COURT OF APPEALS DECISION DATED AND FILED

August 3, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP1115-CR

Cir. Ct. No. 2006CF63

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EUGENE E. DUNAGAN,

DEFENDANT-APPELLANT.

APPEAL from judgment of the circuit court for Dunn County: WILLIAM C. STEWART, JR., Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Eugene Dunagan appeals a judgment convicting him of sexually assaulting Brody K. who suffers from a mental illness or deficiency rendering him incapable of appraising his conduct, contrary to WIS.

STAT. § 940.225(2)(c).[1] Dunagan argues: (1) The court erroneously exercised its discretion when it admitted other acts evidence; (2) the State failed to present sufficient evidence to establish Brody's mental deficiencies and Dunagan's knowledge of the deficiencies; and (3) the statute is unconstitutional because it is void for vagueness and shifts the burden of proof to the defendant. We reject these arguments and affirm the judgment.

BACKGROUND

¶2 The court partially granted the State's motion in limine to admit other acts evidence. The court admitted the testimony of Kevin W., a mentally-disabled minor, and a videotape made by Dunagan showing sexual intercourse with Kevin. At trial, Kevin identified himself and Dunagan in the videotape. He testified he went to Dunagan's home to do yard work to pay off a debt. Dunagan invited him in to the house and had intercourse with him. Kevin was sixteen or seventeen years old at the time the video was made.

¶3 Brody testified he was twenty-one years old at the time he was sexually assaulted by Dunagan. He also did yard work for Dunagan to pay off a debt. After some discussion about whether Brody was impotent, Dunagan performed a "test" consisting of fondling Brody's genitals and performing oral sex on him.

¶4 Various witnesses testified regarding Brody's mental condition. His mother testified he needed assistance with grooming, dressing, finding appropriate

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

clothing and needs to be reminded to eat. She testified Dunagan volunteered to be Brody's mentor to assist him in his special education classes. She also testified Dunagan assisted them in their application for social security disability benefits for Brody. Regarding Brody's ability to appraise his conduct, she testified he was vulnerable to suggestion and gave examples of his inability to appreciate the consequences of his acts.

¶5 A psychiatrist, Dr. Rhonda Davis, confirmed Brody's vulnerability to manipulation. She diagnosed Brody as suffering from autism and co-morbid mood and anxiety disorders. As a result of these disorders, she opined that Brody should not be allowed to marry, drive without supervision, initiate contracts or convey property, and should be allowed only small amounts of money to spend under supervision. She testified Brody was unable to appraise the significance of his sexual conduct. She further opined that someone mentoring Brody over several years or meeting with him regularly would have reason to know he suffered from mental deficiency based on his obsessions, difficulty with changes, speech abnormalities and inability to read other people in social situations.

¶6 Dunagan admitted he saw Brody on an almost daily basis. He admitted performing an impotency test that involved touching Brody's penis, but denied performing oral sex on Brody. He also admitted he knew Brody took medication for ADHD and bipolar disorder, but denied knowing Brody was autistic. On cross-examination, he admitted mentoring Brody for some class work and knew Brody was in special education classes. He admitted knowing that Brody had "shortcomings," but denied knowing of mental deficiency.

DISCUSSION

¶7 The trial court properly exercised its discretion when it admitted evidence concerning Dunagan's sexual assaults of Kevin. The court employed the three part test set out in ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). First, the evidence was properly admitted to show Dunagan's motive, intent, plan and modus operandi. *See* WIS. STAT. § 904.04(2); ***State v. Kourtidas***, 206 Wis. 2d 574, 587, 567 N.W.2d 858 (Ct. App. 1996). Second, the evidence was relevant to show Dunagan's method of operation because of the strikingly similar nature of the crimes, inviting young mentally challenged men to his house to perform yard work to pay off a debt and then sexually abusing them. The crimes against Kevin were made more relevant by Dunagan's suggestion that he was merely performing a "test" on Brody, in effect denying the sexual contact was for his own sexual gratification. Third, the danger of unfair prejudice did not substantially outweigh the probative value of the other acts evidence. Because trial was to the court, the law presumes the trial judge would disregard matters not relevant to the issue. ***Block v. State***, 41 Wis. 2d 205, 212, 163 N.W.2d 196 (1968). The only prejudice Dunagan identifies was the trial court's use of the other acts when considering the sentence it imposed. There is a well-recognized distinction between the fact finder's function at the guilt stage and the sentencing judge's role. *See* ***State v. Prineas***, 2009 WI App 28, ¶28, 316 Wis. 2d 414, 766 N.W.2d 206. Any prejudice that might arise from using the other acts evidence at sentencing has no bearing on its admissibility at the guilt stage. While we acknowledge the evidence regarding the assault on Kevin was prejudicial, it was

not unfair prejudice and its substantial probative value justified admitting it into evidence.[2]

¶8 The State presented sufficient evidence to support the conviction. This court must affirm a verdict unless the evidence, viewed most favorable to the State, is so insufficient in probative value that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Dr. Davis testified Brody was not able to appraise the significance of his sexual conduct and anyone with a consistent relationship with him, either from mentoring or contact over any period of time, would have recognized the deficiency. Dunagan confirmed he had known Brody for years, interacted with him on practically a daily basis, and knew Brody had "shortcomings." He admitted discussing Brody's medications, and knew he was in special education. Although the court heard other evidence of Brody's ability to understand the consequences of acts in other areas, it was not required to give weight or force to that evidence. It is the function of the trier of fact, not this court, to resolve conflicts in the testimony, weigh the evidence and draw reasonable inferences from the basic facts to ultimate facts. ***Id.*** at 506.

¶9 Dunagan's challenges to the constitutionality of WIS. STAT. § 940.225(2)(c) provide no basis for relief. The contention that the statute is void for vagueness was rejected in ***State v. Smith***, 215 Wis. 2d 84, 572 N.W.2d 496

[2] Dunagan also contends the trial court impermissibly utilized the "greater latitude rule" to admit the other acts evidence. While the court indicated it believed the greater latitude rule would apply to a case involving a mentally disabled adult, it specifically indicated its ruling would be the same without applying the greater latitude rule. We need not determine whether the greater latitude rule applies because we conclude the evidence was admissible without applying that rule.

(Ct. App. 1997). We are bound by that decision. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). Dunagan's assertion that the boundaries of the class protected by the statute are not sufficiently clear fails. It is not sufficient to void a criminal statute by merely showing the boundaries of the area of proscribed conduct are somewhat hazy or that what is clearly lawful shades into what is clearly unlawful by degree, or that there may exist particular instances of conduct of legal or illegal nature which may not be ascertainable with ease. ***State v. Courtney***, 74 Wis. 2d 705, 711, 247 N.W.2d 714 (1976). WISCONSIN STAT. § 940.225(2)(c) provides fair notice of the prohibited conduct and provides an objective standard for enforcement of violations. ***Smith***, 215 Wis. 2d at 97.

¶10 Dunagan asserts WIS. STAT. § 940.225(2)(c) impermissibly shifts the burden of proof by creating a presumption of the victim's incapacity to consent. Nonconsent is not an element of the offense. *See* WIS. STAT. § 940.225(4). Section 940.225(2)(c) has four elements: (1) sexual contact or intercourse; (2) with a person who suffers from a mental illness or deficiency; (3) which renders that person temporarily or permanently incapable of appraising the person's conduct; and (4) the defendant knows of such condition. The burden of proof for each of these elements remains squarely on the State. The statute does not create a presumption of the victim's incapacity and does not shift the burden of proof.

By the Court.—Judgment affirmed.

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