COURT OF APPEALS DECISION DATED AND FILED

July 5, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

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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. 2017AP1392-CR

Cir. Ct. No. 2013CF277

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICK W. MACKIE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County: TODD P. WOLF, Judge. *Affirmed*.

Before Lundsten, P.J., Blanchard and Fitzpatrick, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Patrick Mackie appeals a judgment of conviction for first-degree child sexual assault, following a jury trial. Mackie contends that he is entitled to a new trial because the circuit court erred by denying his request for a jury instruction on the defense of mistake. Alternatively, Mackie contends that he is entitled to resentencing because the sentencing court relied on inaccurate information related to Mackie's alcohol use. We reject both contentions. We affirm.

¶2 Mackie was charged with first-degree child sexual assault for having sexual contact with eleven-year-old M.N.M. Mackie pled not guilty and not guilty by reason of mental disease or defect (NGI).

¶3 At the guilt phase of the trial, M.N.M. testified that Mackie climbed into her bunkbed at Mackie's house around 4:00 a.m., pulled up her nightgown and a leg of her underwear, and touched his penis to her vagina while holding onto her side. An investigating officer testified that, in a videotaped interview, M.N.M. had reported that, during the alleged sexual assault, Mackie held onto her and said, "It's okay, baby." The officer also testified that M.N.M. stated in the interview that, in response to M.N.M.'s text to Mackie about the alleged sexual assault, Mackie sent M.N.M. a text message that stated, "oh, baby, I can't believe I did that to you."

¶4 Mackie testified that he experienced psychiatric problems following his military deployments, including memory lapses, and that he had no memory of the early morning hours during which the alleged sexual assault occurred. Mackie testified that he remembered going to his estranged wife's apartment around 10:00 p.m. and begging his wife to come home and then leaving his wife's apartment and going to his work, but that he did not remember anything else from that night

until he woke up in his bed the next morning. The State cross-examined Mackie about a text message Mackie sent his wife a few days after the alleged sexual assault that stated, "Think what you want. It was an incident of confusion. Through meditation here we found it was an accident. I thought she was someone else. There was no penetration." Mackie testified that he sent that text message while at a psychiatric facility, and explained that he meant that he and his treatment providers had reviewed the incident and had come up with possible scenarios of what had happened. Mackie also testified that his nickname for his wife was "baby girl," and his nickname for M.N.M. was "princess."

¶5 Mackie requested that the circuit court instruct the jury on the defense of mistake of fact. He argued that the evidence supported a finding that Mackie mistakenly thought it was his wife, not M.N.M., that he was touching at the time of the alleged sexual assault. The State argued that Mackie was not entitled to the mistake of fact instruction because Mackie testified that he did not remember the incident, not that he was mistaken as to who was in the bed with him at the time of the alleged sexual assault. The court denied Mackie's request for the mistake instruction on the ground that Mackie testified that he did not remember what happened during the alleged sexual assault, not that he was mistaken as to the facts at that time. The court also determined that there was no factual support for Mackie's claim that he was mistaken that it was his wife in M.N.M.'s bed at his house, because Mackie testified that his wife was living at a separate apartment and that Mackie had just returned home after arguing with his wife at her apartment. However, the court allowed Mackie to argue that the intent element was not established based on evidence that Mackie did not know that the person he touched was M.N.M.

¶6 In its opening and closing arguments, the State argued to the jury that the only questions before it in the guilt phase of the trial were whether Mackie had sexual contact with M.N.M. and whether M.N.M. was under thirteen years old at the time. It argued that the sexual contact element—which required the State to prove that Mackie intentionally touched M.N.M.'s vagina with the intent to become sexually aroused or gratified—was met because the only logical reason for Mackie to thrust his penis against M.N.M.'s vagina was for sexual arousal. It argued that the age element was met because M.N.M. was eleven years old at the time. The State also argued that Mackie's claim that he did not remember the sexual assault was not a defense, and that his claim that he thought M.N.M. was his estranged wife was not believable. The State argued to the jury that it would have to disbelieve M.N.M. to find Mackie not guilty.

