IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

JOBE DOUGLAS WOLFE, *Appellant*.

No. 1 CA-CR 15-0357
No. 1 CA-CR 15-0401
(Consolidated)
FILED 7-19-2016

Appeal from the Superior Court in Yavapai County
No. V1300CR201480337
The Honorable Michael R. Bluff, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Craig W. Soland
Counsel for Appellee

Yavapai County Public Defender's Office, Prescott
By John Napper, Jared Keenan
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Jon W. Thompson delivered the decision of the Court, in which Judge Maurice Portley joined and Judge Patricia K. Norris concurred in part and dissented in part.

T H O M P S O N, Presiding Judge:

¶1 Defendant Jobe Douglas Wolfe appeals his convictions and sentences for one count of sexual assault and one count of sexual abuse. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 The twenty-five year old victim testified that she awoke around 2 a.m. and found sixteen year old Wolfe, her next-door neighbor, on top of her, attempting to force his penis into her mouth. As she awoke, she became wedged between the edge of the bed and a table. Wolfe then forced his penis into her vagina. At first, she thought it might be her boyfriend, Wolfe's older brother, who was out of town but often returned unexpectedly and woke her for sex. As the victim realized it was Wolfe, she remembered saying, "What the f[]," louder and louder, until her toddler, who was asleep beside her, woke up. The victim testified that Wolfe was wearing red shorts as he fled from the room. The victim called Wolfe's older brother afterward, upset and crying. Her ex-husband also testified that she was crying and upset when she called him that morning.

¶3 When police arrived, they interviewed Wolfe and the victim, and found red shorts in Wolfe's closet**.** An officer photographed bruises on the left side of the victim's body, where the victim stated she had been jammed against the bed and table. A nurse practitioner examined the victim and provided a sexual assault kit to the detectives. Testing of the sexual assault kit revealed the presence of sperm cells, which matched Wolfe's D.N.A. profile.

¶4 The victim admitted on direct examination that earlier that evening, while she was sitting on the porch of Wolfe's house with a girlfriend, she said something "along the lines of, 'I couldn't wait for [Wolfe's older brother] to get home because I had cobwebs in my vagina.'" The victim explained that she is "very outspoken" and believed that a "sexual nature is very healthy." However, she testified that she did not

mean that she wanted to have sex with anyone other than her boyfriend that night.

¶5 Wolfe testified that he and the victim were good friends, she was often flirtatious with him, and they frequently texted and "hung out" at her house. Wolfe heard the victim make the sexual remark on the porch, but he did not consider it an invitation. Wolfe testified that the victim initiated sex with him after they each drank several shots of liquor, and she vomited. He testified that they had consensual sex that lasted one and one-half hours and that she became upset afterward when he told her he would have to tell his older brother what had happened. Wolfe admitted that he had smoked Spice earlier that night, although he said the effects had worn off hours before the sex. He also acknowledged that he had a history of lying to his family.

¶6 The parties stipulated that the victim had been convicted in 2008 in Camp Verde Municipal Court of false reporting to law enforcement – a conviction she had testified she could not remember.

¶7 The jury acquitted Wolfe of a charge of kidnapping, but convicted him of sexual assault and sexual abuse. The superior court sentenced Wolfe to a term of 6.25 years for the sexual assault conviction, and a concurrent term of 1.5 years for the sexual abuse conviction. Wolfe filed timely notices of appeal of his convictions and sentences, and of the denial of a motion to vacate judgment, and the two appeals were consolidated. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(1) (2016), 13-4031 (2010), and 13-4033 (2010).

DISCUSSION

A. Preclusion of Hearsay

¶8 Wolfe argues that the superior court abused its discretion by precluding as inadmissible hearsay his testimony about what the victim said to him in the months before and on the morning of the incident, and what he told his father that day, and in so doing, deprived him of his constitutional right to have the opportunity to present a complete defense. We review a court's rulings on admissibility of evidence for abuse of discretion. *State v. Dann*, 220 Ariz. 351, 368, ¶ 89, 207 P.3d 604, 621 (2009). "[W]e are obliged to affirm the trial court's ruling if the result was legally correct for any reason." *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984).

