STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal No. 92-2844-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER W. NEUMANN,

Defendant-Appellant.

**Appeal From The Judgment Entered
In The Circuit Court For Milwaukee County,
The Honorable Michael J. Barron,
Circuit Judge, Presiding**

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I.

THE TRIAL COURT'S "RAPE SHIELD" INSTRUCTION MISSTATED THE LAW AND DENIED MR. NEUMANN JURY CONSIDERATION OF RELEVANT EXCULPATORY EVIDENCE.

The state asserts that consent was not at issue here. State's Brief at 1-4. Lack of consent, however, is a necessary element of second-degree sexual assault which the state must prove beyond a reasonable doubt. Wis. Stat. §940.225(2)(a); see In Re Winship, 397 U.S. 358, 364 (1970). That burden cannot constitutionally be shifted to the defendant, State v. Schulz, 102 Wis. 2d 423, 307 N.W.2d 151, 154 (1981), and he did not concede that element. Compare State v. Small, 631 S.W.2d 616 (Ark.

1982). Rather, he properly offered evidence of the complainant's long-term sexual relationship with him specifically on the issue of consent (R9:2; see R30:3-4), and objected to the limiting instruction as denying him evidence of consent (R32:12-13). The evidence was highly relevant to that issue, see Neumann's Brief at 10-12, and the state consented to its admission (R30:4-6). Indeed, the state offered the evidence for its own purposes (R31:7-9). Consent plainly was in issue.

The state, however, seems to assert that evidence of consent nonetheless may be excluded from jury consideration unless corroborated by additional evidence of consent to the acts charged. State's Brief at 3-4. But, corroboration is not required in Wisconsin even to satisfy the requirements of proof beyond a reasonable doubt. See, e.g., State v. Pickett, 259 Wis. 593, 49 N.W.2d 712, 713 (1951) (statutory rape conviction may be based upon uncorroborated testimony of complainant); Cheney v. State, 44 Wis. 2d 454, 171 N.W.2d 339, 346 (1969) (jury may convict upon uncorroborated testimony of accomplice), overruled on other grounds, Byrd v. State, 65 Wis. 2d 415, 222 N.W.2d 696 (1974). It certainly is not required either for admission of evidence or for consideration of that evidence by the jury.

Evidence of the complainant's prior sexual conduct with the defendant need only be material to a fact in issue and of sufficient probative value to outweigh any

inflammatory and prejudicial nature. Wis. Stat. §971.31(11). The evidence clearly satisfied this standard, as the state implicitly conceded by consenting to its admission (R30:4-6). Compare State v. Hopkins, 221 Neb. 367, 377 N.W.2d 110 (1985) (construing significantly different statute as barring admission of such evidence unless other evidence establishes prima facie case of consent to the charged act). The weight to be given that evidence on the issue of consent thus was for the jury to decide. State v. Poellinger, 153 Wis. 2d 493, 451 N.W.2d 752, 757 (1990).

II.

THE TRIAL COURT ERRED BY HOLDING THAT INTENT IS NOT A REQUIRED ELEMENT OF NON-CONSENSUAL SEXUAL INTERCOURSE BY THREAT OR USE OF FORCE OR VIOLENCE.

A. Specific Intent Is A Required Element Of Non-Consensual Sexual Intercourse By The Threat Or Use Of Force Or Violence.

1. Specific intent is a required element of all "sexual intercourse" crimes.

The critical question in determining whether "sexual intercourse," as defined in Wis. Stat. §§940.225(5)(c) and 948.01(b), requires proof of specific criminal intent is whether the legislature intended to criminalize every non-consensual genital or anal intrusion, including those made by doctors, nurses, and parents in rendering necessary health care, without regard to the

culpability of the actor. The obvious answer is no. The legislature could not have intended the statute to be construed as merely a general intent statute in view of the serious potential for absurd, unreasonable, and unconstitutional applications of the statute to harmless and beneficial conduct.

