

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 98-1212-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KEITH LOVE,

DEFENDANT-APPELLANT,

BRIAN LOVE,

DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: STANLEY A. MILLER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. A jury found Keith Love guilty of one count of first-degree sexual assault while armed, contrary to § 940.225(1)(b), STATS., and

one count of second-degree sexual assault of a child, contrary to § 948.02(2), STATS. The jury found Love not guilty of two other counts of first-degree sexual assault while armed, party to the crime. The court sentenced Love to forty years in prison on the first-degree sexual assault while armed count and to twenty years in prison on the second-degree sexual assault of a child count. The court stayed the latter sentence, and placed Love on probation for ten years, to run consecutive to the prison term.

Love's appellate counsel, Attorney Ellen Henak, filed a no merit report pursuant to RULE 809.32, STATS., and *Anders v. California*, 386 U.S. 738 (1967). Love filed a response. This court has reviewed the record, and has considered both counsel's no merit report and Love's response. Because we conclude that there are no arguable appellate issues, we affirm the judgment of conviction.

BACKGROUND

At trial, prosecution witnesses testified to the following. In the early morning of January 12, 1996, Love met Felicia B. outside a tavern. At Felicia's invitation, Love and another man accompanied her to a nearby house. Several other people were at the house: Anna H., Nairobi H., Charlie S., Rodney C., and Anna's grandchildren, fourteen-year-old Amber H. and seven-year-old Deangelo. At the house, Love and Felicia went into a bathroom for a period of time. After they came out of the bathroom, an argument ensued, and Love demanded his money back from Felicia. She refused, and Love pulled a gun from his pants.

Love ordered the adults into a bedroom and forced them to disrobe. Felicia and the man who came with Love to the house went into another room. At some point, Amber and Deangelo awoke, and Love ordered them into the

bedroom. The heads of both children were covered by bedclothes. Love ordered Anna to perform oral sex on Charlie and Nairobi to perform oral sex on Rodney. The women complied. Several witnesses testified that Love frequently threatened to kill them and that Love struck Anna with the gun on at least one occasion.

During the incident, Amber told Love that she had to use the bathroom. Love permitted Amber to use the bathroom. After she did so, Love took her into the living room and sexually assaulted her while he held the gun near her head. Love then went to the bedroom and told the women to continue performing oral sex. Love returned to the living room and again sexually assaulted Amber.¹

After the second assault on Amber, Love permitted the adults to leave the bedroom. The two men then left the house. The entire incident lasted several hours.

Love was charged with two counts of first-degree sexual assault while armed, party to a crime, stemming from the forced acts of fellatio. The jury found Love not guilty on those charges. For the assaults of Amber, Love was charged with one count of first-degree sexual assault while armed, and one count of second-degree sexual assault of a child. The jury found Love guilty of those charges.

¹ Amber testified that, on both occasions, Love sucked her breasts, licked and fingered her vaginal area, inserted his penis into her vagina, and ejaculated.

SUFFICIENCY OF THE EVIDENCE

Counsel first addresses whether sufficient evidence supports the jury's guilty verdicts. Counsel correctly concludes that an appeal on this issue would lack arguable merit. Amber's testimony was credible, and therefore, we will uphold the verdicts. *See State v. Poellinger*, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990). In his response, Love points to several inconsistencies in the testimony of the State's witnesses, and argues that those inconsistencies render the guilty verdicts invalid.² He also points to evidence that he knew Anna, Nairobi, and Felicia before the incident, yet they all testified that he was a stranger. Finally, Love argues that he cannot be found guilty because no physical evidence linked him to an assault of Amber.

It is the jury's province to fairly resolve conflicts in the testimony, weigh the evidence and draw reasonable inferences from the facts. *See id.* at 506, 451 N.W.2d at 757. If more than one inference can be drawn from the evidence, the inference which supports the jury's finding must be followed unless the testimony was incredible as a matter of law. *See State v. Witkowski*, 143 Wis.2d 216, 223, 420 N.W.2d 420, 423 (Ct. App. 1988). Physical evidence is not required in a sexual assault prosecution. *See State v. Holt*, 128 Wis.2d 110, 119-20, 382 N.W.2d 679, 685 (Ct. App. 1985). None of the State's witnesses were incredible as a matter of law, and this court must accept the inferences chosen by the jury.

EFFECTIVENESS OF TRIAL COUNSEL

² For example, Love points out that the description of the gun, the precise chronology of the incident, and other factual details varied between witnesses.