¶7 Defense counsel argued that, even if the jury believed M.N.M., the jury would still have to find Mackie not guilty if it did not believe he acted with intent to have sexual contact with M.N.M. Counsel argued that the evidence established that Mackie was mistaken as to who was in the bed with him when he had sexual contact with M.N.M. Defense counsel argued that, as a result of psychiatric problems that Mackie experienced following his military deployments, Mackie had no memory of the early morning hours in which the sexual contact was alleged to have occurred. Defense counsel argued that Mackie called M.N.M. "baby," his nickname for his estranged wife, during the sexual contact, and that Mackie had spent the night before the assault begging his estranged wife to come home. Defense counsel argued to the jury that Mackie did not intend to have sexual contact with M.N.M. because he believed he was having contact with his wife.

¶8 The court instructed the jury, in part, that: (1) the elements of the offense were that Mackie "had sexual contact with MNM" and that "MNM was under the age of 13 years at the time of the alleged sexual contact"; (2) "[s]exual contact is an intentional touching of the vagina of MNM by" Mackie; (3) "[s]exual contact also requires [Mackie] acted with intent to become sexually aroused or gratified"; and (4) "[y]ou cannot look into a person's mind to find intent. Intent must be found, if found at all, from [Mackie's] acts, words or statements, if any, and from all the facts and circumstances bearing upon intent." The court did not instruct the jury as to the defense of mistake of fact.

¶9 During jury deliberations, the jury sent the following question to the court: "Some of us are having a problem with intent. We know he did this but is he still 'guilty' if we are unsure of: 'did he know it was [M.N.M.?]'" The court referred the jury to the jury instructions to answer their question. The jury found Mackie guilty of first-degree child sexual assault.[1]

¶10 At sentencing, the court considered Mackie's alcohol use as an aggravating factor, noting that Mackie had a history of negative behavior connected to alcohol use. The court stated that Mackie may have consumed alcohol on the night of the alleged sexual assault at his workplace after arguing with his wife. Defense counsel argued that there was no evidence that Mackie had consumed alcohol at his workplace that night, and that there was a question only as to whether Mackie had been drinking earlier in the day. The court stated its

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[1] At the responsibility phase, the jury found that Mackie suffered from a mental disease or defect, but that the disease or defect did not render him substantially incapable of appreciating the wrongfulness of his conduct or to conform his conduct to the law. Two jurors dissented as to the second part of the NGI question.

belief that the evidence showed that it was likely that Mackie consumed alcohol that night, either at Mackie's workplace or a friend's house. The court stated that it based its sentence on Mackie's positive and negative character traits, including his negative behavior related to his alcohol use, the seriousness of the offense, and the need to protect the public in light of the nature of the offense and Mackie's alcohol use and failure to take responsibility for his actions. The court imposed thirteen years of initial confinement and seven years of extended supervision. Mackie appeals.

¶11 Mackie contends first that he was entitled to a jury instruction on his mistake of fact theory of defense.[2] We disagree.

¶12 The mistake defense provides that "[a]n honest error, whether of fact or of law other than criminal law, is a defense if it negatives the existence of a state of mind essential to the crime." WIS. STAT. § 939.43 (2015-16).[3] A charge

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[2] Mackie asserts that the circuit court should have given the following instruction as to Mackie's mistake of fact defense, based on WIS JI—CRIMINAL 770:

> Evidence has been received which, if believed by you, tends to show that the defendant believed that he was in bed with [his wife], not M.N.M. You must consider this evidence in deciding whether the defendant acted with the intent to touch the vagina of M.N.M.
>
> If an honest error of fact results in a person's not having the intent required for a crime, the person is not guilty of that crime.
>
> Before you may find the defendant guilty, the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant acted with the intent to touch the vagina of M.N.M.

[3] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

of sexual assault of a child requires the State to prove a specific state of mind, that is, that the defendant *intentionally* touched *the victim*. *See* ***State v. Brienzo***, 2003 WI App 203, ¶19, 267 Wis. 2d 349, 671 N.W.2d 700. A defense of mistake of fact may be available to a charge of sexual assault of a child if the mistake negatives the defendant's intent to touch the child.

