COURT OF APPEALS
DECISION
DATED AND FILED

May 26, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1785-CR **Cir. Ct. No. 2014CF472**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DOMINIC D. CIZAUSKAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: DANIEL L. LaROCQUE, Judge. *Affirmed*.

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. A jury found Dominic Cizauskas guilty of third-degree sexual assault for having sexual intercourse with H. without her consent. During the trial, Cizauskas defended himself by introducing evidence that H. was motivated to falsely accuse him of sexually assaulting her because she was in a

romantic relationship with another man named King. The defense theory was that H. feared that King would learn that H. had consensual sex with Cizauskas and, therefore, H. told King that Cizauskas forced himself on her. Cizauskas argues that the circuit court, relying on the rape shield statute, erred by excluding uncontested evidence that H. and King had sexual intercourse a couple of days before Cizauskas and H. had intercourse. Cizauskas argues that this ruling deprived him of multiple constitutional rights, including the right to present a defense. We reject this argument and affirm.

Background

¶2 Defendant Cizauskas and H. were well acquainted with each other. They attended high school together, and, during that time, sometimes had sexual relations. On the night of the conduct leading to the charges against Cizauskas, H. was in her first year of college at UW-Madison, and Cizauskas, still a senior in high school, was visiting Madison.

¶3 During prior days, and during the day and evening of the alleged assault, Cizauskas and H. traded text messages. In those messages, they agreed that Cizauskas could come to H.'s dorm room to visit. It was undisputed at trial that Cizauskas went to H.'s dorm room and, while there, had sexual intercourse with H. What was disputed was whether H. consented.

¶4 For purposes of this appeal, the specific differences in the accounts given by H. and Cizauskas do not matter. It is sufficient to say that H. testified that Cizauskas had sexual intercourse with her despite her repeated protests, and that Cizauskas testified that H., through her words and actions, indicated that she wanted to have sexual intercourse.

¶5 After Cizauskas left H.'s dorm room, H. immediately contacted a fellow UW student named King. King had attended the same high school as H. and Cizauskas. King had dated H. while they were in high school. H. told King that Cizauskas sexually assaulted her.

¶6 Cizauskas sought to introduce evidence that, a couple of days before the alleged assault, H. had consensual sexual intercourse with King. Cizauskas argued that this evidence was essential to his defense theory that H. fabricated the assault allegation against Cizauskas because she and King were romantically involved and H. feared that King would find out that she had consensual sex with Cizauskas.

¶7 The circuit court excluded evidence of intercourse with King under the rape shield statute, WIS. STAT. § 972.11(2).[1] But the court permitted Cizauskas to elicit from King and H. that they had hugged and kissed a couple of days before the charged conduct involving Cizauskas.[2]

¶8 We reference additional facts as needed below.

[1] All references to the Wisconsin Statutes are to the 2013-14 version.

[2] As explained later in this opinion, the rape shield statute generally prohibits the admission of any evidence of the complainant's "prior sexual conduct." *See* WIS. STAT. § 972.11(2)(b). The statute defines "sexual conduct" as "any conduct or behavior relating to sexual activities of the complaining witness, *including but not limited to* prior experience of sexual intercourse or sexual contact, use of contraceptives, living arrangement *and life-style*." WIS. STAT. § 972.11(2)(a) (emphasis added). Thus, the circuit court's "hugging and kissing" ruling seemingly admits evidence that would normally be prohibited by the rape shield statute. Neither Cizauskas nor the State discusses this topic, and we likewise ignore it.

Discussion

¶9 Cizauskas argues that the circuit court's ruling, excluding evidence that H. and King had intercourse a couple of days prior to the alleged sexual assault by Cizauskas, deprived Cizauskas of his constitutional right to present a defense. We first briefly discuss the legal framework for our analysis. We then explain why we conclude that the hugging and kissing evidence Cizauskas was allowed to present sufficiently protected his right to present a defense.