1. Conversations about Sex

¶9 Wolfe argues that the court abused its discretion in precluding him on hearsay grounds from responding to the question, "Would you and [the victim] ever talk about sex together?" Defense counsel had argued in superior court that he was not eliciting a statement "for the purpose of proving that whatever sex they're talking about actually occurred," but rather he was simply asking about "a topic that they discussed." He argued "it goes to his state of mind when – regarding any interaction with the victim. If they normally talk about sex, that clearly goes to – it's relevant to their relationship."

¶10 We cannot say the court abused its discretion in precluding defendant's response. A simple "yes" response would not have implicated the rules prohibiting hearsay. *See* Ariz. R. Evid. 801(c) (defining hearsay as an out-of-court "statement" offered in evidence "to prove the truth of the matter asserted in the statement"). But a simple "yes" response would have raised a significant risk of unfair prejudice and confusion of the issues; the jury could have reasonably (and erroneously)[1] construed a "yes" response to the question whether Wolfe and the victim would "ever talk about sex together" as indicating that the two had discussed having sex with each other.

¶11 Alternatively, the jury could have reasonably inferred that Wolfe and the victim's discussion pertained to the victim's sex life with others, including defendant's brother. This testimony would have posed a significant risk that the jury would construe the statements for the truth of the matter asserted, and not simply for its effect on Wolfe's state of mind, and thus the court would have been well within its discretion in precluding it as hearsay. *See* Ariz. R. Evid. 801(c). The risk was especially pronounced given the testimony pertaining to the victim's sex life that had already been

[1] The record on this point became clear during the appellate oral argument. When it was explained that the record suggested the trial court apparently would have allowed an inquiry as to whether Wolfe and the victim had previously discussed having sex together, appellate counsel, who was also trial counsel, agreed. And when asked if he was "proposing to establish that the conversation had to do with your client having sex with the victim," counsel responded, "No." He then explained that the conversations had to do with sex "in general," and the victim's favorite sexual practices and activities.

admitted.[2] Moreover, such an inference would have run afoul of the rape shield law, which allows evidence of "specific instances of the victim's prior sexual conduct" only in limited circumstances not applicable here. A.R.S. § 13-1421(A) (2010).

¶12 Even if the statement that Wolfe and the victim talked about sex had some relevance, the risk of the jury making problematic inferences clearly outweighed the minimal relevance of the general statement that they discussed sex. Consequently, under Arizona Rule of Evidence 403, this statement was properly excluded. Ariz. R. Evid. 403 (permitting the exclusion of relevant evidence if "its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence").

2. Victim's Invitation to Drink

¶13 Wolfe also argues that the court erred in sustaining a hearsay objection to his testimony that before the incident, the victim "asked me if I wanted to drink with her." He argues that because this statement was in the form of a question, it was not a statement offered for the truth of the matter asserted, and was offered as circumstantial evidence of the victim's state of mind just prior to the incident.

¶14 Because the victim intended her invitation as an implicit assertion that she wanted Wolfe to join her for drinks, and Wolfe offered it to show that she wanted him to join her for drinks, it constituted hearsay. *See United States v. Torres*, 794 F.3d 1053, 1059 (9th Cir. 2015) ("We hold that while some questions may constitute non-hearsay, where the declarant intends the question to communicate an implied assertion and the proponent offers it for this intended message, the question falls within the definition of hearsay."). The invitation, however, would have been admissible as circumstantial evidence of the victim's then-existing state of mind under Arizona Evidence Rule 803(3). *See* Ariz. R. Evid. 803(3) (providing for an exception to the exclusion of hearsay for "[a] statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to

[2] The victim had already testified on direct examination that she enjoyed frequent sex with Wolfe's older brother; he would often awaken her for sex late at night after he returned home from work; and she made several remarks regarding her desire to have sex with Wolfe's older brother when he returned home.

prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will").

