**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**April 13, 2011**

**A. John Voelker**
**Acting Clerk of Court of Appeals**

**NOTICE**

**This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.**

**A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.**

**Appeal No. 2009AP3074-CR** **Cir. Ct. No. 2007CF362**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DENNIS J. THORNTON,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Washington County: ANDREW T. GONRING, Judge. *Affirmed.*

Before Neubauer, P.J., Anderson and Reilly, JJ.

¶1 NEUBAUER, P.J. Dennis J. Thornton was found guilty of third-degree sexual assault, contrary to WIS. STAT. § 940.225(3) (2009-10),[1] following a jury trial. Thornton challenges his conviction on three grounds. First, he contends that the jury instruction should have been modified to include "knowledge of nonconsent" as an element of the offense. Second, he argues that the trial court erred when it precluded certain testimony offered by the defense. Finally, he contends that there was not sufficient evidence to convict him. We reject each of Thornton's challenges. We affirm the judgment.

## BACKGROUND

¶2 On October 9, 2007, Thornton was charged with third-degree sexual assault of R.S. The charge stemmed from an incident occurring at R.S.'s home on February 19, 2006. At trial, R.S. testified that she and her husband, Tim, had been married seven years. R.S. indicated that, at the time of the alleged assault, she and her husband and Thornton and his wife were "best friends" and had, until shortly before the incident, lived a block apart from each other. R.S. worked at the same company as Thornton and she and Thornton engaged in activities together such as walking after work. On February 18, 2006, R.S. and her husband drove to the Thornton residence to carpool to a holiday party. They stayed there for approximately two and one-half hours visiting and having drinks before leaving for the party. R.S. had one glass of wine, but did not know how much Thornton or her husband had consumed. They got to the party at about 5:30 p.m. and stayed for five or six hours. Thornton's wife did not feel well, so after the party

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

Thornton's wife dropped R.S., Tim and Thornton in downtown Hartford and went home.

¶3 R.S. stayed out at a bar with Tim and Thornton for approximately two hours before walking to her home. R.S. testified that neither Thornton nor Tim appeared to be overly intoxicated on the walk home. R.S. testified that she "was fine" but tired. Once home, she went "straight to bed" and left Tim and Thornton in the living room. At some point, R.S. woke up and felt somebody caressing her breasts, then "going down" her pants and manually penetrating her vagina. R.S.'s back was to the person, who she assumed was her husband, and the touching continued for "[p]robably a couple minutes." Believing it was "foreplay," R.S. turned around to embrace her husband when she saw Thornton. R.S. left the room, tried to wake up her husband, said "he touched me," and then ran to the bathroom to throw up. When Tim came into the bathroom, R.S. "couldn't talk" and just laid on the floor. She eventually told him what happened the next morning. R.S. testified that she did not at any time give Thornton consent to touch her breasts or insert his finger into her vagina. She eventually reported the incident to the police in February 2007.

¶4 Prior to trial, Thornton moved to modify the jury instruction for third-degree sexual assault. The standard jury instruction includes two elements: (1) the defendant had sexual intercourse with the alleged victim and (2) the alleged victim did not consent. *See* WIS JI—CRIMINAL 1218. Thornton requested the inclusion of a third element—the defendant knew or had reason to know the alleged victim did not consent. Thornton argued that without this element, the crime would require no intent (scienter) and thus would be a strict liability crime. After further briefing and prior to trial, the trial court issued an oral ruling denying Thornton's motion. The court determined that Thornton was

essentially challenging the constitutionality of the statute and, thus, was procedurally barred from doing so because he had failed to notify the attorney general's office. The court also determined that it did not have the authority to modify long-standing standard instructions by adding or deleting elements and, further, that the law is accurately reflected in the instruction.

¶5 The matter proceeded to trial. A jury found Thornton guilty of third-degree sexual assault and the trial court sentenced him to three years of probation with 120 days of jail time with huber privileges. Thornton appeals.

## DISCUSSION

*WISCONSIN STAT. § 940.225 Does Not and Need Not Include Intent as an Element of the Crime*.

