COURT OF APPEALS
DECISION
DATED AND FILED

September 30, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0206-CR **Cir. Ct. No. 02CF001758**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BARRY D. STAMPS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: DAVID T. FLANAGAN, Judge. *Affirmed.*

Before Dykman, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Barry Stamps appeals a judgment convicting him, following a trial to the court, of first-degree sexual assault by use of a dangerous weapon as a habitual offender. He claims that certain hearsay statements were admitted against him in violation of the Confrontation Clause. We conclude that any error in the admission of the statements was harmless.

¶2 The sexual assault charge was based on a woman's allegation that Stamps forced her to have sexual intercourse with him at knifepoint after she had attempted to end their relationship. After the encounter, the complaining witness ran to a neighboring apartment to call the police.

¶3 Stamps admitted that he had had intercourse with the complainant, but claimed it was consensual. He testified that the complainant might have become hysterical because Stamps had ejaculated in her after she had asked him not to. He said she grabbed a blanket and ran naked out of the apartment to a neighbor's apartment. Stamps also testified that the complainant might have "flipped out" because she was high on a combination of cocaine and prescription medication.

¶4 By the time of trial, the neighbor had moved to Arizona. Over Stamps' objection, the State introduced statements the neighbor had made to an investigating police officer. Specifically, the officer testified that the neighbor told him that the complainant had come to the neighbor's apartment crying and scared, with a cut near one eye, wrapped only in a blanket, saying that her boyfriend had tried to stab her, and asking to call the police.

¶5 Assuming, without deciding, that the police officer should have been precluded from relating the neighbor's testimony, we conclude that the neighbor's statements do not contradict Stamps' defense theory or version of events. An error is harmless when it is clear beyond a reasonable doubt that the defendant still would have been found guilty absent the error. ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189. We are satisfied that is the case here.

¶6 Stamps did not dispute the allegation that the complainant ran naked, wrapped in a blanket, to a neighbor's apartment to call police, claiming that

Stamps had tried to stab her. Indeed, Stamps did not dispute that the complainant was crying or that she accused him of assaulting her. Rather, it was Stamps' theory that the complainant "flipped out" after they had consensual intercourse. The neighbor's statements are consistent with this theory.[1]

¶7 Moreover, the record does not show that the trial court relied on the neighbor's statements in any way. Rather, the trial court rejected the defense theory that the complainant was "flipped out" based on the court's own impression of the complainant's level of rationality during the 911 call.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (2001-02).

[1] The only part of the neighbor's statement that might be construed as inconsistent with Stamps' defense was that part of the statement referring to a cut near the complainant's eye. Stamps has not directed our attention to any place in the record—other than the hearsay statement itself—where the cut is mentioned. Stamps does not separately discuss this part of the neighbor's statement, and we are satisfied that its admission did not affect the verdict.