A. Rape Shield Statute And The Right to Present A Defense

¶10 "Wisconsin's rape shield law, Wis. Stat. § 972.11, generally prohibits the introduction of any evidence of the complainant's prior sexual conduct 'regardless of the purpose.'" ***State v. Ringer***, 2010 WI 69, ¶25, 326 Wis. 2d 351, 785 N.W.2d 448 (quoting the statute). "The rape shield law was enacted to counteract outdated beliefs that a complainant's sexual past could shed light on the truthfulness of the sexual assault allegations." ***Id.*** (internal quotation marks and quoted sources omitted). Pertinent here, such laws help limit the possibility that jurors will improperly rely on the proposition that the complainant likely consented because the jurors view the complainant as promiscuous. *See* ***Wood v. State***, 736 P.2d 363, 364-65 (Alaska Ct. App. 1987).

¶11 At times, however, the rape shield statute must yield to the accused's right to present a defense. *See* ***State v. Williams***, 2002 WI 58, ¶69, 253 Wis. 2d 99, 644 N.W.2d 919; ***State v. St. George***, 2002 WI 50, ¶¶49-52, 252 Wis. 2d 499, 643 N.W.2d 777. We review de novo whether the application of the statute to a

particular fact situation deprives a defendant of a constitutional right. ***Williams***, 253 Wis. 2d 99, ¶69; ***St. George***, 252 Wis. 2d 499, ¶49.[3]

B. Whether The Circuit Court's Ruling Impermissibly Impeded Cizauskas's "Romance" Defense

¶12 We begin by noting that the circuit court ruled twice on the defense request to admit evidence that H. and King had sexual intercourse a couple of days before the charged conduct involving Cizauskas. The first ruling occurred pretrial. The second ruling was made when the topic was revisited during trial when King testified. Although there were two rulings, the parties' arguments, sensibly, focus on the second ruling. We do the same.

¶13 As noted, Cizauskas argues that he needed to introduce evidence that H. and King had sexual intercourse a couple of days prior to the alleged assault in order to effectively pursue his defense theory that H. was motivated to lie by her romantic interest in King. Cizauskas argues that he needed this evidence to show that H. was concerned that "if King found out that [H.] had consensual sexual intercourse with [Cizauskas] [King] would be upset at [H.'s] lack of fidelity to [King] so recently after they had renewed their sexual relationship." According to Cizauskas, the "hugging and kissing" evidence was "too innocuous" and, in

[3] Cizauskas also references the Confrontation Clause and his right to compulsory process as constitutional rights implicated by the circuit court's ruling. Case law describing the relationship of these constitutional rights to the right to present a defense is sometimes conflicting and unclear. Regardless, we need not separately address the Confrontation Clause or Cizauskas's right to compulsory process. Cizauskas does not construct separate arguments based on these specific rights. That is to say, we perceive no reason why our discussion of Cizauskas's right to present a defense does not fully address any combination of constitutional rights that Cizauskas may be relying on.

Cizauskas's words, allowed H. and King to "falsely characterize their sexual contact as friendly, non-sexual physical contact."

¶14 We disagree with Cizauskas that evidence of the hugging and kissing, in the context of other evidence in this case, is evidence of "non-sexual physical contact." As the circuit court observed when Cizauskas's trial counsel attempted to equate the hugging and kissing evidence to a person hugging and kissing his mother, "the jury knows that's not his mother."

¶15 To put the dispute in fuller perspective, in addition to hearing both H. and King agree that they hugged and kissed a couple of days before the incident with Cizauskas, the jury learned all of the following:

- In high school, when H. was a junior and Cizauskas was a sophomore, they had consensual sexual intercourse several times.[4]
- Also in high school, H. and King dated their senior year, from approximately July 2012 to May 2013. While H. and King were dating, King once confronted Cizauskas about Cizauskas contacting H. King was aware that H. and Cizauskas had a sexual history.
- At the university, H. and King lived in the same dorm.
- Referring to the time of the alleged assault, H. described herself and King as "just friends," and King described H. as "just a friend of mine."
- H. informed King that Cizauskas was coming to Madison and wanted to see H.
- In the time leading up to Cizauskas's visit to Madison, Cizauskas and H. exchanged dozens of text messages, including a few making reference to the possibility of having sexual intercourse.

[4] We note that evidence of H.'s prior sexual encounters with Cizauskas was admissible under an exception in the rape shield statute that applies to "[e]vidence of the complaining witness's past conduct with the defendant." *See* WIS. STAT. § 972.11(2)(b)1.

