COURT OF APPEALS
DECISION
DATED AND FILED

February 17, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2810-CR **Cir. Ct. No. 2007CF496**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONALD E. SCHROEDER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Ronald Schroeder appeals a judgment convicting him of, among other things, two counts of sexual assault and twenty-seven counts of capturing a nude representation. Schroeder argues (1) the sexual assault statute

is unconstitutionally overbroad, and (2) there was insufficient evidence to prove the nude representation charges. We reject both arguments and affirm.

BACKGROUND

¶2 On April 29, 2007, police arrested Schroeder for battering his girlfriend, Cassandra L. When detective Thomas Hudock interviewed Cassandra to determine whether there were any previous incidents of abuse, she told him that Schroeder had photographed her nude while she was unconscious one evening. She told Hudock that the morning after a night of heavy drinking, Schroeder told her he had taken nude photographs of her while she was unconscious. He then said he was kidding and denied taking any pictures, but later admitted to her that he had taken pictures. When Cassandra asked to see them, he showed her six to nine pictures—none of which showed anyone touching her—which Cassandra told him he could keep as long as he did not show them to anyone.

¶3 Police searched Schroeder's computer and discovered twenty-seven photographs of Cassandra asleep and nude. A number of these pictures showed someone penetrating her anus and vagina with their fingers. When detectives showed Cassandra the pictures they recovered, she told them she did not know Schroeder had penetrated her while she was unconscious or that he had taken pictures other than the ones he had shown her.

¶4 Schroeder was charged with two counts of second-degree sexual assault for digitally penetrating Cassandra while she was unconscious, and

twenty-seven counts of making a visual representation of nudity.[1] Following a jury trial, Schroeder was convicted on all charges.

DISCUSSION

¶5 Schroeder raises two issues on appeal. First, he argues the sexual assault statute is unconstitutionally overbroad. This is a question of law we review independently. *See* ***State v. Janssen***, 219 Wis. 2d 362, 370, 580 N.W.2d 260 (1998). Second, he contends there was insufficient evidence to prove Cassandra did not consent to being photographed nude. When reviewing the sufficiency of evidence, we will not reverse "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).

1. The Constitutionality of WIS. STAT. § 940.225(2)(d)[2]

¶6 Schroeder argues that WIS. STAT. § 940.225(2)(d)—which prohibits sexual contact or sexual intercourse with a person who the defendant knows is unconscious—is unconstitutionally overbroad because in addition to criminalizing nonconsensual sexual contact, it potentially criminalizes consensual conduct. "A statute is overbroad when its language … is so sweeping that its sanctions may be applied to constitutionally protected conduct which the state is not permitted to

[1] Schroeder was also convicted of one count each of accessing computer data without authorization and misdemeanor battery. He does not appeal these convictions.

[2] References to the Wisconsin Statutes are to the 2007-08 version.

regulate." ***Bachowski v. Salamone***, 139 Wis. 2d 397, 411, 407 N.W.2d 533 (1987). Schroeder hypothesizes that under this statute, an individual in a committed sexual relationship who induces one's sleeping partner to wake up for consensual sex by touching his or her intimate parts could be guilty of sexual assault.

¶7 The State counters that a party may not challenge the constitutionality of a statute on hypothetical grounds unless the challenge is based on First Amendment protections. It contends that because WIS. STAT. § 940.225(2)(d) could be applied constitutionally to Schroeder, he cannot argue it might conceivably be unconstitutional on facts not before this court.

¶8 Schroeder does not respond to this argument.[3] Nor does he allege his challenge implicates First Amendment protections. Instead, he posits simply that "Wisconsin long ago recognized that a statute may be overbroad even if it does not abridge rights protected by the First Amendment." True or not, that assertion ducks the question of whether Schroeder may mount a facial challenge to WIS. STAT. § 940.225(2)(d) by hypothesizing ways in which the statute could be unconstitutionally applied to others.[4]

[3] Arguments not refuted are deemed conceded. *See* ***Charolais Breeding Ranches, LTD v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

[4] Schroeder cites a number of cases in support of the idea that statutes not implicating First Amendment rights can nevertheless be overbroad; for example, ***Roe v. Wade***, 410 U.S. 113 (1973); ***Griswold v. Connecticut***, 381 U.S. 479 (1965); and ***State v. Starks***, 51 Wis. 2d 256, 186 N.W.2d 245 (1971). Schroeder's reliance on these cases suffer from the same defect as his primary argument: none involve scenarios where a law was held to be unconstitutional even though it could be constitutionally applied to the defendant.

