COURT OF APPEALS
DECISION
DATED AND RELEASED

November 19, 1996

NOTICE

No. 95-0941-CR

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

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

CHRISTOPHER JAMES,

Defendant-Respondent.

APPEAL from an order of the circuit court for Milwaukee County: STANLEY A. MILLER, Judge. *Reversed*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Following a preliminary examination, *see* § 970.03, STATS., the State filed a three-count Information charging Christopher James with the second-degree sexual assault of his wife, *see* § 940.225(2)(a), STATS., the physical abuse of his wife's eight-year-old daughter, *see* § 948.03(2)(b), STATS., and the substantial battery of his wife, *see* § 940.19(3), STATS. The trial court dismissed the sexual-assault count because, in the trial court's evaluation of the

evidence, the State had not established probable cause to believe that James's wife did not consent to the sexual act. The State appeals. We reverse.

I.

Stephanie G-J is married to James. She testified at the preliminary examination that on the evening of October 19, 1994, after she came home from work, James beat her daughter with a belt and then "left for his men's group meeting at church." When James returned, Stephanie G-J was in the basement doing the family's laundry. James asked Stephanie G-J "if I wanted to make love to him." Stephanie G-J declined. She testified what happened:

> "No, honey." I said, "I don't feel like it." And he said, "Get in the bed," and I said no one more time, and I was pushing the laundry on the floor, and he asked me the third time, and he said it--he said it--you know, I thought I better do this because I don't want to get hurt. So I just got in the bed with the clothes that I had on.

James got on top of his wife and ripped off her clothes after she protested "`Honey, you know I don't like to be naked when we make love.'" In response to the prosecutor's questions, Stephanie G-J testified what happened then:

> Q... I know this is not easy, but can you tell us exactly what he did?
>
> AHe stuck his penis inside of me.
>
> QNow, did you give him consent to do that?
>
> AI had no choice, no.
>
> Q Did you--

AI had no choice, 'cause I know what the circumstances would be if I would have fought.

QDid you in any way attempt to prevent him from putting his penis in your vagina?

AI held my legs closed, and he told me to open my legs, and I didn't. So he squeezed my thighs, and I just--I opened up my legs because that hurts. So while I laid there letting him do what he wanted to do to me, I just didn't feel right. I laid there, and I was crying. It didn't feel right.

QDid you tell him that you didn't want to do this, Ms. [G-J]?

A Yes, before it all happened.

A detective assigned to the Milwaukee Police Department's sensitive crimes unit testified that James related to him his version of the events that night:

AHe stated that at about 5:45 p.m. that evening he had spanked both Holly and Krista for not cleaning off the kitchen table, and that he had spanked them with a belt, and that he may have hit Holly in the arm with the buckle while he was aiming for her butt. He stated that this wouldn't have occurred if they would have cleaned off the kitchen table.

Regarding the sexual assault -- He said he hit Holly and Krista about four times each with the belt.

Regarding the sexual assault, he stated that he wanted to have penis-to-vagina intercourse with his wife; that she did not want to. He said that she was upset with him about spanking the kids.

> He stated that he wanted to have sex anyway; that he may have pinched her legs in order for her to open up her legs, that at one point she did open up her legs and that they did have penis-to-vagina intercourse for about ten to fifteen minutes. He stated that he then went to work. The assault occurred around 8:30 p.m..
>
> QDid he tell you anything about his philosophy with respect to the duty of a wife?
>
> AYes. He stated that it was the wife's duty to have sex with the husband whether she wanted to or not; that, more or less, she had no choice. And he also said it was the same in reverse; that if she wanted to have sex, that the husband had no right to refuse.

The preliminary-examination magistrate bound James over for trial. As noted, the trial court granted James's motion to dismiss the sexual-assault charge. The trial court explained the reason for the dismissal:

> Quite honestly, I'm simply not satisfied -- I don't think there's been a showing of non-consent. I'm really not satisfied, quite honestly. There's a temptation to let it roll over, let it go to trial, let the jury have a look at it, let the jury make the determination.
>
> I think even under the probable cause standard the State was held to at the time of the preliminary hearing a bit more showing was necessary, and I think that particularly becomes important in the context of a relationship apparently from what little this Court's been told.
>
> That's the whole problem. As we move from different stages of the case, the parties produce or

> present to the Court different pieces of the activity that went on which they find to be relevant and the entire picture doesn't come out until the trial, but in this case particularly where apparently there was some sort of counseling going on, the Court doesn't know anything about that.
>
> Also, apparently they are married, so they are living in a household together in an actual marriage, not a marriage-like situation, but they are actually married so much of the nuances would go on between parties. How they even approach each other in the whole sexual arena requires a bit more than what's demonstrated by this preliminary hearing.
>
> Defense motion is granted. I don't believe there was a showing that there was not consent as to that count.