¶13 A jury instruction on a defense theory is required when a defendant makes a timely request for an instruction on a legal theory, the defense is not adequately covered by the other instructions, and the defense is supported by sufficient evidence. ***State v. Coleman***, 206 Wis. 2d 199, 212-13, 556 N.W.2d 701 (1996). Evidence is sufficient to support a defense theory if "a reasonable construction of the evidence will support the defendant's theory 'viewed in the most favorable light it will reasonably admit from the standpoint of the accused.'" *See* ***State v. Stietz***, 2017 WI 58, ¶¶12-13, 375 Wis. 2d 572, 895 N.W.2d 796 (quoted source omitted); ***Coleman***, 206 Wis. 2d at 213. A jury must be instructed on the defense theory if a reasonable jury could find that the facts established the defense. *See* ***Stietz***, 375 Wis. 2d 572, ¶15; ***Coleman***, 206 Wis. 2d at 213-14. The threshold that a defendant must surmount to be entitled to a jury instruction on a defense theory is "low." ***Stietz***, 375 Wis. 2d 572, ¶16. Evidence that is "'weak, insufficient, inconsistent, or of doubtful credibility' or 'slight'" is sufficient to satisfy the defendant's burden. ***Id.***, ¶17 (quoted source omitted). However, for a defense instruction to be required, there must be "'some evidence'" to support the defense theory. ***Id.*** (quoted source omitted). We conclude that Mackie was not entitled to the mistake of fact instruction because there was no evidence to support Mackie's defense theory at trial. *See* ***id.***, ¶16.

¶14 Mackie argues that the following trial evidence constituted "some evidence" to support Mackie's mistake of fact defense: that Mackie spent part of

the night begging his estranged wife to come home, and did not remember the rest of the night after he left his wife's apartment and went to his workplace; that Mackie later texted his ex-wife that it was an "incident of confusion" and that he "thought she was someone else"; and that, during the alleged sexual assault, Mackie called M.N.M. "baby," and Mackie's nickname for his wife was "baby girl" and his nickname for M.N.M. was "princess."

¶15 The State responds that the evidence Mackie has identified amounts to no evidence supporting a mistake of fact defense. It asserts that, because Mackie testified that he did not remember the early morning hours during which the alleged sexual assault occurred, Mackie could not claim he was mistaken as to M.N.M.'s identity. The State asserts that Mackie's text message to his wife stating that he later determined that he must have mistaken M.N.M. for someone else was not evidence that he was mistaken at the time the alleged sexual assault occurred. It also argues that the evidence that Mackie called M.N.M. "baby" during the alleged sexual assault, and that his nickname for his wife was "baby girl" and his nickname for M.N.M. was "princess," shows nothing. It points out that the evidence was not that Mackie called M.N.M. "baby girl," but that he called her "baby." It argues that the evidence showed that Mackie also called M.N.M. "baby," pointing to police testimony that M.N.M. reported that Mackie sent M.N.M. a text message following the sexual assault stating, "oh, baby, I can't believe I did that to you." The State asserts that the circuit court properly denied the mistake instruction because there was no evidence to support it.

¶16 We agree with the State that there was no evidence at trial to support Mackie's mistake of fact defense. The evidence as to Mackie's alleged memory lapses and periods of confusion did not include evidence that Mackie's psychiatric problems caused him to misidentify people. That is, evidence that Mackie had

been arguing with his estranged wife and was emotional and confused, and that Mackie had no memory of the early morning hours in which the sexual assault occurred, does not support a theory that Mackie therefore misidentified M.N.M. as his wife. The evidence that Mackie later determined with his treatment providers that he must have been mistaken as to M.N.M.'s identity is not evidence that Mackie was mistaken as to M.N.M.'s identity at the time of the alleged sexual assault. Finally, the evidence that Mackie called M.N.M. "baby" during the alleged sexual assault also does not amount to any evidence of mistaken identity. Mackie testified that his nickname for his wife was "baby girl" and his nickname for M.N.M. was "princess." However, there was no evidence that Mackie used the distinctive "baby girl" during the alleged sexual assault. The evidence that Mackie called M.N.M. the more common "baby," together with other evidence that Mackie later sent M.N.M. a text message again calling M.N.M. the more common "baby," does not amount to evidence that Mackie was mistaken as to M.N.M.'s identity at the time of the alleged sexual assault. Accordingly, we conclude that there was no evidence that Mackie mistakenly thought eleven-year-old M.N.M. was his wife at the time of the alleged sexual assault.[4]

