COURT OF APPEALS
DECISION
DATED AND FILED

May 9, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP792-CR **Cir. Ct. No. 2014CF944**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRELLE D. OLIVER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: JOHN S. JUDE, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 PER CURIAM. Terrelle D. Oliver appeals from a judgment convicting him of armed robbery and two counts of first-degree sexual assault by use of a dangerous weapon, contrary to WIS. STAT. §§ 943.32(2) and 940.225(1)(b) (2015-16).[1] Oliver contends the trial court erroneously exercised its discretion when it excluded two pieces of evidence that he claims would have undermined the victim's credibility and bolstered his defense. We affirm.

¶2 The complaint alleged that Oliver accosted T.P. at knife point as she walked home alone one night, stole her necklace, seventy-six dollars, and twice forced her to engage in fellatio. Police caught Oliver almost immediately. They found him throwing T.P.'s necklace into a trashcan and had on his person seventy-six dollars in the exact denominations that were taken from T.P. At the police station, Oliver was caught trying to flush the knife down a toilet.

¶3 Pretrial, Oliver moved to have A.H., T.P.'s longtime, sometimes live-in, ex-boyfriend, testify that T.P. made prior false sexual assault allegations against him as a form of retaliation or manipulation in their troubled relationship and in regard to child custody matters. The trial court excluded that testimony because Oliver failed to sufficiently demonstrate that T.P.'s prior allegations were false and to avoid a trial within a trial.

¶4 Oliver also requested that A.H. be permitted to testify how T.P.'s behavior was before her alleged assault compared to after. The trial court excluded that testimony on grounds that Oliver needed expert testimony to opine

[1] The Honorable John S. Jude, who presided over the proceedings, retired in August 2016 and passed away in February 2017. All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

on changes in a sexual assault victim's behavior, and that A.H.'s lay testimony would be speculative and more unfairly prejudicial than probative. The jury found Oliver guilty on all three counts. He appeals.

¶5 Trial courts have broad discretion to admit or exclude evidence. ***State v. Jackson***, 216 Wis. 2d 646, 655, 575 N.W.2d 475 (1998). We will not disturb a trial court's evidentiary determination unless the court erroneously exercised its discretion. ***State v. Ringer***, 2010 WI 69, ¶24, 326 Wis. 2d 351, 785 N.W.2d 448. A court erroneously exercises its discretion if it applied the wrong legal standard or if the facts of record fail to support the court's decision. ***Id.***

¶6 Wisconsin's rape shield statute, WIS. STAT. § 972.11, "generally prohibits the introduction of any evidence of the complainant's prior sexual conduct 'regardless of the purpose.'" ***Ringer***, 326 Wis. 2d 351, ¶25 (quoting § 972.11(2)(c)). The statute "was enacted 'to counteract outdated beliefs that a complainant's sexual past could shed light on the truthfulness of the sexual assault allegations,'" and "reflects the legislature's determination that evidence of a complainant's prior sexual conduct is largely irrelevant 'or, if relevant, [is] substantially outweighed by its prejudicial effect.'" ***Ringer***, 326 Wis. 2d 351, ¶25 (citations omitted).

¶7 The statute's broad evidentiary prohibition is subject to three exceptions encompassing those limited factual scenarios in which the legislature has determined that such evidence may be sufficiently probative of a material issue to overcome its prejudicial nature. *See* WIS. STAT. § 972.11(2)(b)1.-3.; ***Jackson***, 216 Wis. 2d at 657-58. The only exception relevant here is "prior untruthful allegations of sexual assault made by the complaining witness." Sec. 972.11(2)(b)3.

¶8 Merely offering proof of evidence of the complainant's alleged prior untruthful allegations of sexual assault is not enough to defeat the rape shield statute. *See* ***Jackson***, 216 Wis. 2d at 658. Before such evidence may be introduced, the court first must determine whether the evidence fits within WIS. STAT. § 972.11(2)(b)3.—i.e., that a jury reasonably could find that the complainant made prior untruthful allegations of sexual assault. ***Ringer***, 326 Wis. 2d 351, ¶31. The court itself need not be convinced by a preponderance of the evidence, but only that a jury, acting reasonably, could find it more likely than not that the complainant made prior untruthful allegations of sexual assault. ***Id.***, ¶32. If the court concludes the proffered evidence fits within § 972.11(2)(b)3., it also must determine whether the evidence is "material to a fact at issue in the case" and is "of sufficient probative value to outweigh its inflammatory and prejudicial nature." WIS. STAT. § 971.31(11); ***Ringer***, 326 Wis. 2d 351, ¶27.

