FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-2865

JOSEPH L. HOLLOWAY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Washington County.
Timothy Register, Judge.

December 10, 2020

ROWE, J.

Joseph L. Holloway appeals his judgment and sentence for two counts of sexual battery. He argues that the trial court erred in excluding hearsay statements that he asserts showed the victim's state of mind. Holloway contends that the statements would have supported his defense that the victim consented to sex with him. We affirm because the proffer of the hearsay statements did not support their admission under the state-of-mind exception.

Facts

The State charged Holloway with two counts of sexual battery on a person with an intellectual disability. The State alleged that

after taking her to see a movie, Holloway took the victim to a secluded area near Rattlesnake Pond and raped her in a portable toilet. The State alleged that Holloway had anal and vaginal sex with the victim. The victim's mother testified that when the victim finally told her about the sexual encounter with Holloway, she told her that it was the "second time." The victim's mother testified that the victim could not walk or talk until she was five years old. And she could barely read or write.

Holloway did not deny that he had sex with the victim. But he defended against the sexual battery charges, arguing that the thirty-five-year-old victim wanted to have sex with him. He also claimed that he did not know about her mental impairment and had no reason to think that she did not consent to having sex with him.

To support his consent defense, Holloway sought to present the testimony of his boss, Randy Rizzo. Rizzo testified that he had known Holloway for several years. The two attended high school together and were enrolled in special education classes. Rizzo testified that Holloway was at Rizzo's house when Holloway and the victim communicated through a video messaging service. Rizzo was three feet away from Holloway and was positive the victim was on the other end of the call. The State objected to Rizzo's testimony on hearsay grounds when defense counsel asked Rizzo about the subject of the conversation between Holloway and the victim. Defense counsel conceded that statements made during the conversation that Rizzo overheard were hearsay. But counsel argued that the statements were admissible to support Holloway's consent defense and to show the victim's state of mind. The trial court sustained the State's objection but allowed defense counsel to proffer Rizzo's testimony.

On proffer, Rizzo explained that he heard Holloway and the victim "speaking of having intercourse and oral." But Rizzo did not hear the entire conversation because Holloway moved away from Rizzo when the victim started removing her shirt on the video. The court ruled that Rizzo could describe what he saw (the victim starting to remove her shirt), but he could not testify about any statements he overheard.

The jury found Holloway guilty of two counts of sexual battery, a lesser-included offense. The trial court sentenced Holloway to consecutive fifteen-year prison terms. This timely appeal follows.

Analysis

We review the trial court's ruling on the State's objection to Rizzo's testimony about the victim's hearsay statements for an abuse of discretion. *See McCray v. State*, 919 So. 2d 647, 649 (Fla. 1st DCA 2006). Because the trial court's discretion is limited by the evidence code and applicable case law, we review a court's interpretation of these authorities de novo. *Id.*

Holloway argues that the trial court should have overruled the State's objection and allowed Rizzo's testimony. He contends that the victim's statements Rizzo overheard during the video call would have established the victim's state of mind and supported the defense that the victim wanted to have sex.

Under the Florida Evidence Code, an exception to the hearsay rule exists for "[a] statement of the declarant's **then-existing** state of mind" to "[p]rove the declarant's state of mind . . . **at that time** or at any other time when such state is an issue in the action." § 90.803(3)(a)1., Fla. Stat. (2018) (emphasis added). This Court has construed the statutory language "at that time" and held that "the victim's statements immediately prior to, and at the time of the sexual encounter . . . are relevant to, and are admissible as, evidence of the victim's then existing state of mind regarding the question of . . . consent." *Pacifico v. State*, 642 So. 2d 1178, 1186 (Fla. 1st DCA 1994).

Even so, Holloway failed to establish that the proffered hearsay statements showed the victim's state of mind at the time of or just before her sexual encounter with Holloway. First, Rizzo did not testify about **when** the conversation between Holloway and the victim occurred. The time the victim's state of mind would have been at issue would have been just before or at the time of the sexual encounter. *Id.* The conversation that Rizzo overheard could have happened well before or long after the sexual encounter between Holloway and the victim. There is no way to determine

from the proffer if the statements reflected the victim's state of mind at the time of the encounter.

Second, even though Rizzo overheard discussions between Holloway and the victim about "having intercourse and oral" during the video conversation, that does not mean that the victim consented to having sex with Holloway during her encounter with him at Rattlesnake Pond. And it is not clear from Rizzo's testimony whether the victim was an active participant in the conversation or whether she was a passive listener. Rizzo did not attribute any statement to the victim. Nor did he state her assent to any statement made by Holloway.

Thus, because the proffer was insufficient to qualify the hearsay statements for admission under the state of mind exception, we hold that the trial court did not abuse its discretion when it sustained the State's hearsay objection to prevent the introduction of Rizzo's testimony. And so, we AFFIRM Holloway's judgment and sentence.

ROBERTS and KELSEY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Andy Thomas, Public Defender, Greg Caracci and Victor Holder, Assistant Public Defenders, Tallahassee, for Appellant.

Ashley Moody, Attorney General, and Jovona Parker, Assistant Attorney General, Tallahassee, for Appellee.