COURT OF APPEALS
DECISION
DATED AND RELEASED

July 26, 1995

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

NOTICE

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No. 94-2588-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PHAROAH WEAVER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Kenosha County: ROBERT V. BAKER, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Pharoah Weaver appeals from a judgment of conviction of first- and second-degree sexual assault and false imprisonment. He argues that other acts evidence was erroneously admitted and that the evidence was insufficient to prove his guilt beyond a reasonable doubt. We conclude that the admission of a former girlfriend's testimony that Weaver asked if he could rape her was improper but that it was harmless error. We affirm the judgment.

The convictions arise out of the events which occurred on November 23, 1993, in a dorm room on the University of Wisconsin-Parkside campus. That evening, a number of young students were drinking alcohol and smoking marijuana as they visited various parties in different dorm rooms. The victim, Julie G., testified that after the festivities, she returned to her bedroom and laid down on her bed with her clothes still on. Weaver and another man entered the room, with Weaver climbing up to the top bunk with Julie's roommate. The other man got on Julie's bed and began to kiss her. When Julie rebuffed his advance, he left. Julie's roommate also exited the room. Weaver then got down from the top bunk and began to kiss Julie. Julie's friend Gary came in to use the phone and Weaver asked him to leave. The phone call was terminated and Gary exited. Weaver got up from the bed, locked the door and turned off the light. He then advanced on Julie and told her to remove her pants. When Julie refused, he proceeded to remove her pants and underwear at least to her knees. Weaver had intercourse with Julie. Weaver testified that the intercourse was consensual.

After Weaver dressed and left the room, Julie's friends came to check on her. Because Julie was bleeding, her friends insisted that she go to the hospital. Upon later examination, it was discovered that Julie had sustained a severe laceration to the vaginal area.

At trial, Lorena Barrera, a Parkside student and friend of Julie's, testified that at one time she had a close relationship with Weaver. She explained that they had "made out" a couple of times and had one instance of consensual intercourse. Barrera further testified that on November 11, 1993, when she refused Weaver's repeated requests to "make out," Weaver got upset and asked "if he could rape me." Barrera replied that she was going to leave and Weaver told her she could not, that she had to stay and keep him company. Weaver did nothing to physically restrain Barrera at that time.

Barrera's testimony was admitted as other wrongs or acts evidence. *See* § 904.04(2), STATS. The trial court found it relevant to intent and motive. Weaver argues that the purpose of introducing Barrera's testimony was to encourage the jury to infer that Weaver had the character propensity to commit sexual assaults.

Other acts evidence must be subjected to a two-step analysis before being admitted. First, the evidence must be relevant to one of the exceptions listed in § 904.04(2), STATS. This requires that the proponent of the evidence convince the trial court that the evidence is "probative of some proposition (such as proof of motive, opportunity, etc.) other than the proposition that because the person did prior act X, he or she is of such a character and disposition to have committed present act Y." ***State v. Johnson***, 184 Wis.2d 324, 336-37, 516 N.W.2d 463, 466 (Ct. App. 1994). Second, the evidence must be shown to be more probative than prejudicial. ***State v. Mink***, 146 Wis.2d 1, 13, 429 N.W.2d 99, 103 (Ct. App. 1988). Our review of this issue is governed by the misuse of discretion standard, and the trial court's decision to admit the other acts evidence will be upheld if it is in accordance with legal standards and facts of record, if the court undertook a reasonable inquiry and examination of the underlying facts, and if there exists a reasonable basis for the determination. ***State v. Jones***, 151 Wis.2d 488, 492-93, 444 N.W.2d 760, 762 (Ct. App. 1989).

Weaver contends that the evidence was merely a veiled attempt to introduce improper character evidence. We agree and fault the prosecution for piling on such evidence. Courts have been cautioned in ***Whitty v. State***, 34 Wis.2d 278, 297, 149 N.W.2d 557, 565 (1967), *cert. denied*, 390 U.S. 959 (1968), that evidence of other acts be used sparingly and only when reasonably necessary. Although we have recognized that ***Whitty*** is not the bastion it once was, ***Johnson***, 184 Wis.2d at 341, 516 N.W.2d at 468, we are offended by the prosecution's submission of the evidence here because it was clearly irrelevant. Further, we question whether evidence of the conversation between Barrera and Weaver constitutes an act to which § 904.04(2), STATS., even applies.