Prior to the trial court's ruling, the prosecutor told the trial court that she "would just be appalled if the Court found on this record that Stephanie [G-J] freely consented to have sexual intercourse with her husband that night." Under the facts elicited at the preliminary examination, we *are* appalled by the trial court's conclusion that there was not a "showing of non-consent."

II.

The test for a proper bindover following a preliminary examination is whether the State has proven that there is "probable cause to believe that a felony has been committed by the defendant." Section 970.03(7), STATS. If so, the State may charge any felony that is fairly encompassed by the evidence. *See* ***State v. Blalock***, 150 Wis.2d 688, 698, 442 N.W.2d 514, 518 (Ct. App. 1989) ("In pressing felony charges following a bindover, the State is not limited to the crimes initially charged in the complaint but may, in its discretion, charge any offense that is not "`wholly unrelated' to the facts adduced at the preliminary hearing."") (citation omitted). Here, the State charged James with second-degree sexual assault in violation of § 940.225(2)(a), STATS., the same charge it had lodged against him in the criminal complaint.

Section 940.225(2)(a), STATS., makes it unlawful for any person to have "sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence." The term "consent" is defined by the statute as, *inter alia*, "words or overt actions ... indicating a freely given agreement to have sexual intercourse or sexual contact." Section 940.225(4). Under no view of the evidence adduced at the preliminary examination can it be said that Stephanie G-J "indicat[ed]," either by words or actions, "a freely given agreement to have sexual intercourse" with James.

We have long-since passed the dark periods of our history when a victim of sexual assault had to physically resist the assault to the "utmost."[1] In Wisconsin, as elsewhere, "no means no." *See* ***State v. Lederer***, 99 Wis.2d 430, 436, 299 N.W.2d 457, 461 (Ct. App. 1980); ***People v. Carapeli***, 201 Cal. App. 3d 589, 593, 247 Cal. Rptr. 478, 480 (Cal. Ct. App. 1988); ***United States v. Stanley***, 43 M.J. 671, 675–676 (Army Ct. Crim. App. 1995); *cf.* ***Deborah S. v. Diorio***, 153 Misc.2d 708, 712, 583 N.Y.S.2d 872, 876 (Civ. Ct. 1992) ("`No!', by words and/or acts, must be accepted as `No!'"). That the assailant is married to the victim does not transmute "no" into "yes," as it once did (*see* § 944.01(1), STATS. (1973), quoted in *supra* note 1). Section 940.225(6), STATS. ("A defendant shall not be presumed to be incapable of violating this section because of marriage to the complainant."); *cf.* ***State v. Neumann***, 179 Wis.2d 687, 704 n.7, 508 N.W.2d 54, 61 n.7 (Ct. App. 1993) (quoting with approval, in *dictum*, WIS J I—CRIMINAL 1200E ("The fact that (name of victim) was married to the defendant does not mean that she consented to sexual (contact) (intercourse). [The fact of marriage may be considered along with all the evidence in the case in determining whether there was consent.]") (brackets and underlining by WIS J I—CRIMINAL 1200E).

Stephanie G-J testified that she told James "no" twice, and got into bed only because she "had no choice"—aware, she testified, "what the circumstances would be if I would have fought." Further, she testified that she only permitted penetration because he forced her by squeezing her thighs. This testimony was uncontroverted; indeed, James admitted in his statement to the police detective to forcing sex on his wife—believing, according to the

[1] For example, § 944.01(1), STATS. (1973), provided that "rape" was committed by "[a]ny male who has sexual intercourse with a female he knows is not his wife, by force and against her will." Section 944.01(2) defined "by force and against her will" as meaning "either that her utmost resistance is overcome or prevented by physical violence or that her will to resist is overcome by threats of imminent physical violence likely to cause great bodily harm."

detective's recitation of what James told him, "that it was the wife's duty to have sex with the husband whether she wanted to or not."

In dismissing the sexual-assault charge, the trial court focussed on the fact that Stephanie G-J and James "are married." It ruled that consideration of what it called "the nuances" of their relationship and how they "approach each other in the whole sexual arena requires a bit more [to establish probable cause to believe that Stephanie G-J did not freely agree to have sexual intercourse] than what's demonstrated by this preliminary hearing." We disagree. Not only did Stephanie G-J testify without contradiction that she did not consent to have sexual intercourse with James, but James also told the police that she did not want to have sex with him that night. The only "nuances" of the relationship between James and Stephanie G-J that are of record in this case is that Ms. G-J was terrified of him—a man brutal to his children and to her, and a man who thought that he could violate one of Ms. G-J's most fundamental rights because, as he told the police officer, he "wanted to." In light of this, we agree with the State's comment in its brief before this court that "[i]f Judge Miller's decision stands it will be virtually impossible for the state to ever prosecute a sexual assault that happens to occur within a marriage." The trial court's dismissal was contrary to law, and we reverse.

By the Court.—Order reversed.

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