his initial argument, the court made a record on the objection. Jones sought a mistrial because the prosecutor's remark was an impermissible comment on his silence in

violation of the Fifth Amendment. The prosecutor responded that he did not specifically refer to Jones, and he had a right to comment on the state of the record, including testimony that Jones had a knife. The circuit court found that the prosecutor did not make a direct reference to Jones's decision not to testify. The court also considered whether the jury would naturally and necessarily understand the prosecutor's remark to be a comment on Jones's silence. Based on the record, the court found that the jury would not so understand the remark.

¶5 On appeal, Jones renews his argument that the prosecutor impermissibly commented, either directly or indirectly, on his failure to testify in violation of the Fifth Amendment. Jones contests the circuit court's factual finding that the prosecutor's comment was not a reference to Jones's refusal to testify. This finding, made by a circuit court with the ability to assess the entire proceeding, is not clearly erroneous. *See* WIS. STAT. § 805.17(2) (1999-2000).[1] Furthermore, the prosecutor placed the remark in context by emphasizing the victim's testimony that Jones had a knife.

¶6 Whether to declare a mistrial is within the circuit court's discretion. ***State v. Pankow***, 144 Wis. 2d 23, 47, 422 N.W.2d 913 (Ct. App. 1988). The court must consider whether the claimed error is sufficiently prejudicial to require a new trial. ***State v. Adams***, 223 Wis. 2d 60, 83, 588 N.W.2d 336 (Ct. App. 1998).

¶7 The circuit court properly exercised its discretion in declining to declare a mistrial. We have upheld the circuit court's finding that the prosecutor did not comment, either directly or indirectly, on Jones's decision not to testify.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

The court also properly considered whether the language used by the prosecutor was intended or of the character that the jury would naturally and necessarily take it to be a comment on Jones's failure to testify. ***State v. Werlein***, 136 Wis. 2d 445, 456, 401 N.W.2d 848 (Ct. App. 1987).

¶8 We see neither a Fifth Amendment nor a prosecutorial misconduct/due process problem here. A prosecutor may "point out generally that no evidence has been introduced to show the innocence of the defendant." ***Bies v. State***, 53 Wis. 2d 322, 325, 193 N.W.2d 46 (1972). That is what the prosecutor did here.

¶9 Jones next argues that the circuit court violated his Sixth Amendment right to confrontation by prohibiting him from cross-examining the victim about her sexually transmitted disease (gonorrhea) and by restricting cross-examination of a fellow jail inmate about his motive to testify in favor of the State. Jones theorizes that the victim was afraid that her boyfriend would be upset that she had gonorrhea and therefore fabricated the assault by Jones. The State counters that evidence of a victim's prior sexual conduct is barred by the rape shield law, WIS. STAT. § 972.11.

¶10 The general prohibition on introducing evidence of a victim's prior sexual conduct can give way if the defendant's Sixth Amendment right to confrontation is involved. ***State v. Pulizzano***, 155 Wis. 2d 633, 645-48, 456 N.W.2d 325 (1990). The confrontation right may overtake the rape shield law prohibition when "evidence of a complainant's prior sexual conduct may be so relevant and probative that the defendant's right to present it is constitutionally protected." ***Id.*** at 647. Whether excluding evidence of the victim's prior sexual

conduct deprived Jones of his right of confrontation presents a question of constitutional fact which we decide independently. ***Id.*** at 648.

¶11 The circuit court precluded cross-examination of the victim regarding gonorrhea because there was no evidence that the victim knew that she had gonorrhea until she tested positive for it as part of her post-sexual assault medical examination. Because there was no evidence that the victim knew she had gonorrhea prior to the assault, the court excluded the evidence as irrelevant to any motive by the victim to lie about the assault by Jones to appease her boyfriend. The court also found that the fact that Jones tested negative for gonorrhea was not relevant. Thereafter, Jones made an offer of proof. He stated that if permitted to cross-examine on the topic, he would ask the victim whether she had taken a high school health class and if she was aware of the symptoms of gonorrhea prior to sexual contact with Jones. The court did not reconsider its ruling in light of this offer of proof.

¶12 In an earlier motion in limine, Jones conceded that his investigator had been unable to locate the victim's boyfriend or any information about him. Therefore, Jones was unable to support his theory that the victim fabricated the sexual assault to appease her boyfriend. The circuit court found that Jones's contentions regarding the need to fabricate the assault were not borne out by his investigation, and the court could not employ a ***Pulizzano*** analysis. We agree that Jones's offer of proof was inadequate.

¶13 On appeal, Jones argues that there was evidence that the victim had a boyfriend and this evidence was relevant and admissible. It is true that the victim testified that her boyfriend was in jail at the time of the assault. However, Jones

did not ask the circuit court to reconsider its decision to bar evidence that the victim had gonorrhea or a boyfriend whom she wanted to appease.

¶14 We affirm the circuit court's refusal to permit Jones to cross-examine the victim regarding gonorrhea because the evidence was not relevant or probative for the reasons cited by the circuit court. A defendant does not have the right to confront a witness with irrelevant evidence.