In admitting the evidence, the trial court cast aside the holding in ***State v. Alsteen***, 108 Wis.2d 723, 730, 324 N.W.2d 426, 429 (1982), that evidence of other acts of sexual misconduct has no probative value on the issue of the complainant's consent. The trial court questioned whether ***Alsteen*** is still good law in light of the "greater latitude" in the admission of other acts evidence in sexual assault cases. The trial court erroneously exercised its discretion in this respect.

Alsteen controls here. Weaver admitted to sexual intercourse with Julie and, like in ***Alsteen***, the only issue was whether Julie consented to the act.

The fact that Weaver may have asked to "rape" another woman when she refused his advances has no tendency to prove whether Julie consented to intercourse. Barrera's testimony about her conversation with Weaver was irrelevant and should have been excluded. *See* ***id.*** at 731, 324 N.W.2d at 429. Further, it is simply not enough to say that the evidence satisfies the intent or motive exceptions listed in § 904.04(2), STATS. "Regardless of whether the evidence fits within an exception to sec. 904.04(2), it must be relevant to an issue in the case to be admissible." ***Alsteen***, 108 Wis.2d at 731, 324 N.W.2d at 430.

The State makes a brief claim that the evidence was admissible to prove intent and absence of mistake or accident on the kidnapping charge. We see little, if any, connection between Weaver's conversation with Barrera and whether he confined Julie with the intent to confine her against her will. Even if relevant to that limited issue, the probative value of the evidence was clearly outweighed by its prejudice. These were separate occurrences in very different circumstances. The probative value in relation to the kidnapping charge was very minimal.

Reliance on the greater latitude standard was misplaced in this instance. Typically the greater latitude standard has been recognized and applied only in child sexual assault cases. *See* ***State v. Tabor***, 191 Wis.2d 483, 499, 529 N.W.2d 915, 921 (Ct. App. 1995) (Nettesheim, J., concurring). This is not a case involving a child. Further, "the greater latitude standard does not relieve a court of the duty to ensure that the other acts evidence is offered for a proper purpose under [§ 904.04(2), STATS.]." ***State v. Plymesser***, 172 Wis.2d 583, 598, 493 N.W.2d 367, 374 (1992). Since relevancy was not satisfied in this instance, the greater latitude standard could not alone justify the admission of the evidence.

Having concluded that error occurred in the admission of Barrera's testimony that Weaver asked to rape her, we must determine whether that error was harmless. *See* § 805.18(2), STATS. The test for whether an error was harmless is whether there is no reasonable possibility that the error contributed to the conviction, a reasonable possibility being one which is sufficient to undermine confidence in the outcome of the proceeding. ***State v. Patricia A. M.***, 176 Wis.2d 542, 556, 500 N.W.2d 289, 295 (1993). We must look to the totality of the record. ***Id.*** at 556-57, 500 N.W.2d at 295. In practical application, the test "is not whether some harm has resulted but, rather, whether

the appellate court in its independent determination can conclude there is sufficient evidence, other than the purportedly inadmissible evidence, that would convict the defendant beyond a reasonable doubt." ***State v. Van Straten,*** 140 Wis.2d 306, 318-19, 409 N.W.2d 448, 454 (Ct. App.), *cert. denied,* 484 U.S. 932 (1987).

This was a lengthy trial with many of the young partygoers testifying about the evening's activities, including who had what to drink and who smoked marijuana. There were conflicting stories even as to these details. Weaver and Julie testified to vastly different versions of what occurred in the dorm room that night. Thus, as with most sexual assault cases, the conviction rests on credibility determinations made by the jury. We defer to the jury's function of weighing and sifting conflicting testimony. *See* ***State v. Wilson***, 149 Wis.2d 878, 894, 440 N.W.2d 534, 540 (1989).

Julie indicated that she told Weaver "no" several times and that she attempted to push him off her. She was pinned down by her arms and Weaver pushed her legs apart. She told Weaver that it hurt and he stopped only when interrupted by a knock on the door. Julie's roommate testified that Weaver had attempted to "go down her pants" while she was in the top bunk of the bed and that she left the room in order to avoid such contact. She returned to the bedroom after Julie called for her. Although in prior statements she gave to the police she wrote that Julie said that "I had sex" with Weaver, the roommate testified that when she returned at Julie's calling, Julie told her that Weaver "had sex with me."

