COURT OF APPEALS
DECISION
DATED AND FILED

March 26, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2288-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHAD R. ROWE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Reversed and cause remanded with directions.*

DYKMAN, P.J.[1] Chad Rowe appeals from a judgment convicting him of lewd and lascivious behavior, contrary to § 944.20(1)(b), STATS.[2] He

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[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

[2] Section 944.20, STATS., provides:

> (1) Whoever does any of the following is guilty of a Class A misdemeanor:
>
> ….

(continued)

argues that the trial court erred by excluding evidence of his past sexual relationship with the complainant, A.F. We agree and therefore reverse and remand for further proceedings.

Rowe and A.F. agree that on February 9, 1996, they were attending Rowe's birthday party at the Gold Nugget bar in Waunakee. From that point on, Rowe and his friends' accounts of the events and A.F. and her friends' accounts of the events differ dramatically. Rowe testified that A.F. came up to him on several occasions, touched him on his chest and thigh, whispered in his ear and pressed her breasts against his arm. Rowe testified that A.F. suggested that they go to her apartment, which was about a block away, so they could be alone. When they did so, they both became more amorous. A.F. rubbed Rowe's penis, both inside and outside of his pants, and Rowe massaged A.F.'s breasts. A.F. eventually stopped and told Rowe that she was going over to a friend's house. Rowe ended up on A.F.'s bed, with his penis exposed. A.F. then left, and Rowe followed about ten minutes later. After that, Rowe walked A.F. back to her apartment and left.

A.F. testified that she went to Rowe's birthday party, greeted him with a hug, and after that did not touch him. Rowe told her that he was going to come over to her apartment after the party, and she told him that this was fine. Rowe did so, and when she let him in, he put his arms around her and wanted to kiss her. She told him, "No, Chad, I don't want to," but he would not stop. He began grabbing her breasts and tried putting his hand down her pants. She noticed that Rowe's pants were unzipped and that she could see his penis. She told him thirty or forty times, "Just stop it," but he continued. Finally, when Rowe laid

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(b) Publicly and indecently exposes genitals or pubic area.

down on her bed, she was able to leave and go to a friend's house. When Rowe showed up at her friend's house, she left, and Rowe followed her. She walked in her apartment, and Rowe left.

Just prior to trial, the parties and the court discussed the admissibility of "other acts" evidence. Defense counsel indicated that Rowe intended to testify that he and A.F. had enjoyed a sexual relationship for several years. Rowe's attorney produced a document, evidently written by Rowe, entitled: "A brief history of the casual sexual encounters between [A.F.] and Chad Rowe." The document was marked as an exhibit. It is typewritten, four pages long, and contains a lurid account of sexual activity between Rowe and A.F., beginning in the fall of 1991 and ending with the events of the 1996 birthday party. The assistant district attorney told the court that A.F. would admit that she had intercourse with Rowe around 1991, but had no further sexual contact with him until the events of February 9, 1996. The court concluded that Rowe's proposed testimony was arguably relevant, but its relevance was:

> clearly outweighed by the great danger that the jury would be distracted by trying to resolve numerous other factual situations, numerous other contested allegations of sexual contact, both between these parties and between other people, and that the interest of justice would not be served by admitting that into evidence.

At the verdict and instruction conference, Rowe asked the court to give the jury the pattern jury instruction for lewd and lascivious behavior—indecent exposure, modified by adding a definition of the word "indecent." That definition, the source of this appeal, is the last sentence in the instruction that told the jury the elements of the crime:

> The first element requires that the defendant exhibited to the view of another person or persons genitals.

> The second element requires that such exhibition or exposure by the defendant occurred publicly, that is, not in a hidden manner, but open to view.
>
> ….
>
> The third element requires that such exhibition or exposure by the defendant was "indecent." "*Indecent" means that the exposure of genitals, under the circumstances in which it occurred, is a type of conduct which offends the sense of decency or propriety of the community*.

(Emphasis added.)

The court added the last sentence of the instruction because Rowe argued that if there was no definition of the term "indecent," that term was too subjective to pass constitutional muster. The court instructed the jury on the elements of fourth-degree sexual assault and lewd and lascivious behavior. The jury found Rowe not guilty of fourth-degree sexual assault and guilty of lewd and lascivious behavior.

Rowe argues that he was deprived of a defense when the court prevented him from introducing evidence of his alleged past sexual activity with A.F. He argues that his right to present that evidence is constitutionally protected.

Article I, § 7 of the Wisconsin Constitution provides in part: "In all criminal prosecutions the accused shall enjoy the right … to meet the witnesses face to face; [and] to have compulsory process to compel the attendance of witnesses in his behalf …." In ***State v. Pulizzano***, 155 Wis.2d 633, 645-46, 456 N.W.2d 325, 330 (1990), the court said: "[Compulsory process] grants defendants the right to admit favorable testimony." However, the court also noted: "Confrontation and compulsory process only grant defendants the constitutional right to present relevant evidence not substantially outweighed by its prejudicial effect." ***Id.*** at 646, 456 N.W.2d at 330. Finally, in discussing § 972.11, STATS.,

which forbids the introduction of evidence of a complainant's sexual history in certain circumstances, the court said: "Despite the virtue of the general rule that such evidence is inadmissible, however, in the circumstances of a particular case evidence of a complainant's prior sexual conduct may be so relevant and probative that the defendant's right to present it is constitutionally protected." ***Id.*** at 647, 456 N.W.2d at 331.