¶15 But any error in excluding this testimony was harmless. To demonstrate that an error was harmless, the state must prove beyond a reasonable doubt that the error in excluding the evidence "did not contribute to or affect the verdict or sentence." *State v. Henderson,* 210 Ariz. 561, 567, ¶ 18, 115 P.3d 601, 607 (2005). Wolfe testified without objection that he and the victim sat at her kitchen table and each drank four or more shots of her liquor before they had sex. The jury could reasonably infer from this testimony that the victim invited Wolfe into the house to drink with her. On this record, any error in excluding the victim's invitation did not contribute to or affect the verdict, and accordingly was harmless.

3. Victim's Phone Call after Sex

¶16 Wolfe argues that the court also erred in precluding him from testifying that after the sex, he overheard the victim on the phone and he did not hear her say that the sex was consensual. Defense counsel proffered the following day that Wolfe would have testified that he heard her say instead "[t]hat she woke up with me on top of her." Wolfe argued that the testimony was not offered to prove the truth of the matter asserted, but instead offered to show the effect it had on Wolfe.

¶17 The state concedes on appeal that this testimony would not have constituted hearsay because it was not offered to prove the truth of the matter asserted, and we agree. Preclusion of this testimony, however, was harmless error in light of other testimony to the same effect. Wolfe's brother testified that the victim called him afterward, crying and upset, and told him "that she woke up and [Wolfe] was on top of her." The victim testified that Wolfe walked by her door when she was on the phone with his brother. And Wolfe testified that he was "scared. . . [b]ecause of the things that I heard her say" on the phone, and that his brother subsequently accused him of rape. On this record, any error in excluding this testimony did not contribute to or affect the verdict, and accordingly was harmless.

4. What Wolfe Told His Father Afterward

¶18 Wolfe argues that the court also erred in precluding his father from testifying that Wolfe told him what happened the following morning, and that Wolfe's version of events at the time matched what Wolfe told the jury at trial. The court did not preclude his father from testifying to this effect. The record shows that after sustaining a hearsay objection to what Wolfe's brother told his father, defense counsel informed the court that he

wanted to elicit testimony that Wolfe told his father that the victim had vomited before sex. The state did not object, and the court allowed defense counsel to elicit that statement**.** Defense counsel subsequently asked Wolfe's father if Wolfe told him what happened that night, and whether Wolfe specifically told him that she had vomited, and Wolfe's father responded affirmatively to both questions. Because Wolfe did not seek to admit, and the court did not preclude, additional questions on what Wolfe had told his father that morning, Wolfe's claim of error fails.

B. Denial of Right to Present Complete Defense

¶19 Wolfe argues that the court's rulings improperly denied him his constitutional right to present a complete defense. "[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citation and internal punctuation omitted). A defendant's right to present evidence is subject to restriction, however, by application of evidentiary rules that "are not arbitrary or disproportionate to the purposes they are designed to serve." *See United States v. Scheffer,* 523 U.S. 303, 308 (1998) (internal quotes and citation omitted). A rule is "unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused." *Id.* at 308.

¶20 Wolfe argues that even if the some of the superior court's rulings were correct, his right to present a complete defense trumped the rules prohibiting hearsay. For this argument, he relies on *Chambers v. Mississippi*, 410 U.S. 284 (1973) and *State v. Machado*, 224 Ariz. 343, 230 P.3d 1159 (App. 2010), *aff'd*, 226 Ariz. 281, 246 P.3d 632 (2011), neither of which stand for that broad proposition. *See Scheffer*, 523 U.S. at 308; *see also State v. Soto-Fong*, 187 Ariz. 186, 195, 928 P.2d 610, 619 (1996) ("*Chambers* did not hold that trial judges must always admit exculpatory hearsay."). In *Chambers*, the U.S. Supreme Court held that defendant's due process rights were violated by the preclusion on hearsay grounds of testimony from three separate witnesses that another person had confessed to the crime, because the confession was against the declarant's penal interest and was "offered at trial under circumstances that provided considerable assurance of their reliability." *Chambers*, 410 U.S. at 302. In *Machado*, this court held that the trial court erred in excluding as inadmissible hearsay an anonymous call confessing to the crime, because it satisfied the test for determining admissibility under Evidence Rule 804(b)(3). *Machado*, 224 Ariz. at 358-59, ¶¶ 40-44, 230 P.3d at 1173. Wolfe has not shown how either *Chambers* or *Machado* would require admission of the testimony at issue. And, although the court erred in precluding some of the cited testimony on hearsay grounds, we conclude that these errors, viewed in light of Wolfe's

failure to make an offer of proof at trial on his conversations with the victim about sex, did not deprive Wolfe of a meaningful opportunity to present a complete defense.