Weaver testified that earlier in the evening Julie sat on his lap and they kissed and caressed one another. Five other friends of Weaver's testified that they observed Julie in an intoxicated state and sitting on Weaver's lap allowing him to fondle her. Weaver said Julie suggested that he and his friend go to her dorm room. Eventually Weaver ended up in Julie's bedroom. After kissing her while they were on the bed and after Gary terminated his phone call and left the room, Weaver asked Julie if she minded if he locked the door. He indicated that she answered no and asked him to turn off the light as well. Weaver then described how he had consensual sexual intercourse with Julie. He denied forcing her legs apart. He further indicated that when Julie told him that it was hurting he stopped. Weaver denied trying to "go down" the pants of Julie's roommate while in the top bunk that night.

Even though we have recognized that Barrera's testimony tended to invite the jury to conclude that Weaver had the character propensity to have forcible intercourse, we are convinced that the evidence did not have the effect of tipping the credibility balance against Weaver. There was sufficient disparity in the testimony so that even without Barrera's testimony the jury could reject Weaver's testimony.

Further, Barrera was only one of the prosecution's ten main witnesses. Her testimony was not directly reiterated to the jury in the prosecution's closing argument. The prosecutor mentioned that Barrera testified to "some pretty uncomfortable things" and how Barrera was afraid of Weaver. Barrera's testimony was also indirectly referenced as an explanation for Gary's desire to use the bedroom phone in order to check on Julie. Although the prosecutor referred to Weaver as a predator and rapist, the prosecution's use of the inadmissible testimony was not egregious.

Our confidence in the outcome is particularly bolstered by the compelling medical evidence indicating a sexual assault. Both the emergency room doctor and the nurse indicated that the injury Julie sustained was not consistent with consensual intercourse. The doctor explained in detail the severe and substantial injury Julie sustained. He opined that if she had not sought medical treatment, she could have bled to death. He believed that a great deal of force was required to inflict the injury he observed. The nurse testified that Julie's was the worst injury she had ever seen and that great amounts of force were necessary to inflict that injury.

We note that the defense explored with the doctor and the nurse other possible explanations for Julie's injury. The doctor conceded that some women do not produce enough natural lubricating secretions and that because not every penis is proportioned to a given vagina, injury could occur as a result. It was established that only a pediatric speculum could be used to conduct the examination on Julie, thus suggesting that she had a very small vagina.

Despite these small concessions about the potential disparity between penis and vagina size, the medical experts confirmed their findings that a sexual assault had occurred. Although the doctor agreed that the injury could be related to the size of Weaver's penis, the doctor held firm to his

opinion that the injury was the result of sexual assault. He stated that even with a large penis, a great deal of force was required to inflict the injury. The doctor was also of the opinion that if the intercourse was consensual and Julie experienced pain, intercourse would be ended at that point. He further believed that nonlubrication had nothing to do with the cause of the injury. The nurse also indicated that even if one assumed a large penis and a small vagina, the injury was still the result of sexual assault because of the force necessary to inflict it.

The uncontroverted medical evidence that Julie sustained an injury as the result of a forcible sexual assault was tangible proof which undoubtedly impressed the jury. That evidence, in combination with Julie's testimony, leads us to conclude that the admission of Barrera's testimony was harmless error.

Our harmless error analysis chips away at Weaver's sufficiency of the evidence claim. Our review of the sufficiency of the evidence is to determine whether 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. Ray***, 166 Wis.2d 855, 861, 481 N.W.2d 288, 291 (Ct. App. 1992). We have already considered all of the evidence under a higher scrutiny of review and concluded that it was sufficient to sustain the convictions. Weaver's claim is completely disposed of by the requirement that we accept the inferences drawn from the evidence by the jury. *See* ***State v. Poellinger***, 153 Wis.2d 493, 506-07, 451 N.W.2d 752, 757-58 (1990). Julie's testimony and the injury she sustained satisfy all of the elements of the crimes, including lack of consent, great bodily harm, forcible contact, and Weaver's intent to hold his victim to service against her will. There is no question that the evidence was sufficient to support the convictions.

By the Court.—Judgment affirmed.

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