¶6 Thornton contends that "knowledge of non-consent should be required as an element of third-degree sexual assault." He asserts that the statutory language of WIS. STAT. § 940.225(3) is not dispositive and the crime's penalty and purpose necessitate an element of intent. In making a determination of whether a criminal statute includes scienter as an element of the crime when the statute does not explicitly refer to scienter, a court may consider the following factors: (1) the language of the statute, (2) the legislative history of the statute, (3) the seriousness of the penalty, (4) the purpose of the statute, and (5) the practical requirements of effective law enforcement. *See* ***State v. Jadowski***, 2004 WI 68, ¶¶21-30, 272 Wis. 2d 418, 680 N.W.2d 810. Because this involves a question of statutory interpretation, we review Thornton's challenge de novo. *See* ***id.***, ¶9.

¶7 WISCONSIN STAT. § 940.225(3) governs third-degree sexual assault. It provides in relevant part: "Whoever has sexual intercourse with a person

without the consent of that person is guilty of a Class G felony." ***Id.*** The jury instruction for third-degree sexual assault requires the State to prove only that the defendant had sexual intercourse with the victim and that the victim did not consent.[2] WIS JI—CRIMINAL 1218. Consent is defined by § 940.225(4) as "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." "In the context of sexual assault, consent in fact requires an affirmative indication of willingness. A failure to say no or to resist does not constitute consent in fact." ***State v. Long***, 2009 WI 36, ¶31, 317 Wis. 2d 92, 765 N.W.2d 557.

¶8 Thornton acknowledges that WIS. STAT. § 940.225(3), on its face, does not include a scienter element. Rather, Thornton premises his argument on the seriousness of the penalty exposure for third-degree sexual assault, namely, a felony conviction with a maximum penalty of ten years in prison. Thornton cites to ***Jadowski***, 272 Wis. 2d 418, ¶27, in support of his contention that the severity of the penalty imposed for a particular offense bears significant consideration in determining whether a statute should be construed as dispensing with mens rea. *See also* ***Morissette v. U.S.***, 342 U.S. 246, 256 (1952) (penalties for strict liability crimes "commonly are relatively small and conviction does no grave damage to an offender's reputation"). In other words, the more severe the penalty attached to the crime, the more likely it is that the legislature intended a scienter element

[2] As to the latter element, the jury instruction provides: "This element requires that (name of victim) did not freely agree to have sexual intercourse with the defendant. In deciding whether (name of victim) agreed or did not agree, you should consider what she said and what she did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance." WIS JI—CRIMINAL 1218.

despite a statute's silence on the issue. We reject Thornton's argument as applied to § 940.225(3).

¶9 In ***State v. Lederer***, 99 Wis. 2d 430, 433, 299 N.W.2d 457 (Ct. App. 1980), a defendant challenged the constitutionality of WIS. STAT. § 940.225(3) on grounds of overbreadth, specifically that the definition of consent in § 940.225(4) "could subject an individual to punishment for engaging in consensual sexual activities where no testimony was produced regarding acts or words which evidenced freely given consent." This court rejected the defendant's argument. We concluded that the plain language of § 940.225(3) requires the state to prove that the act of intercourse was without consent, but relieves the state of the burden of proving that the victim resisted in order to establish that the act was nonconsensual. ***Lederer***, 99 Wis. 2d at 434. As to the defendant's contention that two parties may enter into consensual sexual relations without manifesting freely given consent through words or acts, this court observed: "[W]e know of no other means of communicating consent." ***Id.*** at 435. We agree. The statute requires proof of nonconsent, which pursuant to the definition of consent under § 940.225(4) includes an absence of words or overt actions indicating freely given consent to have sexual contact with defendant. It is the consent, the "affirmative indication of willingness" of the victim, and not the knowledge of the defendant that is controlling. *See* ***Long***, 317 Wis. 2d 92, ¶31.

