COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0471-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JASON R. BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

¶1 PER CURIAM. Jason Brown appeals from a judgment convicting him of kidnapping, false imprisonment, second-degree sexual assault and attempted second-degree sexual assault, and also from an order denying his motion for postconviction relief. He claims the lineup at which the victim identified him was impermissibly suggestive, the sexual assault and attempted

sexual assault charges were multiplicitous, and counsel was ineffective for failing to timely raise each of these issues. We find no merit to Brown's contentions and affirm.

BACKGROUND

¶2 The complaining witness was grabbed from behind while walking home during the early morning hours. Her assailant twisted her arm behind her back and pushed her up against a nearby building, all the while choking her and telling her to shut up. He then pushed his body against her so that she could feel his erect penis against her buttocks, and he reached his hand around in front of her to unzip her pants. She managed to turn around and push him away as he raised a fist to hit her, then escaped by slipping out of the blouse she was wearing and running away in her bra.

¶3 The witness described her assailant to the police as a black man with dark skin, 25 to 35 years old, 5'6" to 5'8" tall, overweight with a stocky build and a large belly, large lips, shaved or short hair, and a gold tooth on the right side of his mouth. The police picked up Brown based on this description and placed him in a lineup with five other black men who ranged in height from 5'7" to 5'10" and in weight from 175 to 200 pounds. At 5'6" and 210 pounds, Brown was the shortest and heaviest man in the lineup. He was also the only one with a gold tooth, but the witness was not able to observe the tooth during the lineup. She identified Brown by his face, body and voice.

¶4 A jury convicted Brown of kidnapping contrary to § 940.31(1)(b), STATS., false imprisonment contrary to § 943.30, STATS., second-degree sexual assault contrary to § 940.225(2)(a), STATS., and attempted second-degree sexual assault contrary to §§ 940.225(2)(a) and 939.32, STATS. Brown moved for

postconviction relief based upon new evidence, double jeopardy, and ineffective assistance of counsel, and he filed this appeal after his motion was denied.

STANDARD OF REVIEW

¶5 Brown failed to challenge the lineup prior to or at trial. Therefore, we will not directly address that contention. *See* ***Preuss v. Preuss***, 195 Wis.2d 95, 105, 536 N.W.2d 101, 105 (Ct. App. 1995) (issues not promptly raised before the trial court are deemed waived). However, Brown also claims that counsel's failure to preserve the issue deprived him of effective assistance. Claims of ineffective assistance of counsel present mixed questions of law and fact. *See* ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). We will not set aside the circuit court's findings about counsel's actions and the reasons for them, unless they are clearly erroneous. *See* § 805.17(2), STATS.; ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985). Whether counsel's conduct violated the defendant's constitutional right to the effective assistance of counsel is ultimately a legal determination, which this court decides *de novo*. *See* ***id***. at 634, 369 N.W.2d at 715.

¶6 Although Brown also claims counsel was ineffective for failing to raise the multiplicity issue until after trial, the trial court addressed the issue on the merits and the State does not argue that the motion was untimely. We will therefore consider *de novo* whether Brown was subjected to double jeopardy when he was convicted of both sexual assault and attempted sexual assault, rather than reviewing the claim within the context of ineffective assistance. *See* ***State v. Selmon***, 175 Wis.2d 155, 161, 498 N.W.2d 876, 878 (Ct. App. 1993).

DISCUSSION

Counsel's Failure to Challenge the Lineup.

¶7 The test for ineffective assistance of counsel has two elements: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. *See* ***Strickland***, 466 U.S. at 687. To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. *See* ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847-48 (1990). To satisfy the prejudice element, the defendant usually must show that counsel's errors were serious enough to render the resulting conviction unreliable. *See* ***Strickland***, 466 U.S. at 687. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. *See* ***id.***

¶8 Brown claims that counsel was ineffective for failing to review the lineup prior to the day of trial and to challenge it as unduly suggestive. While we might be persuaded that counsel was deficient in relying solely on a prior attorney's acceptance of the lineup, we are satisfied that no prejudice resulted because the lineup was not, in fact, unduly suggestive. All but one of the men presented in the lineup fell within the height range which the complaining witness had given to the police, and all matched her general description of the assailant's age, skin color, haircut, and stocky build. Brown has presented no authority which would require the police to present to a witness a number of men who resemble their suspect as closely as possible. Rather, the police are required to produce men

who match as well as possible the description given by the witness under the totality of the circumstances. *See* ***Simos v. State***, 83 Wis.2d 251, 256, 265 N.W.2d 278, 280 (1978). By ensuring that the witness could not observe the most obvious manner in which five of the men differed from the description the witness had given (namely, the lack of gold teeth), the police refrained from unduly suggesting to her that the suspect they had apprehended was the actual assailant.

Multiplicity of Charges.

¶9 The Fifth Amendment of the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb …." *See* U.S. CONST. amend. V. The Double Jeopardy Clause includes three distinct constitutional guarantees: (1) protection against a second prosecution for the same offense after an acquittal; (2) protection against a second prosecution after a conviction; and (3) protection against multiple punishments for the same offense. *See* ***State v. Kurzawa***, 180 Wis.2d 502, 515, 509 N.W.2d 712, 717 (1994).

¶10 Multiplicity arises when a single criminal episode or course of conduct is charged as multiple counts rather than merged into one. *See* ***State v. Hirsch***, 140 Wis.2d 468, 471, 410 N.W.2d 638, 639 (Ct. App. 1987). The test to determine whether multiple counts are permissible in a given situation is first, whether the charges are identical in law and fact, and second, whether the legislature intended to allow more than one unit of prosecution under the relevant statutes. *See* ***State v. Bergeron***, 162 Wis.2d 521, 534, 470 N.W.2d 322, 327 (Ct. App. 1991). The court shall presume, unless there are factors present which clearly indicate otherwise, that the legislature intended cumulative punishments, so long as neither charge is a lesser included offense of the other. *See* ***State v.***

Sauceda, 168 Wis.2d 486, 495, 485 N.W.2d 1, 4 (1992); ***State v. Kuntz***, 160 Wis.2d 722, 755, 467 N.W.2d 531, 544 (1991).

¶11 The State concedes that the charges against Brown were the same in law, because they both alleged violations of § 940.225(2)(a), STATS. However, it contends, and we agree, that they were different in fact. The sexual assault occurred when Brown pressed his erect penis against the complaining witness without her consent, asking her how that felt. The attempted sexual assault occurred when Brown proceeded to unzip the complaining witness's pants and raised his fist to subdue her in order to have intercourse with her, stopping only because she escaped. *See* ***Bergeron***, 162 Wis.2d at 534-35, 470 N.W.2d at 327 (sexual contacts involving separate parts of the body and requiring separate volitional acts may be charged separately). We have also previously determined that the legislature intended multiple punishments to be available for multiple denigrations of a person's integrity and threats to safety. *See* ***id***. at 536, 470 N.W.2d at 328. We therefore conclude there was no double jeopardy violation.

By the Court.—Judgment and order affirmed.

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