C. Preclusion of Evidence Arizona Rape Shield Law

¶21 Wolfe argues that the superior court erred when it applied the Arizona Rape Shield Law, A.R.S. § 13-1421(A)(4), to exclude evidence of specific instances of the victim's prior sexual conduct.

¶22 Wolfe argues that the prosecutor misled the jury by eliciting testimony from the victim that she had an active sexual relationship with Wolfe's older brother, and that she was the type of person to keep her sex life between just the two of them. Wolfe argues that his proffered evidence of her prior sexual conduct would show that during their relationship, his older brother received a videotape of her having sex with a girl, and on a different occasion, she offered to meet another girlfriend's sexual needs, saying the brother would be okay with it. Wolfe argues that, absent this impeachment evidence, the jury was left with an inaccurate portrayal of the victim as someone who was "having a normal, monogamous relationship with [her boyfriend]" and as someone "who would not seduce the much younger brother of her boyfriend because she is the type of person to keep her sex life private between herself and her 'partner.'"

¶23 The court precluded the evidence, reasoning that the prosecutor had not put the victim's prior sexual conduct at issue for purposes of A.R.S. § 13-1421(A)(4) by eliciting the testimony at issue in Wolfe's motion — that she was too embarrassed to discuss details of the rape with the female detective in part because "[w]hen you have a sexual life with a partner, you keep it between each other." The court also reasoned that "[e]ven though I agree that credibility is always at issue, I think the testimony is highly prejudicial, compared to whatever probative value it may have concerning her credibility. The trial is not going to be about her sex life and not – whether or not Mr. Wolfe sexually assaulted her."

¶24 Wolfe moved to reconsider the following day, arguing that the prosecutor had put the victim's prior sexual conduct at issue by asking her to describe her sex life with his older brother, eliciting testimony that painted her "as a chaste woman who has a run-of-the-mill monogamous sexual relationship with her partner." The judge denied the motion for reconsideration, reasoning, "I do not believe that that opens the door for evidence about other sexual acts that she may have committed or other individuals she may have involved in her and [her boyfriend's] sex life."

We review a trial court's decision to preclude evidence under A.R.S. § 13-1421 for an abuse of discretion. *See State v. Gilfillan*, 196 Ariz. 396, 405, ¶29, 998 P.2d 1069, 1078 (App.2000).

¶25 The court did not abuse its discretion. As applicable here, evidence of the victim's prior sexual conduct may only be admitted if the proponent proves by clear and convincing evidence that (1) the "evidence is relevant and is material to a fact in issue in the case"; (2) the evidence is "offered for the purpose of impeachment when the prosecutor puts the victim's prior sexual conduct in issue"; and (3) "the inflammatory or prejudicial nature of the evidence does not outweigh the probative value of the evidence." A.R.S. § 13–1421(A)(4).

¶26 First, although, as the superior court noted, credibility is always an issue, Wolfe failed to demonstrate that evidence of the victim's prior sexual conduct was material to any fact in issue in the case. As the court recognized, whether the victim had a typical monogamous sexual relationship or not was not at issue in this case: The sole issue was whether she had consented to sex with Wolfe. *See State ex rel. Pope v. Superior Court*, 113 Ariz. 22, 28, 545 P.2d 946, 952 (1976) ("Reference to prior unchaste acts of the complaining witness 'injects collateral issues into the case which . . . divert the jury's attention from the real issues, the guilt or innocence of the accused.'" (citation omitted)); *Gilfillan*, 196 Ariz. at 401 n.3, ¶ 16, 998 P.2d at 1074 n.3 (noting that the rape shield statute seemingly codifies the rule enunciated in *Pope* and its progeny). The court did not abuse its discretion in its implicit finding that the proffered evidence was not material.