Counsel next addresses whether an arguable challenge to the effectiveness of Love's trial counsel could be made. Counsel discusses three acts of counsel: (1) the failure to move for a mistrial after jurors noted that a defense witness was in the courtroom; (2) the failure to request the dismissal of a juror who felt ill during the medical testimony; and (3) counsel's statement, made during closing argument, that Amber was the "most credible" of the State's witnesses. In his response, Love also faults his attorney for not calling to testify two bartenders who worked at the tavern.

A defendant claiming denial of the effective assistance of counsel must establish both that counsel's performance was deficient and that the defendant was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, a defendant must show, against a "strong presumption that counsel acted reasonably within professional norms," that trial counsel's performance was deficient. *State v. Johnson*, 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990). To establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 127, 449 N.W.2d at 847 (quoting *Strickland*, 466 U.S. at 687). An attorney's performance is not deficient if it is reasonable under prevailing professional norms and considering all the circumstances. *Id.* at 129, 449 N.W.2d at 848.

Second, a defendant must establish that his right to a fair trial was prejudiced. *Strickland*, 466 U.S. at 687. "[T]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Johnson*, 153 Wis.2d at 129, 449 N.W.2d at 848 (citation omitted).

A. Witness in the Courtroom

Willie Mitchell, a friend of Love's, testified for the defense. After his testimony, the bailiff advised the court that "five or six jurors were rather excited with the fact that [Mitchell] had been present in the gallery during the trial and they are concerned that the defense witnesses are being allowed to stay ... while the prosecutor's witnesses were told to leave the courtroom." Love's counsel offered no comment to the court, and nothing further was done.

Appellate counsel discusses whether trial counsel should have moved for a mistrial after the bailiff's report. We agree with counsel's assessment that no arguable issue is presented. Mitchell's presence in the courtroom could be considered extraneous information before the jury. *See State v. Messelt*, 185 Wis.2d 254, 275, 518 N.W.2d 232, 241 (1994) (extraneous information is "information which a juror obtains from a non-evidentiary source, other than the 'general wisdom' we expect jurors to possess."). However, Love must show a "reasonable possibility" that the information would prejudice the average juror. *Id.* at 276-77, 518 N.W.2d at 241. When applying the "reasonable possibility" standard, courts should assess the impact of the extraneous information "by considering such factors as the nature of the extraneous information and the circumstances under which it was brought to the jury's attention; the nature of the state's case; the defense presented at trial; and the connection between the extraneous information and a material issue in the case." *State v. Poh*, 116 Wis.2d 510, 530, 343 N.W.2d 108, 119 (1984). Based on a consideration of those factors, we conclude that Love cannot show prejudice.

The extraneous information is Mitchell's presence in the courtroom, possibly in violation of a sequestration order.³ Neither party can be faulted for Mitchell's conduct. Unlike *Poh*, where the extraneous information concerned "other act" evidence, *id.* at 531, 343 N.W.2d at 119, Mitchell's presence in the courtroom does not implicate any issue before the jury.

In his response, Love relies on investigative information obtained by appellate counsel suggesting that some jurors had observed Mitchell "laughing and making fun of" an unidentified female witness. The investigative report is not properly part of this record. *See South Carolina Equip., Inc. v. Sheedy*, 120 Wis.2d 119, 125-26, 353 N.W.2d 63, 66 (Ct. App. 1984) ("[A]n appellate court can only review matters of record in the trial court and cannot consider new matter attached to an appellate brief outside that record."). Even if the information regarding Mitchell's courtroom behavior were properly before the court, it merely reinforces information already provided to the jury through Mitchell's testimony, that is, his opinion that the victims were prostitutes and drug users, and therefore, not to be believed.

We conclude that Love has not shown a "reasonable possibility" that the average juror would have been affected by Mitchell's presence in the

³ It is not clear from the record whether Mitchell was in the courtroom prior to, or after, his testimony.

courtroom. Therefore, a challenge to the effectiveness of Love's trial counsel, premised on a failure to move for a mistrial, would fail on the prejudice prong.⁴

B. Failure to Dismiss a Juror

The nurse who examined Amber shortly after the incident testified to her findings. During that testimony, a juror requested a recess because she felt ill. After a short recess, the court asked the juror if she could continue. The juror told the court that "hearing a lot of medical things" caused her to feel "lightheaded" and "faint." The juror told the court that she just needed a short break and that she could continue. This inquiry occurred outside the presence of the rest of the jury. Because the juror assured the court that she could continue, Love's counsel cannot be faulted because he did not ask that the juror be dismissed.

C. Closing Argument

Love's defense at trial focused on the credibility of the State's witnesses—Anna had been convicted of prostitution and delivery of a controlled substance and Nairobi had been convicted of prostitution. Willie Mitchell testified that he had seen Nairobi and Felicia use drugs and prostitute themselves for drugs.

