COURT OF APPEALS
DECISION
DATED AND FILED

March 2, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1179-CR **Cir. Ct. No. 2007CF424**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KELLY J. MCCREDIE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Manitowoc County: JEROME L. FOX, Judge. *Affirmed*.

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

¶1 REILLY, J. Kelly J. McCredie argues that sexual intercourse by fraud is not a crime in Wisconsin. McCredie entered the victim's darkened bedroom one night. When the victim spoke to McCredie she erroneously believed

that it was McCredie's brother. McCredie did not correct her and proceeded to engage in sexual intercourse. McCredie was convicted by a jury of third-degree sexual assault. On appeal, McCredie argues that there is no legal basis for his conviction as the victim consented to sexual intercourse, albeit thinking it was with McCredie's brother. McCredie argues that because the jury instructions did not reflect his "theory of the defense," he is entitled to a new trial. We hold that there is no support for McCredie's sexual intercourse by fraud theory, and that the circuit court properly rejected McCredie's proposed jury instructions. McCredie's conviction is therefore affirmed.

FACTS

¶2 On the night of August 27, 2007, Kelly K. received a text message from McCredie's brother Kraig stating that he was drunk and that he needed a place to stay. Kelly K. agreed to let Kraig spend the night at her apartment. Kelly K. described Kraig as a "drinking friend" who had visited her apartment before, although the two were never romantically involved.

¶3 At some point in the evening after Kelly K. had gone to bed, McCredie entered the apartment. When McCredie entered, he encountered Kelly K.'s sister, who was also spending the night at the apartment. When Kelly K.'s sister asked McCredie why he was there, McCredie said that he had been invited by Kelly K. Kelly K.'s sister never told McCredie to leave and eventually went back to sleep.

¶4 Kelly K. testified that she hated McCredie and that she made it clear to him prior to the night of August 27 that he was not welcome in her home. Furthermore, after McCredie entered the apartment and said that Kelly K. invited

him over, Kelly K.'s sister said that she did not believe him because she knew that Kelly K. did not like him.

¶5 Kelly K. was sleeping in her bedroom with her two children when she was awakened by a man on top of her. Because the room was dark, Kelly K. erroneously thought that it was Kraig who was on top of her. Kelly K. asked, "Kraig, what are you doing?" and the man responded, "I broke up with my girlfriend." The man then began kissing Kelly K., removing her clothing, and restraining her arms over her head. Kelly K. stated that she was afraid that if she tried to fight back or resist her children would be harmed. The man proceeded to vaginally penetrate her with his penis; he then forcibly turned her over and shoved her face into a pillow and anally penetrated her. At this point Kelly K. told the man to stop, that he was hurting her, but he continued to anally penetrate her, followed by another act of vaginal penetration.

¶6 Towards the end of the incident, Kelly K. realized the man was not Kraig. Kelly K. left the bedroom with her son and woke up her sister. Kelly K. asked her sister who was in her bedroom, and her sister replied that it was McCredie. Both of them went to Kelly K.'s bedroom and when they turned on the light they saw McCredie getting dressed. McCredie scampered out of the apartment as Kelly K. called the police.

¶7 Kelly K. testified that she did not consent to having sexual intercourse with McCredie and that she would not have consented to having sexual intercourse with Kraig either. McCredie was subsequently charged with three counts of second-degree sexual assault, one count of burglary, and one count of felony bail jumping. The third count of second-degree sexual assault was eventually amended to a lesser included charge of third-degree sexual assault.

Third-degree sexual assault has two elements that the State must prove beyond a reasonable doubt: that the defendant had sexual intercourse with the victim and that the victim did not consent. *See* WIS. STAT. § 940.225(3) (2009-10);[1] WIS JI—CRIMINAL 1218. Second-degree sexual assault includes an additional element: that the sexual intercourse occurred by the use or threat of force or violence. *See* § 940.225(2); WIS JI—CRIMINAL 1208. "Consent" is defined as "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse." Section 940.225(4).

¶8 McCredie waived his right to a jury trial on the felony bail jumping charge and the circuit court found him guilty. A jury found McCredie not guilty on the two second-degree assault charges and the burglary charge, but guilty on the third-degree sexual assault charge.

¶9 McCredie argues that the second element of third-degree sexual assault—that Kelly K. did not consent to sexual intercourse—cannot be satisfied as the sexual intercourse was voluntary. He therefore raises two issues with the circuit court's jury instructions. He first argues that the circuit court erroneously rejected McCredie's proposed "theory of the defense" jury instruction:

> If the State cannot prove that the victim did not consent to having sexual intercourse, you must find the defendant not guilty. Under Wisconsin law, mistake as to the identity of the person with whom [you] are having sexual intercourse with does not negate consent even if the defendant acted intentionally to deceive the victim as to his identity.
>
> The defendant's theory of the case is that the victim consented to have sex with the defendant under the mistaken belief that she was having sex with another

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

> person. He has contended that because the victim freely agreed to have sexual intercourse with him believing that he was a different person, the victim consented to have sex with him. Thus, he says that a necessary element of the crime of second degree sexual assault does not exist in this case.