The state narrowly focuses upon the fact that the definition of "sexual intercourse" does not, on its face, require proof of intent. Criminal intent, however, is the rule in our criminal jurisprudence, State v. Stoehr, 134 Wis. 2d 66, 396 N.W.2d 177, 181 (1986), because it is generally neither fair nor reasonable to enact statutes that may subject morally blameless persons to criminal punishment. See, e.g., State v. Collova, 79 Wis. 2d 473, 255 N.W.2d 581, 587 (1977). Consequently, Wisconsin courts look beyond the language of the statute when considering whether it requires proof of criminal intent. The courts of this state often consider whether a proposed construction of a statute would result in absurd or unreasonable consequences in hypothetical situations. E.g., State v. Phillips, 99 Wis. 2d 46, 298 N.W.2d 239, 242 (Ct. App. 1980); State v. Szarkowitz, 157 Wis. 2d 740, 460 N.W.2d 819, 825 (Ct. App. 1990); State v. Burkman, 96 Wis. 2d 630, 292 N.W.2d 641, 647 (1980); State v. Fischer, 17 Wis. 2d 141, 115 N.W.2d 553, 556-57 (1962). See also State v. Starks, 51 Wis. 2d 256, 186 N.W.2d 245, 249 (1971).

The state also argues that it is not unreasonable to construe the "sexual intercourse" crimes as merely general intent offenses because any non-consensual intrusion is "most likely" to be for a harmful purpose and the hypothetical situations set forth by Mr. Neumann rarely arise. The state erroneously focuses on the number of situations (which, in any event, are not few), rather than upon the number of persons potentially subject to the broad scope of these statutes. If "sexual intercourse" does not require proof of specific criminal intent, nearly all parents, doctors, or nurses, for example, likely would engage in innocent conduct proscribed by the "sexual intercourse" statutes numerous times in their lives.[1] Further, criminal statutes imposing severe penalties may not be drafted so loosely as to make application to culpable rather than non-culpable offenders merely "most likely."

The state also argues that non-consensual sexual intercourse is not a "wholly routine and innocent act" for which the legislature would have imposed an intent element. This argument ignores entirely the fact that the definition of "sexual intercourse" is so broad that it does encompass many routine and innocent acts. As in Collova, this Court should be "unwilling to conclude" the

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[1] There is no authority for the state's suggestion that a parent or guardian can consent to sexual intercourse for medical reasons, see State's Brief at 12, if sexual intercourse crimes are indeed general intent offenses.

legislature intended to subject a defendant to such harsh criminal penalties absent proof of criminal intent. Collova, 255 N.W.2d at 587.[2]

2. **The "sexual intercourse" statutes are unconstitutional if they do not require proof of specific intent.**

The state asserts that the concerns Mr. Neumann raises about the potential application of the sexual assault statutes to innocent conduct would only arise in "remote situations," and therefore it is not unconstitutional for the legislature to draft the definition of "sexual intercourse" statutes so broadly that it proscribes harmless and beneficial conduct, including numerous health, medical, and child care procedures. State's Brief at 17-25. The proscription against any non-consensual "sexual intercourse" as defined by the Wisconsin statutes would have far-reaching application to innocent conduct if "sexual intercourse" does not require proof of specific intent. See Neumann's Brief at 21-23. The breadth of the "sexual intercourse" statutes does more than "result in some inequities," compare State v. Hermann, 167 Wis. 2d 269, 474 N.W.2d 906 (Ct. App. 1991);

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[2] Collova is not distinguishable, State's Brief at 13, simply because the statute addressed there was not part of the criminal code. See Stoehr, 396 N.W.2d at 180-81, (while Wis. Stat. §939.23 "provides guidance" in determining whether specific intent is required, courts should look beyond the express language of the statute regardless of whether §939.23 applies).

it criminalizes wholly innocent conduct.

The state's suggestion that it would be a valid exercise of the police power to proscribe routine medical and health procedures involving non-consensual "sexual intercourse" is downright eerie. The state's police powers do not permit the legislature to criminalize all conduct not specifically protected by the Constitution. See State v. Starks, 51 Wis. 2d 256, 186 N.W.2d 245, 249 (1971) (vagrancy statute potentially applicable to sightseers and window-shoppers went beyond the legitimate police power).