¶10 Finally, in addressing the defendant's challenge to WIS. STAT. § 940.225(3) as creating a strict liability offense, i.e., one requiring no knowledge or intent, this court acknowledged that a violation subjects an offender to a severe punishment and the severity of punishment "is often indicative of the legislature's intent to create a strict liability offense." ***Lederer***, 99 Wis. 2d at 435. However, we nevertheless concluded that the legislature is not "precluded from creating a

strict liability offense where substantial penalties are to be imposed." ***Id.*** We rejected the defendant's constitutional challenge to § 940.225(3). ***Lederer***, 99 Wis. 2d at 435. In light of ***Lederer***, Thornton's challenge to § 940.225(3) fails.

*The Trial Court Did Not Err in Precluding Hearsay Testimony.*

¶11 Thornton next contends that the trial court erred in precluding certain testimony of Thornton's and Tim's mutual friend, Brian Mechinech, as hearsay evidence under WIS. STAT. § 908.01(3). Hearsay under § 908.01(3) is an out-of-court statement offered to prove the truth of the matter asserted. *See* ***State v. Patino***, 177 Wis. 2d 348, 362, 502 N.W.2d 601 (Ct. App. 1993). As in all evidentiary determinations, the admissibility of out-of-court statements pursuant to a hearsay exception lies within the trial court's discretion and will be upheld absent any misuse of that discretion. *See* ***State v. Huntington***, 216 Wis. 2d 671, 680-81, 575 N.W.2d 268 (1998); ***State v. Petrovic***, 224 Wis. 2d 477, 484, 592 N.W.2d 238 (Ct. App. 1999). If the trial court's decision is supported by the record, we will not reverse even though the court may have given the wrong reason or no reason at all. ***Petrovic***, 224 Wis. 2d at 484. Here, Thornton sought admission of Mechinech's testimony under § 908.01(4)(a)1., an exception to the hearsay rule that governs prior inconsistent statements.

¶12 Thornton expected Mechinech to testify regarding a conversation with Tim. According to Mechinech, Tim told him that R.S. had said that she and Thornton were kissing on the night in question before the touching occurred. Thornton asserts that, if Mechinech had been permitted to testify, R.S.'s alleged statement to Tim would have contradicted R.S.'s testimony that she believed it was Tim in bed with her until she turned around. In other words, Thornton argues, that "[h]earing that there may have been kissing prior to the touching would have

discredited [R.S.'s] testimony and supported the conclusion that the acts were consensual." Tim testified at trial that he had not told anyone that R.S. had kissed Thornton that night and denied R.S. ever telling him that. Further, R.S. testified on cross-examination that she had not kissed Thornton and had not told anyone that she had kissed Thornton.

¶13 Thornton contends that Mechinech's testimony was admissible as a prior inconsistent statement under WIS. STAT. § 908.01(4)(a)1. The State, however, argues that the testimony was inadmissible because Thornton failed to present a witness who heard R.S. make the statement to Tim. Both parties agree that Mechinech's testimony involved "double hearsay" (Tim told Mechinech that R.S. told Tim about kissing) offered to prove the truth of the matter asserted. As such, both levels of hearsay must fall under the exception of prior inconsistent statements. *See* WIS. STAT. § 908.05 (hearsay is not excluded "if each part of the combined statements conforms with an exception to the hearsay rule"). The State also argues, without citation to authority, that the testimony, even if a prior inconsistent statement, is inadmissible because Thornton is attempting to prove the truth of the matter asserted. While prior inconsistent statements were previously admissible only as impeachment evidence, *see* ***Vogel v. State***, 96 Wis. 2d 372, 379, 291 N.W.2d 838 (1980), the law has since changed, ***id.*** at 378-86. Because prior inconsistent statements are not hearsay, they are generally admissible and, therefore, may be offered as substantive evidence if the declarant is available for cross-examination. ***State v. Horenberger***, 119 Wis. 2d 237, 247, 349 N.W.2d 692 (1984). Nevertheless, even if testimony is relevant and admissible, a trial court may still exclude the evidence under WIS. STAT. § 904.03 and the trial court implicitly did so here.

