COURT OF APPEALS
DECISION
DATED AND FILED

April 24, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP982-CR **Cir. Ct. No. 2010CF1033**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY KOSTERMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Affirmed.*

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

¶1 PER CURIAM. Timothy Kosterman appeals a judgment convicting him of first-degree sexual assault, armed burglary and misdemeanor theft. We

conclude that any ***Miranda***[1] violation that may have occurred was harmless because it is clear beyond a reasonable doubt that, absent the error, a rational jury would have found him guilty. We affirm.

¶2 These facts are not disputed. Sarah D. was awakened to find someone in her bedroom. The intruder cut off her shorts with a knife and twice had penis-to-vagina sexual intercourse with her. The man's voice was similar to Kosterman's. Sarah and Kosterman were casual friends through his former dating relationship with Lisa, the tenant who lived upstairs from Sarah. Kosterman had been at the bar where Sarah and her friends had been socializing earlier that night. When the man left, Sarah discovered that her cell phone was not on her nightstand. Sarah woke Lisa and told her she had been raped. They called the police.

¶3 Police executed a search warrant at Kosterman's residence in Kosterman's presence. The search yielded a butterfly knife, a butcher or Bowie knife, the shirt the bar surveillance video showed Kosterman wearing and, in Kosterman's garbage, a cell phone battery cover matching Sarah's missing cell phone. A police officer arrested Kosterman and read him his rights. Kosterman refused to give a statement without a lawyer.

¶4 Kosterman was taken to the police station to meet with Investigator Theodore Schlitz. Schlitz knew that Kosterman had been advised of his ***Miranda*** rights an hour or less earlier and had declined to make a statement. Schlitz encouraged Kosterman to reconsider. Kosterman agreed to talk and Schlitz read Kosterman his ***Miranda*** rights. Kosterman told Schlitz that, as he had consumed a

[1] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

lot of alcohol, his recollection was "pretty spotty," that he could not remember taking Sarah's keys or assaulting her, and hoped he had not done it.

¶5 Kosterman later alleged that Schlitz's actions constituted a ***Miranda*** violation and moved to suppress the statements. The court denied that motion as well as Kosterman's renewed motion on the first day of trial.

¶6 At trial, the State put on the following evidence. Sarah testified that she got a ride home from the bar with a friend; climbed through the window because she could not find her keys; called her friends back at the bar to look for her keys; went to bed; was awakened by something touching her ankle; asked three times who it was but the intruder said only "Shhh"; and heard a "flick" then felt an edge and a prick against her neck. She testified that the intruder cut her shorts and underwear off; twice engaged in penis-to-vagina intercourse and attempted anal intercourse; told her he was sorry, that she did not deserve what was happening, and that he was not the kind of person who did this but "someone had broke[n] his heart and he did not know how to heal it." She testified that he kept his face hooded but his voice sounded like Kosterman's; she never consented to any of the events; he held a knife the whole time; she was frightened and, as soon as he left, she went upstairs to Lisa's apartment and called the police.

¶7 Lisa testified that Sarah appeared at her door crying, seeming upset and scared and saying she had been raped, and that some of the things Sarah told her the intruder had said were similar to things Kosterman said to her while they were dating. The responding police officer and the detective who met Sarah at the hospital described her as "trembling," "upset," "in shock," and "very shaken up." The sexual assault nurse examiner testified that Sarah presented with vaginal and genital redness, tears, lacerations, and petechiae.

¶8 A state crime lab technician identified fibers on the butterfly knife as "consistent in every way" with fibers from Sarah's shorts. A state crime lab forensic scientist concluded that Kosterman's DNA matched that on Sarah's vaginal and rectal swabs. The bar surveillance video showed Kosterman picking up Sarah's keys off the bar and pocketing them; two of Sarah's friends testified that Kosterman was near them as they looked for the keys but said nothing. The tape of a recorded telephone call Kosterman made to his sister the day after his arrest allowed the jury to hear him tell her that he got drunk, things got out of hand and he sexually assaulted someone, and to hear him say "no" when his brother-in-law asked him if the sex began consensually. Schlitz testified that Kosterman told him that he had drunk a lot and was "really trashed"; went straight home after bar time and stayed there; denied going to Sarah's house or having sex with her; could not explain how Sarah's cell phone cover got into his trash; and denied taking her keys off the bar but, after being shown the surveillance video, conceded it was he on the tape but could not recall taking the keys.

¶9 Testifying in his own defense, Kosterman told the jury that he drank beer and shots from 5:00 p.m. until bar time; picked up Sarah's keys and planned to drop them off at her house as an excuse to see her because he found her attractive; drove home after bar time but, remembering the keys, drove to Sarah's house; let himself in when she did not answer his knocks, went into her bedroom, woke her up by touching her foot, and identified himself; talked to her about problems in his life, started to cry, asked if he could make love to her and she said "yeah," but it was "like … a pity[-] sex type of thing."