Notably, the court in Starks applied the same analysis urged by the defendant here. Although the defendant in Starks may have been engaged in conduct that the state had the authority to proscribe and which the statute was aimed at preventing, the court struck down the statute because there was a serious risk of the statute being applied to persons engaging in innocent conduct. Moreover, Starks demonstrates that "overbreadth" analysis, while ordinarily applied in the First Amendment context, also is appropriate outside that context. See also City of Milwaukee v. K.F., 145 Wis. 2d 24, 426 N.W.2d 329, 337 (1988).

Finally, the fact that other states have found it necessary to define "sexual intercourse" statutes to preclude their application to innocent conduct such as routine medical care demonstrates that the concern for prosecution is a legitimate one. See e.g., Ill. Rev. Stat. ch. 18, §12-18(b). Thus, unlike State v. Jones, 55 Wis. 2d

742, 200 N.W.2d 587 (1972), which applied a unique overbreadth analysis by determining that no one ever would consider married couples to be within the sexual perversion statute's prohibitions, here the danger of the statute being misapplied is real. In any event, the court in Jones merely paid lip service to overbreadth analysis and, in fact, improperly applied vagueness standards to the defendant's claims.

B. General Intent Is A Required Element Of Non-Consensual Sexual Intercourse By Threat Or Use Of Force Or Violence Even If Specific Intent Is Not.

The state concedes that, if not a specific intent crime, a criminal sexual intercourse conviction still requires proof of the defendant's general intent to commit the act of sexual intercourse. State's Brief at 16. The state argues, however, that the Supreme Court erred in holding that intoxication is a defense to general intent crimes when, as here, "the accused is so completely intoxicated as to be '"... incapable of forming intent to perform an act or commit a crime... ."'" State v. Verhasselt, 83 Wis. 2d 647, 667, 266 N.W.2d 342, 352 (1978) (emphasis added) (citing Staples v. State, 74 Wis. 2d 13, 21, 245 N.W.2d 679 (1976); State v. Guiden, 46 Wis. 2d 328, 331, 174 N.W.2d 488, 490 (1970)).

"'Intent is a state of mind existing at the time a person commits an offense.'" Guiden, 174 N.W.2d at 490

n.4 (citation omitted). Because the intent to commit the act of sexual intercourse is "a state of mind essential to the crime," the Verhasselt decision is fully consistent with, and indeed compelled by, the voluntary intoxication statute. See Wis. Stat. §939.42(2).

Although certain states have held otherwise, see State's Brief at 28-29, this Court is bound by Wisconsin Statutes and the Wisconsin Supreme Court's decisions in Verhasselt, Staples and Guiden. See, e.g., State v. Lossman, 118 Wis. 2d 526, 348 N.W.2d 159, 163 (1984).*

The state's waiver argument, State's Brief at 25-26, also fails as it ignores the fact Mr. Neumann did request an instruction on general intent and intoxication, specifically citing Verhasselt as authority, and objected to the trial court's instruction for failure to require intent of any kind (R15; R32:7-11).

C. The Trial Court's Misinterpretation Of The Statute As Not Requiring Intent Denied Mr. Neumann A Fair Trial.

The trial court's misinterpretation of the sexual assault statute was not harmless. See State v. Dyess, 124 Wis. 2d 525, 370 N.W.2d 222, 232 (1985) (error harmless only if state establishes "there is no reasonable possi-

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* The state's reliance on dicta in State v. Heisler, 116 Wis. 2d 657, 661, 344 N.W.2d 190, 192-93 (Ct. App. 1983), State's Brief at 26, is misplaced, as the Court there apparently overlooked Verhasselt and failed even to cite it. The law review articles the state relies upon reflect only non-Wisconsin and pre-criminal code law. See State's Brief at 26.

bility that the error contributed to the conviction"). The state's assertion that the evidence and proffer of expert testimony were insufficient to raise the intoxication defense, see State's Brief at 29-34, is simply wrong.*

To place intoxication in issue, the defendant must come forward with evidence of his impaired condition. Schulz, 307 N.W.2d at 156.