¶27 Second, Wolfe did not show that the prosecutor had "put[] the victim's prior sexual conduct in issue" or that the proffered evidence was admissible for the "purpose of impeachment" within the meaning of A.R.S. § 13-1421. The purpose of A.R.S. § 13–1421 is "to protect victims of rape from being exposed at trial to harassing or irrelevant questions concerning any past sexual behavior." *Gilflillan*, 196 Ariz. at 400–01, ¶ 15, 998 P.2d at 1073–74. The prosecutor did not "put[] the victim's prior sexual conduct at issue" within the meaning of A.R.S. § 13-1421(A)(4) by eliciting testimony on redirect examination that she was too embarrassed to give a detective complete details of the rape in part because she believed sex was a private matter. Nor would evidence that the victim may have included girlfriends in her and her boyfriend's sex life have impeached either her testimony that she considered sex a private matter or her testimony that she and her boyfriend had an active and happy sexual relationship. The court did not abuse its discretion by concluding that this evidence was not admissible under A.R.S. § 13-1421(A)(4).

¶28 Third, the court acted well within its discretion in finding that any probative value the proffered evidence had on the victim's credibility was outweighed by unfair prejudice. On this record, we conclude the court did not abuse its discretion in precluding the evidence.

CONCLUSION

¶29 For the foregoing reasons, we affirm Wolfe's convictions and sentences.

N O R R I S, J., concurring in part and dissenting in part:

¶30 Although I agree with the majority's resolution of Wolfe's arguments about the victim's invitation to drink, her phone call after sex, the conversation he had with his father the next morning, and the rape shield law, I disagree with its conclusion that the superior court did not abuse its discretion in barring him from answering the sex conversation question. As I explain, the court precluded Wolfe from answering this question and then from testifying further about his relationship with the victim based on a fundamental misunderstanding of hearsay—a misunderstanding also shared by the State. The court's ruling was not harmless; its ruling seriously interfered with Wolfe's right to tell the jury his side of the story—that he and the victim had engaged in consensual sex.

¶31 Hearsay is an out-of-court statement intended as an assertion offered in evidence by a party "to prove the truth of the matter asserted in the statement." Ariz. R. Evid. 801 (a)–(c). As this definition reflects, not every out-of-court statement is hearsay. If a party offers an out-of-court statement for a non-hearsay reason—not to prove the truth of the matter asserted by the out-of-court declarant—the statement is not hearsay. *State v. Forde*, 233 Ariz. 543, 564, ¶ 77, 315 P.3d 1200, 1221 (2014); *State v. Rogovich,* 188 Ariz. 38, 42, 932 P.2d 794, 798 (1997).

¶32 Here, Wolfe tried to present evidence to the jury describing his relationship with the victim. After Wolfe testified the victim would tell him about "some personal things" and "secrets," defense counsel asked him, "[w]ould you and [the victim] ever talk about sex together?" The obvious answer—"yes"—would have established that Wolfe and the victim freely discussed intimate and personal matters, which, if believed, was relevant to whether they freely engaged in other intimate and personal activities such as having sex. Wolfe did not offer this testimony for the truth of the matter asserted—that he and the victim had sex with each other—but as evidence probative to his defense that he and the victim engaged in consensual sex. *See generally* Ariz. R. Evid. 401 (evidence is relevant if "it

has any tendency to make a fact" of consequence in determining the action "more or less probable than it would be without the evidence").