¶10 Kosterman also testified that Sarah's clothing was tangled in the sheets so he cut it off with a knife he always carried; they twice had penis-to-vagina intercourse; he left the keys on the floor of Sarah's bedroom but could not

explain why they were never found; he took her cell phone when he left so he could return it as an excuse to see her again; he decided that was a "pretty dumb thing to do" and came back to return it less than an hour later but left when he saw squad cars; he thought Sarah had called the police because he took her phone so he threw it out the window and, when he later found the cover, he threw it away.

¶11 Kosterman testified that he had lied when he told the police he did not remember, that he had not gone to Sarah's house and that he had not had sex with her because he was afraid if he admitted having sex with her it would confirm their suspicions. He testified that when he told his sister he sexually assaulted someone, he meant that was what he was arrested for, not that he did it, and when he told his brother-in-law the act did not begin consensually, he meant that he entered the house without permission.

¶12 The jury returned verdicts of guilty to two counts of first-degree sexual assault, the armed burglary and the misdemeanor theft. Kosterman appeals.

¶13 We assume without deciding that a ***Miranda*** violation occurred. *See* ***State v. Stevens***, 2012 WI 97, ¶52, 343 Wis. 2d 157, 822 N.W.2d 79 (once a suspect has invoked his or her right to silence, police may not inquire whether he or she has reconsidered until the accused initiates further communication). We analyze the admission of statements taken in violation of ***Miranda*** under the rubric of harmless error. ***State v. Martin***, 2012 WI 96, ¶44, 343 Wis. 2d 278, 816 N.W.2d 270.

¶14 For an error to be deemed harmless, the party who benefited from the error—here, the State—must show that "it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189 (citation omitted).

To assess the nature of the error and the harm it is alleged to have caused, we look at the frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the erroneously admitted evidence duplicates untainted evidence, the nature of the defense and the nature and overall strength of the State's case. ***State v. Mayo***, 2007 WI 78, ¶48, 301 Wis. 2d 642, 734 N.W.2d 115. Assessing harmless error presents a question of law we review de novo. ***State v. Ziebart***, 2003 WI App 258, ¶26, 268 Wis. 2d 468, 673 N.W.2d 369.

¶15 Kosterman's defense was two-fold: that the event was consensual and that he had claimed a lack of recollection because he did not want to bolster a wrongful accusation by placing himself at the scene. He asserts that the statements' admission was not harmless because they undercut his credibility, thus creating an inference that his claim of consent also could not be believed.

¶16 Kosterman's statement to Schlitz denying involvment was not used frequently. Further, it could have been even used to impeach his testimony even if excluded. Thus the first factor is not significant in the harmless error analysis.

¶17 The second factor is the importance of the erroneously admitted evidence. Kosterman's statement was not pivotal in and of itself. It contained no damning admissions; rather, it consisted of denials and a claim of failed memory. Because he chose to testify at trial, the State bears the burden of proving beyond a reasonable doubt that the erroneous admission at trial of Kosterman's statements did not impel his testimony, and that he would have made the same damaging admissions at trial even if the prosecution had not already put his police statement before the jury. *See* ***Harrison v. United States***, 392 U.S. 219, 224-26 (1968); ***State v. Anson***, 2005 WI 96, ¶¶38-40, 58, 282 Wis. 2d 629, 698 N.W.2d 776.

¶18 The State has met its burden. During voir dire, before the trial court had ruled on Kosterman's renewed motion to suppress and, thus, before Kosterman knew that his statements to police would be before the jury, his counsel told the jury that Kosterman intended to testify. Furthermore, the State had a formidable body of evidence to support Sarah's claim that Kosterman was the person who took her keys, entered her apartment uninvited and had sex with her. Kosterman virtually had to testify to put forth his defense that the sex was consensual. His testimony was not impelled by the use of his police statement.

¶19 The nature and strength of the defense and of the State's cases show that the error was harmless. Neither party's case depended on Kosterman's earlier denial and lack of recollection. With or without his statements' admission, the jury had to decide who and what to believe from the testimony at trial: on one side, Sarah's claim of rape, evidence about her immediate distress and injuries, no evidence undermining her credibility, and Kosterman's statements to his sister and brother-in-law; on the other side, that Kosterman took her keys, entered her house uninvited in the wee hours of the morning and claimed consensual "pity sex." The jury must decide issues of credibility, weigh the evidence, and resolve conflicts in the testimony. ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990). The State's case outweighed Kosterman's very weak one. The error was harmless.

By the Court.—Judgment affirmed.

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