> This evidence must be more than a mere statement that the defendant was intoxicated. The evidence must be credible and sufficient to warrant the jury's consideration of the issue as to whether the defendant was intoxicated to the extent it materially affected his or her ability to form the requisite intent. The test which the trial court must apply is whether, construing all the evidence produced most favorably to the defendant, a reasonable juror could conclude that the defendant's state of intoxication -- in the words of the statute -- "negative[d] the existence of a state of mind essential to the crime."

Id.; see State v. Strege, 116 Wis. 2d 477, 343 N.W.2d 100, 105 (1984).

A reasonable juror easily could conclude that Mr. Neumann's extreme level of intoxication negatived the existence of the required intent. Mr. Neumann consumed bottle after bottle of champagne and other intoxicants over the course of the evening, so much so that he blacked out. Even the state's witnesses recognized him to be very

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* The state does not address, and thus implicitly concedes, that the trial court's erroneous failure to instruct on the required element of intent was not harmless even independent of any allegation of intoxication. See Neumann's Brief at 34-35.

intoxicated; indeed, one of his roommates testified that Mr. Neumann still was incoherent and appeared intoxicated even the following morning (R31:158-59). See generally Neumann's Brief at 4-7 (Statement of Facts). This evidence plainly goes beyond mere intoxication. Even without Dr. Levy's testimony, it establishes Mr. Neumann's mental condition to be one of blackout and incoherence.

Dr. Levy's testimony would have removed any possible lingering doubt as to the adequacy of this evidence. Dr. Levy would have testified that a person who drinks to the point of blackout, as the evidence indicates Mr. Neumann did, "does not know what he is doing," "does not form intent to do the acts he does during the blackout" and "would have no intent to do those incidents [sic] as it's happening" (R32:5-7). Such evidence is sufficient to negate the required intent, regardless whether it is "specific" or merely the intent to perform the act of sexual intercourse.

The state nonetheless quibbles with the proffer's language that one in blackout "does not form intent" and "would have no intent" rather than some other equivalent terminology. State's Brief at 33. The state's hypertechnical semantic nitpicking lacks substance. An offer of proof "need not be stated with complete precision or in unnecessary detail but it should state an evidentiary hypothesis underpinned by a sufficient statement of facts to warrant the conclusion or inference that the trier of

fact is urged to adopt." Milenkovic v. State, 86 Wis. 2d 272, 272 N.W.2d 320, 326 (Ct. App. 1978).

The state also errs in speculating that the bases for Dr. Levy's proffered testimony may be faulty. See State's Brief at 33. The expert's opinion that drinking to blackout negates intent clearly is relevant. The underlying bases for that opinion are matters for cross-examination, Wis. Stat. §907.05, affecting at most the weight the jury may give the opinion, not its admissibility. See Blinka, Wisconsin Evidence §705.1 (1991). The state's speculation also ignores the fact that the examples set forth in the proffer were just that, examples. Mr. Neumann never asserted that the limited examples referred to were the sole basis for Dr. Levy's expert opinion.

The state's suggestion that the Court should ignore the evidence of intoxication because some evidence suggests an ability to form intent, State's Brief at 30-31, ignores the requirement that the Court must "construe[] all evidence produced most favorably to the defendant" in these circumstances. Schulz, 307 N.W.2d at 156; see id. at 153-58 (reversing conviction based upon unconstitutional intoxication instruction despite "considerable evidence by state witnesses that [defendant] did not seem to be intoxicated").

Finally, the state ignores the context in which this case was tried. The state should not be permitted to

argue in this Court that Mr. Neumann failed to present sufficient evidence of intoxication at trial when the state succeeded before trial in having the trial court find the intoxication defense to be irrelevant. Cf., State v. Gove, 148 Wis. 2d 936, 437 N.W.2d 218, 221 (1989). Following that ruling, this case was defended solely on the issues of consent and reasonable doubt.

CONCLUSION

Because the trial court's errors in denying Mr. Neumann the benefit of clearly exculpatory evidence on the issue of consent and misconstruing the mens rea requirement of the offense charged clearly prejudiced his right to a fair trial, Mr. Neumann respectfully asks that this Court reverse the judgment of conviction against him and grant him a new trial.

Dated at Milwaukee, Wisconsin, March 30, 1993.

Respectfully submitted,

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