Section 904.03, STATS., permits a trial court to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." A trial court has discretion to exclude evidence because its probative value is substantially outweighed by the danger of unfair prejudice. ***State v. Echols***, 175 Wis.2d 653, 677, 499 N.W.2d 631, 638 (1993). But whether a constitutional principle is applicable to a given fact situation is a question of law, which we review *de novo*. *See* ***State v. Clappes***, 136 Wis.2d 222, 235, 401 N.W.2d 759, 765 (1987); *see also* ***Pulizzano***, 155 Wis.2d at 648, 456 N.W.2d at 331. Thus, although we defer to the trial court's determination that evidence of Rowe and A.F.'s alleged past sexual encounters should be excluded because the probative value of that evidence is outweighed by the danger of issue confusion, we will decide *de novo* whether the exclusion of that evidence deprived Rowe of his constitutional right to present evidence.

We note that a jury has found Rowe not guilty of fourth-degree sexual assault, a crime with two elements, intentional sexual contact and lack of consent. *See* § 940.225(3m), STATS. The only evidence of the sexual contact between Rowe and A.F. came from them, and it is undisputed that Rowe had intentional sexual contact with A.F. Logic suggests that the jury must have

concluded that the intentional sexual contact was consensual. It would seem unusual to let a jury decide whether consensual, unpaid sexual contact between two unrelated and unmarried adults, in one of their homes, was a crime.

The State asserts that Rowe's conduct, "lying on a friend's bed spread eagle, pants around ankles, exposing one's penis," was ample evidence for the jury to determine that Rowe was guilty of lewd and lascivious behavior—indecent exposure. Exposing one's genitals in a dwelling may or may not be indecent, depending upon the circumstances. Some forms of sexual behavior are crimes in and of themselves, such as bigamy, incest, prostitution and patronizing prostitutes. But partial nakedness on a friend's bed is not a crime, *per se*. The conduct in only criminal if it is "indecent." We are unwilling to adopt the State's position that lying partially naked on a friend's bed is always lewd and lascivious conduct.

Rowe asserts that the incident following his birthday party was just another example of the infrequent but long-term sexual relationship he had with A.F. He wanted to explain to the jury that he and A.F. had "skinny dipped" in the Wisconsin River in 1992, with considerable resulting sexual contact. In 1993, they had a similar experience at Mendota Park in Middleton. In 1993, they had sexual intercourse in a tree house in A.F.'s backyard and also engaged in intercourse in a house that was under construction. In 1994, they had intercourse in the back seat of A.F.'s mother's car, and in 1995, A.F. and Rowe watched a pornographic movie and then engaged in sexual contact.

We point out the testimony that Rowe wanted to give because the testimony, if believed by the jury, could have led it to conclude that Rowe's conduct with A.F. in 1996 was not indecent. The jury could also have believed

A.F. that, with the exception of one long-past instance of sexual intercourse, she and Rowe had had no sexual contact at all and that Rowe's conduct in her presence in 1996 was therefore indecent. But without knowing Rowe's assertions as to the circumstances preceding the exposure of his genitals in A.F.'s apartment, the jury did not have the opportunity to make that choice.

We conclude that the evidence Rowe wanted to produce is similar to the evidence the defendant wanted to produce in ***State v. Pulizzano***, 155 Wis.2d 633, 456 N.W.2d 325 (1990). There, the defendant wanted to show that a child complainant had been the victim of a prior sexual assault to rebut the inference that a child so young would not know the specifics of a sexual act unless the defendant had committed it. ***Id.*** at 639, 456 N.W.2d at 327. In ***Pulizzano***, as here, the trial court determined that the relevance of the child's prior sexual assault was outweighed by the danger of jury distraction. *See* ***id.*** at 640, 456 N.W.2d at 328. Still, the supreme court concluded that the defendant's constitutional right to present the evidence was paramount. *See* ***id.*** at 655, 456 N.W.2d at 334-35.

Without the evidence Rowe wished to produce, he had little or no way of showing that the exposure of his genitals did not occur under indecent circumstances. While the case will take more time to try, that is not an insurmountable obstacle. There were few witnesses to Rowe and A.F.'s alleged pre-1996 conduct. The jury can be instructed on the purpose of the evidence. The State's interests are not as weighty as its interests in ***Pulizzano***, and Rowe's constitutional right to present evidence is at least as compelling as the defendant's right in that case. We conclude that Rowe's constitutional right is paramount. Accordingly, we reverse and remand for a new trial.

By the Court.—Judgment reversed and cause remanded with directions.

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