In closing argument, after noting that credibility was the "major point" of the trial, counsel argued

⁴ Appellate counsel also analyzes this matter as a possible unauthorized contact with the jury in violation of a sequestration order, and concludes that Love cannot show the prejudice required for a mistrial. *See Nyberg v. State*, 75 Wis.2d 400, 406-11, 249 N.W.2d 524, 527-29 (1977), *overruled on other grounds by State v. Ferron*, 219 Wis.2d 481, 579 N.W.2d 654 (1998). As noted in *Nyberg*, a sequestration order is designed "to prevent the shaping of testimony by one witness to match that given by other witnesses." *Id.* at 409, 249 N.W.2d at 528. There is no suggestion that Mitchell's testimony was affected by any violation of the sequestration order.

I have to tell you that out of the three major people that spoke [Anna, Nairobi, and Amber], Amber is by far the most credible of anybody. The others I think are out-and-out liars, and I think they are doing it to get back at Keith because they think he directed them to a bad drug deal.

Counsel went on to attack the testimony given by the adults by enumerating inconsistencies and conflicts between the various accounts of the incident. When discussing Amber's testimony, however, counsel was more indirect, and placed the responsibility for her alleged untruthfulness on the adults.

This court will not second-guess trial counsel's considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel. *State v. Felton*, 110 Wis.2d 485, 501-02, 329 N.W.2d 161, 169 (1983). When counsel has made a strategic choice, we apply an even greater degree of deference to counsel's exercise of judgment in considering whether the challenged action constitutes ineffective representation. *State v. Vinson*, 183 Wis.2d 297, 307-08, 515 N.W.2d 314, 318-19 (Ct. App. 1994). We agree with appellate counsel that trial counsel's decision to elevate Amber's credibility above the adult witnesses while arguing that, nevertheless, she was being untruthful, was a reasonable trial strategy. A meritorious challenge to counsel's closing argument cannot be raised.

D. Trial Counsel's Investigation

In his response, Love argues that his attorney was ineffective because he did not call as witnesses two persons who were bartenders at the tavern. Love faults counsel's pretrial investigation because the subpoenas for the bartenders could not be served for lack of a surname, yet at least one of the surnames was revealed in the police reports. Love suggests that the bartenders would have testified that Anna

and Nairobi knew him, and that they were at the tavern, with a group of people that included Love, before the incident.

To raise a successful claim of ineffective counsel, Love must show that there is a reasonable probability, but for counsel's error, the result of the trial would have been different. *See Johnson*, 153 Wis.2d at 129, 449 N.W.2d at 848. Both Willie Mitchell and Love's brother, Julius, testified that Anna, Nairobi, and Felicia were at the tavern, and that everyone knew each other from the neighborhood. Therefore, the credibility of the testimony from Anna and Nairobi that they did not know Love was already challenged. Because the bartenders' testimony would have been cumulative, Love cannot show a reasonable probability of a different result.

IMPEACHMENT OF AMBER

Appellate counsel next addresses several potential issues concerning Amber's participation in a car-jacking that took place several months after the assaults. At trial, Love sought to question Amber about the car-jacking, her use of a gun during the crime, and her statement to police that the car's owner had sexually propositioned her. The court refused to allow this line of questioning, ruling that the commission of car-jacking and use of a gun was not relevant and that the rape-shield law precluded evidence of Amber's sexual involvement with the car's owner. *See* § 972.11(2), STATS. No arguable appellate issues exist.

To be admissible at trial, evidence must be relevant. Section 904.02, STATS. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Section 904.01,

STATS. Whether to admit evidence is a matter within the trial court's discretion. *State v. Evans*, 187 Wis.2d 66, 77, 522 N.W.2d 554, 557 (Ct. App. 1994).

We agree with appellate counsel that evidence of Amber's subsequent involvement in a car-jacking and her use of a gun during that crime is "other-act" evidence that is not admissible under § 904.04(2), STATS. The evidence does not fall into any of the statutory exceptions, nor does it complete the story of the crime or show consciousness of guilt. See *State v. Pharr*, 115 Wis.2d 334, 348, 340 N.W.2d 498, 504 (1983); *State v. Amos*, 153 Wis.2d 257, 273-75, 450 N.W.2d 503, 509-10 (Ct. App. 1989). Amber's subsequent conduct is not relevant to any issue in the case, and therefore, the court properly exercised its discretion when it limited Love's inquiry into the car-jacking.⁵

The court also correctly precluded Love's inquiry into the circumstances of the car-jacking, particularly, Amber's statement to police that the car's owner had previously sexually propositioned her. As noted by appellate counsel, evidence of a complaining witness's sexual conduct is generally not admissible except to show a prior untruthful allegation of sexual assault. Section 972.11(2)(b)3, STATS. Because there was no assertion that Amber's statement concerning the car's owner was untruthful, the evidence was not admissible.