- King testified that it would not have affected his relationship with H. if King found out that H. and Cizauskas had consensual sex on the night in question. King asserted that H. "was just a friend" and that they never planned to date after high school.

Given this context, it is far-fetched to equate H.'s and King's hugging and kissing with the sort of non-sexual hugging and kissing engaged in by sons and mothers.

¶16 Plainly, H.'s and King's hugging and kissing was based on sexual attraction. And, plainly, H. and King were not "just friends," at least not as most people might think that phrase is generally used. But it is a different matter whether H. and King had begun to rekindle the sort of romantic relationship that would provide H. with a motive to falsely accuse her then-friend Cizauskas of sexually assaulting her. Reasonable jurors would have understood this.

¶17 We agree with the circuit court that telling the jurors that H. and King had sexual intercourse at the time that they hugged and kissed would have added little to Cizauskas's defense. To the extent it made sense that, with their history, H. and King hugged and kissed but were "just friends," it would just as easily have made sense that they additionally had sexual intercourse but were "just friends," that is, "just friends" in the sense that they were not involved to the extent that either wanted to resume a dating relationship. As suggested by King's testimony outside the presence of the jury, it is widely known that many people engage "in what might be described as hooking up or casual sexual activity with people [they are] not dating."

¶18 We do not hold that the intercourse evidence would have added nothing to the defense effort. Rather, we agree with the circuit court that its exclusion did not deprive Cizauskas of his right to present a defense.

¶19 Furthermore, based on the same reasoning, even if we concluded that the circuit court erred, we would conclude that the error was harmless. Our review of the entire trial transcript persuades us beyond a reasonable doubt that the result of this trial would have been the same with or without the King-intercourse evidence. A trial with this intercourse evidence would also have included King's testimony about casual hook-ups. The jury would have been faced with essentially the same dispute.

¶20 Before concluding, we address some of the case law support Cizauskas relies on.

¶21 Cizauskas cites to a trilogy of United States Supreme Court cases: ***Davis v. Alaska***, 415 U.S. 308 (1974); ***Delaware v. Van Arsdall***, 475 U.S. 673 (1986); and ***Olden v. Kentucky***, 488 U.S. 227 (1988). He argues that these cases secure a criminal defendant's right to cross-examine a witness for motive and bias. We agree that Cizauskas has this right, but, for the reasons already explained, we disagree that the circuit court's ruling violated it.

¶22 Of the three cited Supreme Court cases, only ***Olden*** involved the reversal of a sexual assault conviction based on excluded evidence that supported a defense theory similar to the one here. *See* ***Olden***, 488 U.S. at 228-30, 233. Even so, we are not persuaded that ***Olden*** supports Cizauskas's argument. ***Olden*** is a per curiam decision that is short on both facts and analysis, but it appears factually distinguishable in several ways. To begin, it appears that the jury in ***Olden*** was prevented from hearing *any* evidence regarding the *undisputed* existence of a romantic relationship between the victim and another key witness. *See* ***id.*** at 229-30. Further, when the victim testified on direct examination that she

lived with her mother, the defense was prevented from cross-examining the victim with the fact that she and the other witness were cohabiting. *See* ***id.***

¶23 Here, in contrast to ***Olden***, the jury heard some evidence suggesting motive or bias based on the relationship between H. and King. And, the evidence that H. and King had sexual intercourse was of far less impeachment value than the cohabitation evidence excluded in ***Olden***.

¶24 Cizauskas also relies on a handful of cases from other states. We find nothing persuasive in these cases. Each, like ***Olden***, is easily distinguished on its facts. For example, in ***State v. Pride***, 528 N.W.2d 862 (Minn. 1995), the court found a constitutional violation when the defense was entirely deprived of the opportunity to present evidence of an undisputed romantic relationship between a victim and another witness to show the victim's motive or bias. *See* ***id.*** at 863-65 & n.3, 867. Here, as we have explained, the circuit court ruling provided Cizauskas with a reasonable compromise that allowed him to pursue his "romance" theory while taking into account protections afforded by the rape shield statute.

¶25 In sum, we conclude that the circuit court's ruling under the rape shield statute did not violate Cizauskas's constitutional rights.

Conclusion

¶26 For the reasons stated above, we affirm the judgment convicting Cizauskas of third-degree sexual assault.

By the Court.—Judgment affirmed.

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