¶14 In ruling on the admissibility of Mechinech's testimony, the trial court determined that Mechinech's testimony might be used to show a prior inconsistent statement by Tim, but otherwise would be hearsay. In addition, the court determined that Thornton was attempting to use the testimony as truth of the matter asserted, i.e., to establish consent.

¶15 Tim's testimony at trial was consistent with R.S.'s testimony in which she also denied kissing or having told anyone that kissing was involved in the incident. Insofar as Tim's testimony conflicted with a prior statement made to Mechinech, the trial court noted, and we agree, "it could well be a prior inconsistent statement of Tim." However, the court went on to rule that "Mechinech is not going to be able to testify that Tim told him *that [R.S.] said* that there was kissing involved." (Emphasis added.) Although the trial court's holding permitted Thornton's attorney to ask Mechinech whether Tim had told Mechinech the incident involved kissing, Tim had already denied having done so, and Thornton's attorney chose not to pursue it with Mechinech, stating that he would "avoid the topic."

¶16 As to the exclusion of Mechinech's testimony regarding R.S.'s alleged statement to Tim, we see no error in the trial court's exercise of discretion. First, the alleged statement was hearsay within hearsay. Second, Mechinech had no personal knowledge of what R.S. told Tim, *see* WIS. STAT. § 906.02. Third, Mechinech's proffered testimony was not corroborated by any other witnesses and, finally, both Tim and R.S. provided consistent testimony unequivocally denying the substance of Mechinech's testimony. It is evident from the record that the court found Mechinech's testimony as to what Tim told Mechinech that R.S. told Tim to be too attenuated and unreliable to be admitted at trial. We cannot conclude that the court erred in its evaluation of the evidence. *See* ***State v.***

***Sorenson***, 143 Wis. 2d 226, 240, 421 N.W.2d 77 (1988) (the circuit court has not committed an erroneous exercise of discretion if we can discern a reasonable basis for its evidentiary decision).

*Sufficiency of the Evidence*

¶17 Thornton's final argument on appeal is that the State did not present sufficient evidence upon which the jury could base a guilty verdict for third-degree sexual assault. Based on our review of the record, we disagree.

¶18 "[A]n appellate court may not reverse a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The test is not whether this court is convinced of the appellant's guilt beyond a reasonable doubt, but "whether this court can conclude that the trier of fact could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true." ***State v. Searcy***, 2006 WI App 8, ¶22, 288 Wis. 2d 804, 709 N.W.2d 497 (citing ***Poellinger***, 153 Wis. 2d at 503-04).

¶19 In support of his argument, Thornton simply recites testimony that arguably contradicts R.S.'s claims or makes them less credible. For example, Thornton points out that Tim had discouraged her from going to the police and that Tim's testimony as to the events of the morning of February 19, 2006, differed in some aspects from R.S.'s. We are unpersuaded. It is the jury's task, not this court's, to sift and winnow the credibility of the witnesses. ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985). Further, "it is certainly allowable for the jury to believe some of the testimony of one witness and some of

the testimony of another witness even though their testimony, read as a whole, may be inconsistent." ***Id.***; *see also* ***Poellinger***, 153 Wis. 2d at 503 ("The function of the jury is to decide which evidence is credible and which [evidence] is not and how conflicts in the evidence are to be resolved."). Here, R.S. provided sufficient testimony to support a verdict for third-degree sexual assault. The jury's verdict reflects its finding that R.S. was credible, and we will not disturb that finding on appeal.

## CONCLUSION

¶20 This court has previously concluded that third-degree sexual assault is a strict liability crime under WIS. STAT. § 940.225(3). Thus, the trial court did not err in denying Thornton's request to modify the jury instructions to include "knowledge of non-consent." We further conclude that the trial court properly exercised its discretion when it deemed Mechinech's proffered testimony inadmissible. Finally, we have reviewed the record and find sufficient evidence upon which the jury could have found Thornton guilty of third-degree sexual assault. We therefore affirm the judgment.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.