¶33 In this type of situation, courts throughout the United States have recognized that if relevant to consent, a rape victim's out-of-court statements are admissible over a hearsay objection. *See People v. Bishop*, 183 Cal. Rptr. 414, 417 (Cal. App. 1982) (out-of-court conversation between victim and defendant accused of raping victim was not hearsay because defendant offered it to show that the relationship between defendant and victim was friendly); *State v. Everidge*, 702 So. 2d 680, 685 (La. 1997) (witness's testimony that he overheard victim arrange a rendezvous with defendant accused of raping victim was not hearsay because defendant did not offer it for the truth of the matter asserted, but rather to show that the conversation occurred); *Brown v. Commonwealth*, 487 S.E.2d 248, 253 (Va. Ct. App. 1997) (witness should have been allowed to testify that he overheard a conversation between the victim and the defendant about trading sex for drugs; although the conversation would have been inadmissible as hearsay to prove the truth of whether the victim and defendant had in fact traded sex for drugs, the "fact that the defendant and victim had engaged in a conversation of an intimate or personal nature prior to the alleged offense was relevant, if believed, to prove the prior relationship between them").

¶34 Defense counsel explained the non-hearsay purpose of this testimony to the superior court. But, the colloquy among the court, defense counsel, and the prosecutor reflects the court and the State basically thought any out-of-court statement made by or concerning the victim constituted hearsay regardless of the purpose for its admission.

> Defense counsel: Would you and [the victim] ever talk about sex together?
>
> Prosecutor: Objection; speculation -- or hearsay.
>
> Court: Sustained.

The colloquy continued at a bench conference out of the hearing of the jury:

> Defense counsel: My question is not hearsay -- that answer is not hearsay. I'm not asking -- if he says, yes, we talked about sex, I'm not admitting that for the purpose of proving that

whatever sex they're talking about actually occurred.

Court: Well, that's a subsequent question.

Defense counsel: [T]here is no statement that's being offered for its truth.

Prosecutor: So how is it relevant if it's not true that they talked about sex? Obviously, it's offered for its truth; and therefore, it's hearsay because it's an out-court statement between him and her.

Defense counsel: It's not -- okay. It's relevant because, again, it goes to his state of mind when -- regarding any interaction with [the victim]. If they normally talk about sex, that clearly goes to -- it's relevant to their relationship.

Court: If he talks about sex with her, with [the victim], yeah. But you're asking about –- about -- talking about sex with her brother -- his brother.

Defense counsel: No, I ask him this: They would talk about sex.

Court: Okay.

Defense counsel: Together.

Court: If his answer is yes, that's hearsay.

Defense counsel: I'm not offering it to prove that the actual sex occurred.

Prosecutor: That's not the issue.

Defense counsel: Okay. And I'm not offering it for its truth, of the matter asserted.

Court: I'll sustain the objection. It's hearsay.

¶35 The majority agrees that a "yes" answer would not have implicated the rules prohibiting hearsay. *See supra* ¶ 10. But then, the majority reasons that a simple "yes" response "would have" raised a significant risk of unfair prejudice and confusion because the jury could have reasonably but erroneously construed a "yes" response as indicating that Wolfe and the victim had discussed having sex with each other. But, as discussed above, the question and its obvious answer would have established that Wolfe and the victim freely discussed intimate and personal matters, which, if believed by the jury, was relevant to whether they freely engaged in other intimate and personal activities such as having sex. *See supra* ¶ 32. That this testimony would have been harmful to the State's case did not make it unfairly prejudicial. *State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993) (unfair prejudice is an undue tendency to suggest a decision on an improper basis). As our supreme court has recognized, "not all harmful evidence is unfairly prejudicial. After all, evidence which is relevant and material will generally be adverse to the opponent." *Id*.

¶36 The majority also reasons the jury could have reasonably inferred that the question and its obvious answer somehow pertained to the victim's sex life with others, including Wolfe's brother. But, that was not the question defense counsel asked, as he emphasized in the colloquy quoted above. And, any arguable confusion could have been avoided if the court had allowed defense counsel to rephrase the question for clarity.

¶37 The exclusion of this testimony was harmful. *State v. Anthony*, 218 Ariz. 439, 446, ¶ 39, 189 P.3d 366, 373 (2008) (error is harmless only if reviewing court "can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict"). This was a "he said—she said" case. Whether the jury believed the victim or Wolfe turned on its assessment of Wolfe's and the victim's credibility. The jury may well have rendered a different verdict if Wolfe had been able to fully describe his relationship

with the victim. Accordingly, I would reverse Wolfe's conviction and remand for a new trial.