¶15 Jones next argues that the circuit court violated his constitutional right to confrontation by restricting cross-examination of a fellow jail inmate about his motive to testify in favor of the State. The inmate testified that the victim was one of his very close friends. He was in the group of friends who encountered the victim shortly after the assault. The victim was very upset and said she had been sexually assaulted. While walking to the police station, the inmate, the victim and others in their group came upon Jones. The victim was visibly upset at seeing Jones.

¶16 Later, the inmate met Jones in jail. Jones approached the inmate and asked him to tell a detective that the victim had lied about the assault and she was trying to frame him because Jones did not pay her for sex. When the inmate met with the detective, he told the detective his and the victim's version of events rather than Jones's version.

¶17 On cross-examination, Jones attempted to question the inmate about whether helping the police in the Jones case would benefit him in his own criminal case. Jones asked, "You don't know that when you want help with your case you don't help somebody in jail, you help the prosecution, you help the police, correct?" The court sustained the State's objection to the question on the grounds

that the question was argumentative. On redirect, the inmate testified that he was never promised anything by the State in exchange for testifying in the Jones case.

¶18 We will assume without deciding that it was error to preclude Jones from inquiring whether the inmate expected anything from the State in exchange for his testimony.[2] We conclude that any error was harmless because on redirect examination, the State specifically asked the inmate if he had been promised anything in exchange for his testimony in the Jones case. The inmate replied that he had not. Therefore, this issue was before the jury.

¶19 We turn to Jones's last appellate issue: whether the circuit court erroneously declined to instruct the jury on the lesser-included offense of third-degree sexual assault.[3]

> Whether the evidence supports the submission of a lesser-included offense is a question of law, which an appellate court reviews de novo. The test for submitting a lesser-included offense is whether "there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense." Further, a court must view the evidence in a light most favorable to the defendant.
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> When considering a request for a lesser-included offense instruction, the court must first determine whether "the

[2] The State objected to Jones's inquiry on the grounds that it was argumentative. Jones did not offer to rephrase the question to obtain testimony from the inmate on the question of whether he was promised anything for his testimony in the Jones case.

[3] First-degree sexual assault, WIS. STAT. § 940.225(1)(b) (1997-98), includes "sexual intercourse with another person without consent of that person by use or threat of use of a dangerous weapon." Third-degree sexual assault, WIS. STAT. § 940.225(3) (1997-98), includes "sexual intercourse with a person without the consent of that person." Third-degree sexual assault is a lesser-included offense of first-degree sexual assault. *Cf.* ***State v. Simpson***, 118 Wis. 2d 454, 465-67, 347 N.W.2d 920 (Ct. App. 1984) (third-degree sexual assault is lesser-included offense of second-degree sexual assault), *on reconsideration,* 125 Wis. 2d 375, 373 N.W.2d 673 (Ct. App. 1985).

> lesser offense is, as a matter of law, a lesser included offense of the crime charged." If so, then the court considers whether the evidence justifies the instruction.

State v. Fitzgerald, 2000 WI App 55, ¶¶7-8, 233 Wis. 2d 584, 608 N.W.2d 391 (citations and quoted sources omitted).

¶20 An instruction regarding a lesser-included offense may be given "if a reasonable but different view of the record and any testimony other than the defendant's exculpatory testimony supports acquittal on the greater charge and conviction on the lesser charge." ***State v. Glenn***, 199 Wis. 2d 575, 585-86, 545 N.W.2d 230 (1996).

¶21 Jones contends that the circuit court should have given an instruction on third-degree sexual assault because he did not have a knife on his person when he was arrested. The circuit court found that Jones had sufficient time to dispose of the knife. The sexual assault occurred at approximately 7:00 p.m., the police first had contact with the victim at 8:05 p.m., and Jones was picked up by a police officer and given a ride to a church at 8:40 p.m. (before the officer knew that Jones was a sexual assault suspect). The circuit court declined to give an instruction on third-degree sexual assault because the evidence at trial did not support that Jones did not have a knife.

¶22 Except for the fact that Jones did not possess a knife when he was arrested, all of the other evidence at trial indicated that Jones brandished a knife as part of the assault. Jones argues that the absence of a knife on his person permits a reasonable inference that he did not possess a knife during the assault. The question is whether a reasonable view of the evidence supports guilt of the lesser-included offense and reasonable doubt as to some element of the greater offense. ***State v. Moua***, 215 Wis. 2d 511, 518, 573 N.W.2d 202 (Ct. App. 1997). We agree

with the circuit court that the passage of time between the assault and Jones's arrest does not yield a logical inference that Jones never possessed a knife. The logical inference is that Jones disposed of the knife before he had contact with the police. Because a reasonable view of the evidence does not permit a finding that Jones lacked a knife, there was no basis for acquitting Jones of first-degree sexual assault and convicting him of third-degree sexual assault. The circuit court did not err in declining to instruct on a lesser-included offense.

By the Court.—Judgment affirmed.

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