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[4] Mackie contends that the parties' arguments and the court's jury instructions, without the mistake instruction, confused the jury as to the intent element, as demonstrated by the jury's question as to whether it could find Mackie guilty if Mackie did not know it was M.N.M. in the bed. The State argues that the jury instructions as to the intent element adequately instructed the jury on Mackie's mistake of fact defense. It contends that the court properly allowed Mackie to argue that the evidence did not establish that Mackie intended to touch M.N.M.'s vagina because Mackie was mistaken about M.N.M.'s identity. However, the State also concedes that, if Mackie was entitled to the mistake instruction, the court's error in failing to give the instruction was not harmless, given the jury question. Because we conclude that there was not sufficient evidence to require the mistake defense, we do not reach the parties' arguments as to whether the instructions, as given, adequately covered the defense.

¶17 Next, Mackie contends that the circuit court relied on inaccurate information at sentencing. Again, we disagree.

¶18 "A defendant has a constitutionally protected due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. A defendant who moves for resentencing on the ground that the sentencing court relied on inaccurate information must establish "'both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing.'" ***Id.***, ¶26 (quoted source omitted).

¶19 Mackie contends that the sentencing court relied on the inaccurate information that Mackie had consumed alcohol on the night of the alleged sexual assault. Mackie contends that the court's statement that Mackie's alcohol consumption contributed to the sexual assault was inaccurate because, according to Mackie, it was not supported by any evidence in the record. Mackie points out that he testified at trial that he had consumed four beers earlier in the day, but that he was not intoxicated that night. Mackie points to police testimony that M.N.M. reported that Mackie had not been drinking that night, and that Mackie's wife had stated that Mackie was not intoxicated when they argued. Mackie acknowledges that there was police testimony that Mackie reported having four beers "that night," but argues that the testimony was not specific as to when Mackie had been drinking. Mackie then argues that the court relied on the inaccurate information that Mackie's alcohol consumption contributed to the sexual assault when the court considered Mackie's alcohol use as a character defect and that the public needed to be protected from Mackie because alcohol led him to commit the crime. He argues that the court erred by continuing to rely on its mistaken belief as to Mackie's alcohol consumption over Mackie's objection. He then contends that, had the circuit court not mistakenly believed that Mackie was intoxicated at the

time of the alleged sexual assault, the court would have likely given more weight to Mackie's psychiatric issues as a mitigating factor and would not have drawn such negative conclusions about Mackie's character.

¶20 The State responds that the circuit court did not rely on inaccurate information at sentencing. It contends that the court properly considered the evidence as to Mackie's problem with alcohol and that Mackie had consumed alcohol on the day of the sexual assault.

¶21 We conclude that the court did not rely on inaccurate information at sentencing. The court considered the information before it that Mackie had a problem with alcohol which caused Mackie to engage in negative behavior, and that Mackie may have consumed alcohol during the day or night of the sexual assault. That information was not inaccurate.

¶22 The court stated at sentencing that one version that came forward was that Mackie may have consumed alcohol at his workplace after arguing with his estranged wife. Defense counsel objected, arguing that there was no evidence that Mackie had consumed alcohol that night. The court then stated that it remembered that there was evidence that Mackie gave one account of the night of the sexual assault in which he consumed beer, and that it might have been when Mackie was at his workplace after arguing with his estranged wife. The State indicated that it did not remember any evidence of Mackie consuming alcohol at his workplace, but that a police officer testified that when he asked Mackie if he had consumed beer that day or that night, Mackie indicated he had consumed beer at his friend's house. The court reiterated that there had been comments that Mackie had been drinking, and acknowledged that it might not have been that he was drinking at his workplace. The court stated that it believed that it was likely

that Mackie had been drinking on the night of the sexual assault based on all of the evidence before it, including that Mackie's struggle with alcohol had caused him to engage in negative behavior. It stated that, if Mackie did not remember the incident, the court believed the lack of memory was related to alcohol use. The court's statements related to Mackie's possible alcohol use on the day or night of the sexual assault were supported by the evidence. Because the court did not rely on inaccurate information, Mackie is not entitled to resentencing.

By the Court.—Judgment affirmed.

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