¶10 Second, McCredie takes umbrage with the instructions the circuit court provided the jury as to the third-degree sexual assault charge. The court instructed the jury that "consent" meant that Kelly K. "did not freely agree to have sexual intercourse with the defendant." McCredie argues that the circuit court should not have included the phrase "with the defendant." Prior to his trial, McCredie requested that the phrase "with the defendant" be removed from the sexual assault jury instructions. The prosecution agreed, so the circuit court removed the phrase from its definition of "consent" in the second-degree sexual assault jury instructions. In an apparent oversight by all parties, the "with the defendant" language was accidentally not removed from the third-degree sexual assault instructions. Defense counsel did not catch this error until the jury was already deliberating, and the circuit court declined to amend the instructions.

¶11 McCredie argues that the circuit court's jury instructions were so prejudicial that he is entitled to a new trial. We disagree and affirm his conviction.

STANDARD OF REVIEW

¶12 Whether a jury instruction fully and correctly informs the jury of the applicable law is a question of law that we review de novo. ***State v. Ferguson***, 2009 WI 50, ¶9, 317 Wis. 2d 586, 767 N.W.2d 187. A defendant in a criminal case is entitled to have a jury instruction on any valid theory of defense if: (1) the theory relates to a legal defense and not an interpretation of evidence; (2) the request is timely made; (3) the theory is not adequately covered by other

instructions; and (4) the theory is supported by sufficient evidence. ***State v. Coleman***, 206 Wis. 2d 199, 212-13, 556 N.W.2d 701 (1996).

DISCUSSION

¶13 The core of McCredie's argument is that Kelly K. consented to having sexual intercourse with Kraig. McCredie then leaps to the conclusion that if she consented to sexual intercourse with Kraig, she also consented to sexual intercourse with anyone who could trick her into thinking that she was having sexual intercourse with Kraig. This forms the basis of McCredie's proposed "theory of the defense" jury instruction and his argument that the circuit court erred in not removing the phrase "with the defendant" from its definition of "consent" in the third-degree sexual assault jury instruction.

¶14 We first address whether McCredie's proposed jury instruction was a valid theory of defense. McCredie's theory is that he could not have committed second- or third-degree sexual assault because Kelly K. erroneously believed that he was Kraig. Under McCredie's theory, a defendant cannot be convicted of sexual assault if he successfully deceived the victim into having sexual intercourse with him. The legislature has created no such exception to sexual assault. The third-degree sexual assault statute makes it a crime to have sexual intercourse without the victim's consent. *See* WIS. STAT. § 940.225(3). A victim cannot consent to sexual intercourse if the defendant has disguised his true identity. One cannot obtain valid consent by use of fraud or deceit. Fraud vitiates consent. ***Slawek v. Stroh***, 62 Wis. 2d 295, 314, 215 N.W.2d 9 (1974). Moreover, it is the consent of the victim and not the knowledge or intent of the defendant that is controlling. We conclude that because McCredie's proposed instruction did not present a valid legal theory of defense, the circuit court appropriately rejected it.

¶15 McCredie's proposed instruction also fails the fourth prong of the valid theory of defense test—that the proposed theory is supported by sufficient evidence. McCredie's proposed theory required him to show that Kelly K. consented to having sex with McCredie under the mistaken belief that he was Kraig. The evidence at trial does not support this theory of defense. Kelly K. testified that she never would have consented to having sexual intercourse with Kraig. Furthermore, the jury heard no testimony of "words or overt actions" from Kelly K. "indicating a freely given agreement to have intercourse or sexual contact" with anyone on the night of August 27, 2007. *See* WIS. STAT. § 940.225(4).

¶16 We also reject McCredie's argument that he is entitled to a new trial because the circuit court did not remove the phrase "with the defendant" from its jury instructions defining "consent" in the context of third-degree sexual assault. While "with the defendant" was removed from the second-degree sexual assault instructions, it was accidentally left in the third-degree sexual assault instructions. McCredie's counsel did not catch this mistake until the jury was already deliberating. We hold that the circuit court did not err when it refused to alter the third-degree sexual assault jury instructions. As discussed earlier, McCredie's theory that he did not commit sexual assault because Kelly K. allegedly thought she was having sexual intercourse with someone else has no basis in the law, nor is it supported by the facts in the record. The jury instructions properly state that one of the elements of sexual assault is that the victim did not consent to sexual intercourse *with the defendant*. *See* WIS JI—CRIMINAL 1208, 1218. A woman's consent to have sexual intercourse with one man is not consent to have sexual intercourse with another. The fact that the phrase "with the defendant" was removed from the second-degree sexual assault jury instructions but not the third-

degree sexual assault instructions is irrelevant as the phrase never should have been removed in the first place. As the third-degree sexual assault instruction was appropriate, McCredie's conviction is affirmed.

CONCLUSION

¶17 The circuit court properly rejected McCredie's proposed "theory of the defense" jury instruction as there is no legal support for McCredie's sexual intercourse by fraud theory. Furthermore, it was not erroneous for the circuit court to leave the phrase "with the defendant" in the third-degree sexual assault jury instructions as the court was applying the proper jury instruction. We affirm McCredie's conviction.

By the Court.—Judgment affirmed.

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