JURY COERCION

Appellate counsel next discusses whether the court misused its discretion when, in response to a jury note that asked what would happen if they

⁵ The court did permit Love to ask Amber if she owned a gun at the time of the incident. That inquiry was relevant to Amber's familiarity with guns, and her ability to correctly identify the kind of gun used by Love. The court properly precluded Love from asking Amber whether she owned a gun at any time after the assaults.

could not reach a unanimous decision on any of the counts, the court read them WIS J I—CRIMINAL 520, the standard supplemental instruction on agreement.⁶ The jury had been deliberating less than three hours when it made its inquiry, and before discharging the jury for the evening, the court read the supplemental instruction. Love did not object to the court's response to the jury note. We agree with appellate counsel that Love cannot successfully contend that the jury's verdict was coerced.

SENTENCING

The final issue discussed in the no merit report is whether the court properly exercised its sentencing discretion. Sentencing lies within the sound discretion of the trial court, and a strong policy exists against appellate interference with that discretion. *See State v. Haskins*, 139 Wis.2d 257, 268, 407 N.W.2d 309, 314 (Ct. App. 1987). The trial court is presumed to have acted reasonably and the defendant has the burden to show unreasonableness from the record. *See id.* The primary factors to be considered by the trial court in sentencing are the gravity of the offense, the character of the offender, and the need for the protection of the public. *State v. Harris*, 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984). The weight to be given the various factors is within the trial court's discretion. *Cunningham v. State*, 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977).

The court considered the relevant factors. The court discussed the nature and gravity of the offense, including the impact of the crime on Amber and

⁶ Appellate counsel also addresses a pretrial motion for withdrawal that was made by Love's attorney. In his response, Love expressly abandons this potential issue. We will not discuss it further.

her family. The court also noted that the public needed to be protected from Love's criminal conduct, and that every member of the public, including prostitutes, deserved such protection. The sentence was not harsh or excessive. Love faced a maximum sentence of sixty years. The court imposed a forty-year sentence, followed by a period of probation supervision. The sentence is not "so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *Ocanas v. State*, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975).

APPLICABILITY OF SECTION 940.225(1)(b), STATS.

In his response, Love argues that he could not be convicted of both first-degree sexual assault while armed and second-degree sexual assault of a child.⁷ Love's argument ignores Amber's testimony that Love had sexual intercourse with her on two separate occasions, and that during the first incident, Love held a gun near her head. Different conduct supports the two charges, and the State properly charged Love with separate crimes. *See State v. Eisch*, 96 Wis.2d 25, 34-35, 291 N.W.2d 800, 805 (1980). And, as we have discussed above, sufficient evidence supports the jury's verdict on each count.

⁷ Love points out that lack of consent is an element of first-degree sexual assault while armed but that consent is not a defense to second-degree sexual assault of a child, and asserts that jury confusion resulted from that inconsistency. The court properly instructed the jury on each count. The court instructed the jury that, on the first-degree sexual assault while armed count, the State must prove that Amber did not consent to the sexual intercourse, and for the second-degree sexual assault of a child count, that consent to sexual intercourse is not a defense. The instructions were correctly given, and we presume that the jury followed the instructions. *See State v. Truax*, 151 Wis.2d 354, 362, 444 N.W.2d 432, 436 (Ct. App. 1989). No arguable appellate issue regarding consent and the jury instructions exists.

Love also argues that he cannot be convicted of first-degree sexual assault while armed because Amber was less than sixteen years old at the time of the assault. Love contends that he can only be convicted of second-degree sexual assault of a child, and that the “while armed” element must be treated as a “use of a dangerous weapon” penalty enhancer under § 939.63(1)(a)2, STATS. Because the use of a dangerous weapon is an essential element of first-degree sexual assault while armed, the State was not required to treat Love’s use of a weapon as a penalty enhancer. *See* § 939.63(1)(b), STATS.⁸

CONCLUSION

Based on an independent review of the record, this court finds no basis for reversing the judgment of conviction. Any further appellate proceedings would be without arguable merit within the meaning of *Anders* and RULE 809.32, STATS. Accordingly, the judgment of conviction is affirmed, and appellate counsel is relieved of any further representation of the defendant on this appeal.

By the Court.—Judgment affirmed.

⁸ Section 939.63(1)(b), STATS., states: “The increased penalty ... does not apply if possessing, using or threatening to use a dangerous weapon is an essential element of the crime charged.”