¶9 Our case law is clear that he may not. "Outside of the First Amendment context, a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the court." ***State v. Lee***, 192 Wis. 2d 260, 270, 531 N.W.2d 351 (Ct. App. 1995); *see also* ***United States v. Salerno***, 481 U.S. 739, 745 (1987) ("The fact that [a law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."); ***State v. Cole***, 2003 WI 112, ¶47, 264 Wis. 2d 520, 665 N.W.2d 328 ("Generally, a person cannot challenge the constitutionality of a statute on the grounds that it may be unconstitutional as applied to others."). We will therefore not entertain Schroeder's hypothetical examples of how WIS. STAT. § 940.225(2)(d) might conceivably be unconstitutionally applied to others.

2. Sufficiency of the Evidence

¶10 Schroeder next argues there was insufficient evidence to support his conviction for capturing a nude representation. An individual is guilty of capturing a representation of nudity, if he or she:

> Captures a representation that depicts nudity without the knowledge and consent of the person who is depicted nude while that person is nude in a circumstance in which he or she has a reasonable expectation of privacy, if the person knows or has reason to know that the person who is depicted nude does not know of and consent to the capture of the representation.

WIS. STAT. § 942.09(2)(am)1.

¶11 Schroeder argues Cassandra did not have a reasonable expectation of privacy because "[b]oth parties regularly slept in the nude and saw each other nude on a regular basis."[5] We unequivocally rejected this argument in ***State v. Jahnke***, 2009 WI App 4, 316 Wis. 2d 324, 762 N.W.2d 696, where we held that reasonable expectation of privacy "means a reasonable expectation under the circumstances that one will not be *recorded* in the nude." ***Id.***, ¶14 (emphasis added). Although Schroeder acknowledges this holding, he summarily concludes, "Given the open nature of their relationship [Cassandra] did not have a reasonable expectation of privacy that she would not be recorded in the nude." This argument treads perilously close to misrepresenting the law.

¶12 Nor is there support for Schroeder's argument that the evidence failed to show Cassandra did not consent to being photographed. Schroeder argues Cassandra's agreement he could keep the pictures he showed her indicates she retroactively consented to being photographed nude—or that it at least indicates he had no reason to know Cassandra did not consent to being photographed. As the State points out, this argument is problematic in several respects.

¶13 First, Schroeder provides no support for the idea an individual can retroactively consent to an activity. Second, even if such consent were possible, Schroeder's behavior indicates he knew Cassandra did not consent to being

[5] Schroeder also states that "[Cassandra] had sent Schroeder a partially nude photo of herself very early in their relationship." This hardly proves Cassandra gave Schroeder carte blanche to photograph her without her knowledge as she slept. He also claims Cassandra had no reasonable expectation of privacy because the couple "had an active and varied sex life." Evidence of an active sex life is irrelevant to the question of whether an individual has a reasonable expectation he or she will be recorded nude. *See* ***State v. Jahnke***, 2009 WI App 4, ¶14, 316 Wis. 2d 324, 762 N.W.2d 696.

photographed. Schroeder initially denied photographing Cassandra, but then led her to believe he had taken far fewer and less explicit pictures than he actually took. Third, Cassandra testified Schroeder suggested earlier in their relationship that they take nude photographs of each other and she told him she was not interested. Finally, it is the function of the jury to evaluate the credibility of witnesses and weigh the evidence. ***Poellinger***, 153 Wis. 2d at 504, 506. Here, there was ample evidence for the jury to conclude Cassandra did not consent to Schroeder photographing her.

By the Court.—Judgment affirmed.

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