

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 6, 2009

David R. Schanker
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. 2008AP746-CR

Cir. Ct. Nos. 2007CF120
2007CF122

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PETER M. JOSEPHSON,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Washington County: DAVID C. RESHESKE, Judge. *Affirmed.*

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Peter Josephson appeals from judgments of conviction of possession of child pornography and three counts of repeated sexual assault of the same child. He argues that he was denied his constitutional right to

present a defense when his motion to present evidence that the victim had a sexual relationship with another man was denied under the rape shield law, WIS. STAT. § 972.11 (2007-08).¹ We conclude that the evidence Josephson sought to introduce did not satisfy all five of the criteria outlined in *State v. Pulizzano*, 155 Wis. 2d 633, 656, 456 N.W.2d 325 (1990), to establish a constitutional exception to exclusion of the evidence. We affirm the judgments.

¶2 Before the jury Jennifer C. testified that she began to babysit Josephson's children when she was thirteen years old, and in the summer of 2004 she would stay overnight at Josephson's residence. There were multiple instances of oral sex and intercourse between the two over the following two years. Josephson told Jennifer he loved her and she said she loved him. They talked about getting married when Jennifer turned eighteen.

¶3 Jennifer also testified that in December 2006, Josephson bought a digital camera and took pictures of her naked and during sexual encounters. Jennifer described some of the photos to the police and they were recovered at Josephson's residence. One photo showed Jennifer and Josephson kissing. Two others showed sexual contact with male genitalia but the man's face is not in the photos. Jennifer indicated that the photos were taken with Josephson in his bedroom.

¶4 Before trial Josephson sought permission to ask Jennifer whether she had a sexual relationship with any other man. He suggested that Jennifer had a relationship with a man named "Josh" and that Jennifer's mother could confirm it.

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

He wanted to establish the possibility that the man in the picture was not him. The parties agreed that the identity of the man in the photos had no import with respect to the possession of child pornography charge and that the photos also served to corroborate sexual contact between Jennifer and Josephson. Josephson argued that his constitutional right to not testify was impaired because he could only offer his testimony that he was not the man in the photos. The trial court found that the identity of the man in the photos was affected by the fact that Jennifer described the photos to police before the search of Josephson's residence and the photos were found in Josephson's possession. It denied Josephson's motion to ask the victim if she had a sexual relationship with any other man.

¶5 Despite the prohibition in WIS. STAT. § 972.11 against evidence of a sexual assault victim's prior sexual conduct, in some circumstances such evidence "may be so relevant and probative that the defendant's right to present it is constitutionally protected" and as applied § 972.11 may impermissibly infringe upon a defendant's constitutional rights. *Pulizzano*, 155 Wis. 2d at 647-48. Whether the application of § 972.11 denied Josephson of his constitutional right to present a defense is a question of constitutional fact that we determine without deference to the trial court's determination but benefiting from its analysis.² See *State v. St. George*, 2002 WI 50, ¶16, 252 Wis. 2d 499, 643 N.W.2d 777.

² We question whether Josephson preserved the constitutional claim he raises on appeal because he did not cite *State v. Pulizzano*, 155 Wis. 2d 633, 456 N.W.2d 325 (1990) to the trial court, or otherwise frame the issue as the deprivation of the constitutional right to present a defense. We conclude that the issue was not waived. Josephson argued his motion in limine in terms of his constitutional right not to testify. The trial court recognized that it was being asked to consider the constitutionality of WIS. STAT. § 972.11 as applied in this case.

¶6 To establish the constitutional right to present evidence of a victim's other sexual conduct a defendant must make a sufficient offer of proof on five criteria: 1) that the prior acts clearly occurred; 2) that the acts closely resembled those of the present case; 3) that the prior act is clearly relevant to a material issue; 4) that the evidence is necessary to the defendant's case; and 5) that the probative value of the evidence outweighs its prejudicial effect. *Pulizzano*, 155 Wis. 2d at 656. We conclude Josephson did not make a sufficient offer of proof on numbers one and two above.

¶7 The evidence Josephson sought to address by asking Jennifer if she had a sexual relationship with any other man was the pictures. Thus, Josephson was required to establish not only that Jennifer had a sexual relationship with some other man but that the relationship involved the taking of salacious pictures. Josephson offered no proof on either element. He only speculated that Jennifer might have had a sexual relationship with "Josh." He did not offer the mother's statement confirming that. Although an offer of proof need not be stated with complete precision or unnecessary detail, it must be "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." *State v. Jackson*, 216 Wis. 2d 646, 662, 575 N.W.2d 475 (1998) (citation omitted). There was no suggestion that the other relationship involved the taking of pictures. There was no similarity of conduct. The mere existence of a sexual relationship does not permit an inference that pictures were taken. *See id.* Josephson's offer of proof also failed to establish

how the pictures taken with another man and someplace else ended up hidden in picture frames in his residence.³

¶8 This was not a case where the proffered evidence was so relevant and probative as to force an exception to exclusionary statute. Josephson was not denied his constitutional right to present a defense.

By the Court.—Judgments affirmed.

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

³ The trial court's ruling recognized the disconnection between evidence that Jennifer had a sexual relationship with another man and the discovery of the pictures in Josephson's house.

