COURT OF APPEALS
DECISION
DATED AND RELEASED

December 20, 1995

No. 94-3102-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PHILLIP W. SPAGNOLA,

Defendant-Appellant.

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

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

PER CURIAM. Phillip W. Spagnola appeals from an order denying his motion to dismiss the criminal complaint because he was prosecuted under § 948.02(2), STATS., which he contends is unconstitutional. The trial court disagreed and so do we. Therefore, we affirm.

The information charged Spagnola with several counts relating to an incident involving J.P., who was thirteen years old on the night Spagnola lured her outside and had sexual contact with her. Specifically, Spagnola was

charged with four counts of second-degree sexual assault of a person under the age of sixteen by sexual contact and sexual intercourse (finger in vagina), without consent and by use of force. Spagnola was also charged with child enticement and kidnapping. J.P. testified at trial that Spagnola lured her outside, tripped her so that she fell to the ground, pinned her down, removed some of her clothes and had sexual contact with her.

Spagnola testified that J.P. did not tell him to stop kissing her once they were outside but that at some point she suddenly told him to leave her alone. Spagnola denied having any other contact with J.P. He did not know how her clothes came to be in disarray. The jury found Spagnola guilty of one count of second-degree sexual assault for having sexual contact with a person under sixteen contrary to § 948.02(2), STATS.

On appeal, Spagnola makes several meritless arguments. First, he argues that § 948.02(2), STATS., is unconstitutional because it violates his privacy right to engage in consensual sexual relations. He also argues that the statute as applied has a chilling effect on the exercise of his right to select sexual partners. Finally, he argues that the statute violates J.P.'s right to consent to sexual relations.

Section 948.02(2), STATS., second-degree sexual assault, classifies as a Class C felony sexual contact or sexual intercourse with a person who has not attained sixteen years. The constitutionality of a state statute presents a question of law which we review independently. ***State v. Migliorino,*** 150 Wis.2d 513, 524, 442 N.W.2d 36, 41, *cert. denied,* 493 U.S. 1004 (1989). Unconstitutionality must be demonstrated beyond a reasonable doubt. ***Id.*** at 525, 442 N.W.2d at 41. We presume a statute is constitutional. ***Schramek v. Bohren,*** 145 Wis.2d 695, 702, 429 N.W.2d 501, 503 (Ct. App. 1988). The burden on the party advancing a constitutional challenge has been described as "awesome." ***Id.***

We are persuaded by the analysis employed in ***Goodrow v. Perrin,*** 403 A.2d 864 (N.H. 1979). In that case, the New Hampshire Supreme Court upheld the constitutionality of a state statute prohibiting sexual penetration of a person between the ages of thirteen and sixteen. The defendant raised a constitutional challenge to the statute similar to that raised by Spagnola, i.e.,

that the statute infringed on his constitutionally protected privacy right to engage in consensual sexual activity. *See* ***id.*** at 865.

In disposing of the defendant's claim, the ***Goodrow*** court employed an analysis which we find persuasive. While adults have a right to privacy with regard to sexual relations and decisions involving procreation, *see* ***Carey v. Population Servs. Int'l,*** 431 U.S. 678 (1977), that right is not absolute and may be circumscribed or regulated where important state interests are at stake. ***Goodrow***, 403 A.2d at 866. New Hampshire, seeking to protect the well-being of its youth, promulgated a statute fixing the age at which a minor may consent to sexual activity. ***Id.*** Because the State has an interest in protecting the well-being of its youth, "the State has broader authority in proscribing children's privacy rights and in proscribing adults' privacy rights, insofar as they impinge upon a child's welfare, than it would if only adults were concerned." ***Id.***

The ***Goodrow*** court held that the defendant had "no privacy right to engage in sexual intercourse with a person whom the legislature has determined is unable to give consent." ***Id.*** We adopt this reasoning and conclude that § 948.02(2), STATS., does not violate Spagnola's alleged privacy right to engage in sexual activity with a person who is unable to consent by law.

Spagnola next argues that the statute has a "chilling effect" on his ability to exercise his right to engage in consensual sexual activity with adults, particularly because it is no defense under Wisconsin law that he was mistaken as to the age of his sexual partner. *See, e.g.*, § 939.23(6), STATS. ("[c]riminal intent does not require proof of knowledge of the age of a minor even though age is a material element in the crime in question"). Therefore, Spagnola argues, "every potential sexual encounter exposes a person to criminal charges which has a chilling effect on the defendant's willingness to engage in sexual relations, even with someone he reasonably believes to be an adult."

This argument is without merit. First, Spagnola's thesis is not supported by citation to relevant legal authority. Second, we do not agree that § 939.23(6) and § 948.02(2), STATS., have a chilling effect on an adult's exercise of his or her right to choose a sexual partner for fear that he or she might choose someone unable to consent. Because an adult is obligated to refrain from sexual

activity with a child, the burden is upon him or her to determine the age of a prospective sexual partner. The State's interest in protecting children and prohibiting sexual activity between them and adults is of greater import than the burden upon an adult to determine whether a prospective sexual partner is unable to consent to sexual activity.

Finally, Spagnola argues that § 948.02(2), STATS., is invalid because it violates the minor's right to consent to sexual relations. We need not address the merits of this issue because we conclude that Spagnola does not have standing to raise it. "[A] party has standing to raise constitutional issues only when his or her own rights are affected. He or she may not vindicate the constitutional rights of a third party." ***Mast v. Olsen,*** 89 Wis.2d 12, 16, 278 N.W.2d 205, 206-07 (1979).

Even if Spagnola could assert J.P.'s constitutional rights in an effort to defeat the constitutionality of the statute, such an argument requires a factual basis not present in this case—that J.P. consented to sexual activity with him. *See* ***Byrd v. State,*** 65 Wis.2d 415, 420-22, 222 N.W.2d 696, 699-700 (1974). The testimony at trial from J.P. and others who observed her struggle with Spagnola indicated that she did not consent. There is insufficient evidence in the record to support Spagnola's claim that J.P. consented to sexual contact with him. Therefore, Spagnola may not seek to vindicate J.P.'s alleged right to engage in consensual sexual contact.

By the Court.—Order affirmed.

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