¶9 Oliver's claim that T.P. made prior untruthful sexual assault allegations against A.H. arose after A.H. called police to assist with a child custody matter involving the pair's son. Soon after, T.P. filed a police report claiming that A.H. sexually assaulted her as he had "on several occasions." T.P. told police that A.H. never used violence or threats, "but was just persistent in trying to touch her until she would just give up on saying no," and that she never told anyone about any prior assaults. T.P. did not recant her formal accusation.

¶10 A.H. admitted that his and T.P.'s sexual relationship continued after they no longer cohabited but insisted he never sexually assaulted or raped her. He testified that police never contacted him due to insufficient evidence and that he never saw a police report.

¶11 The fact that T.P. never recanted "weighs against a jury's finding that the allegations were untruthful." *See* ***Ringer***, 326 Wis. 2d 351, ¶37. The fact that police never followed up with A.H.—even if because they viewed T.P.'s claim with skepticism—does not prove untruthfulness. *Cf.* ***id.***, ¶40 (fact that accused not prosecuted by itself does not support finding of untruthful allegation). That A.H. may have a valid defense does not dictate a finding that T.P's allegations were untruthful. *See* ***id.***, ¶38.

¶12 A jury reasonably could find it more likely than not that the issue came down to competing versions of "consent" rather than truth or untruth. T.P. genuinely may have believed "giv[ing] up on saying no" does not signify consent. A.H. genuinely may have believed T.P. ultimately consented such that, in his mind, the sexual conduct did not amount to rape or sexual assault.

¶13 Thus, Oliver failed to bring forth evidence from which the trial court could conclude that a jury reasonably could find that T.P.'s allegations against A.H. were untruthful. At most, his offer of proof shows that there were competing versions of what occurred and that A.H. may have a defense to the allegations. We agree with the trial court that admitting evidence of T.P.'s prior allegations against A.H. could result in a trial within a trial, confuse the issues as they relate to Oliver, and invite the jury to speculate about T.P.'s truthfulness regarding the alleged prior sexual assaults. *See* ***id.***, ¶41. We agree that Oliver's proffered evidence does not fit within WIS. STAT. § 972.11(2)(b)3., and thus is barred by the rape-shield statute.

¶14 The trial court also denied Oliver's motion to allow A.H., as someone who knew T.P. for about ten years, to testify about T.P.'s behavior just before and after the encounter with Oliver. Oliver wanted the jury to be able to

decide "based off their own experiences whether somebody whose [sic] been sexually assaulted would react or act as [T.P.] did after the incident."

¶15 The court excluded the lay evidence. "[C]ourts admit expert opinion testimony to help juries avoid making decisions based on misconceptions of victim behavior." ***State v. Jensen***, 147 Wis. 2d 240, 252, 432 N.W.2d 913 (1988). The court reasoned it would "create way too much speculation for the jury to have to act as experts themselves to make some kind of a conclusion that a sexual assault victim acted a certain way over a period of time," such that "the danger of the prejudicial value outweighs its probative value."

¶16 Oliver contends the court misapplied the law. He argues that the evidence he sought to introduce was not offered to compare or contrast T.P.'s post-assault behavior with that of other sexual assault victims but would consist only of A.H.'s own observations of T.P.'s behavior after the alleged assault.

¶17 The problem is that Oliver failed to make an offer of proof to establish what A.H.'s testimony would have been. "When a claim of error is based on the erroneous exclusion of evidence, 'an offer of proof must be made in the trial court as a condition precedent to the review of any alleged error.'" ***State v. Hoffman***, 106 Wis. 2d 185, 217-18, 316 N.W.2d 143 (Ct. App. 1982) (citation omitted); *see also* WIS. STAT. § 901.03(1)(b). The offer serves to provide the trial court a more adequate basis for an evidentiary ruling as well as to establish a meaningful record for appellate review. ***State v. Dodson***, 219 Wis. 2d 65, 73, 580 N.W.2d 181 (1998).

¶18 We are guessing, as the jury would have had to do, that Oliver hoped A.H. would testify that T.P.'s behavior did not change after the claimed assault, making suspect the veracity of her accusation. Oliver did not make that clear,

however, nor did he indicate whether A.H. even lived with T.P. around the time of the assault such that A.H. would have had a basis for testifying to any change in her behavior. The testimony, totally speculative in nature, was properly excluded.

By the Court.—Judgment affirmed.

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