COURT OF APPEALS
DECISION
DATED AND FILED

February 20, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0311-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ANTHONY LIGGINS,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Anthony Liggins appeals from judgments entered after he was convicted of substantial battery, two counts of first-degree sexual assault, kidnapping, one count of intimidating a witness, and one count of intimidating a victim, contrary to WIS. STAT. §§ 940.19(2), 940.225(1)(b),

940.31(1)(b), 940.42 and 940.44(2) (1999-2000).[1] He also appeals from an order denying his postconviction motion. Liggins claims: (1) there was insufficient evidence to support the convictions on the two sexual assaults and the kidnapping; and (2) he received ineffective assistance of counsel. Because the evidence in the record is sufficient to support the convictions, and because Liggins failed to prove any ineffective assistance of counsel, we affirm.

BACKGROUND

¶2 The events leading to the charges in this case occurred on May 13, 1998. The victim, Dorothy S., invited Liggins to her home to celebrate her birthday. The two had been involved in a somewhat abusive relationship for several years, and they had a son together. The two offered conflicting stories of what happened on the night in question.

¶3 Dorothy testified that Liggins accused her of sleeping around, punched her in the face several times, and followed her into the bathroom where he yanked the shower curtain rod off the wall and struck her in the back with it. She said he then took his tennis shoes and beat her in the back with them, and punched her in the right side. He then took some white shoelaces and tied her wrists and ankles together. She testified that they went into the bedroom, where he pushed her onto the bed, and when she began to scream for help, he covered her head with a pillow. She claimed that she had trouble breathing and feared that he would kill her. Liggins then punched her again in the face and put a blanket over her head. She said he then untied her wrists, walked toward the kitchen, and

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

threatened to kill her. Dorothy went into the bathroom. Liggins followed her into the bathroom, and she noticed he was carrying a long-bladed knife. He put the knife down on the edge of the tub and ordered her to get down on the floor. Liggins then committed the two sexual assaults—penis-to-vagina and penis-to-mouth. Dorothy testified that she was too scared to fight.

¶4 Dorothy testified that after this, they returned to the bedroom and Liggins struck her in the back with a glass liquor bottle. At this point, they heard the police knock at the door. The police were responding to a noise complaint called in by the downstairs neighbor. When no one answered, the police entered by using a key obtained from the apartment manager and by forcing open the chain lock. The police reported that Dorothy seemed traumatized, had a swollen face, a bloodied lip, and injuries to her arms and back. The police arrested Liggins.

¶5 Liggins's version of what happened was different. He admitted to battering Dorothy, but claimed that the sexual intercourse occurred before the argument, and was completely consensual. The jury found Liggins guilty on the sexual assault counts and the kidnapping. Prior to trial, Liggins had already pled guilty to substantial battery and two counts of intimidation.

¶6 Liggins filed a postconviction motion alleging his trial counsel was ineffective, which was denied. Liggins now appeals.

DISCUSSION

A. Insufficient Evidence.

¶7 Liggins claims that the evidence is insufficient to support the sexual assault and kidnapping convictions. We disagree.

¶8 In reviewing challenges to the sufficiency of the evidence, our standard of review is limited:

> [A]n appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citations omitted).

¶9 Liggins first contends that there was insufficient evidence to support the "use or threat of use of a dangerous weapon" element of the sexual assault charges. We disagree. In order to convict Liggins of the first-degree sexual assaults, the State must prove three elements: (1) that Liggins had sexual contact or sexual intercourse with Dorothy; (2) that the contact was without Dorothy's consent; and (3) that Liggins used or threatened use of a dangerous weapon. WIS. STAT. § 940.225. Liggins challenges only the third element. He argues that the mere presence of the knife in the bathroom is insufficient to satisfy this element.

¶10 We agree that the mere presence of a knife in the bathroom would be insufficient. But here, the evidence shows that the knife was not just "merely present." The testimony sets forth that a horrendous beating occurred for several hours before the sexual assaults. The record also contains Liggins's threats to kill Dorothy shortly before he followed her into the bathroom while wielding a large-bladed knife and, after placing the knife on the edge of the bathtub, Liggins

ordered her onto the floor where he committed the sexual assaults. The knife was readily accessible to Liggins in Dorothy's small bathroom. The implied threat of use of the knife based on the totality of the circumstances was sufficient to satisfy the third element of first-degree sexual assault. *See* ***State v. Johnson***, 231 Wis. 2d 58, 69, 604 N.W.2d 902 (Ct. App. 1999) (threat of force element does not require express threat, but may be accomplished implicitly by the circumstances surrounding the event). Based on the foregoing, we conclude that a reasonable jury could infer the threat of use of the knife based on the totality of the circumstances surrounding its use.

¶11 Liggins also claims that there was insufficient evidence to support the kidnapping charge. His basis for this claim is that: (1) Dorothy was not tied up during the assaults; (2) the kidnapping and the sexual assault charges are multiplicitous, in violation of double jeopardy; and (3) the State did not have to prove any different elements on the kidnapping charge. The same sufficiency of evidence standard of review noted above applies. We address each of Liggins's claims in turn.

¶12 First, we agree with the State that whether or not Dorothy was tied up during the assaults is not dispositive. There are four elements that the State needed to prove in order to convict on kidnapping: (1) that Liggins confined Dorothy; (2) that the confinement was without Dorothy's consent; (3) that the confinement was accomplished by use of force; and (4) that Liggins did so with intent to hold Dorothy to service against her will. WIS. STAT. § 940.31(1)(b).

¶13 In order to prove confinement, it is not necessary to show that Dorothy was tied up during the assaults. Rather, the State needed to show that Dorothy was forcibly confined without her consent. The record demonstrates that

the State did so. The jury heard evidence that Liggins tied Dorothy up, that he restrained her in her bedroom, and that after beating her, he followed her into the bathroom wielding a large-bladed knife. A reasonable jury could infer from this evidence that Liggins forcibly confined Dorothy without her consent.

¶14 Liggins's next contention is that the nonconsensual sex element of sexual assault cannot be the same as the "held to service against will" element of kidnapping without creating multiplicity and double jeopardy concerns. This argument, however, was never raised during proceedings at the trial court level and, therefore, cannot be raised on appeal. *See* ***State v. Benzel***, 220 Wis. 2d 588, 591, 583 N.W.2d 434 (Ct. App. 1998) ("Ordinarily, even a claim of a constitutional right will be deemed waived unless timely raised before the trial court."). Further, even if the argument had not been waived, it would fail. Wisconsin courts have rejected the common-law doctrine of "merger," that is, that the crime of kidnapping merges into another crime when the only evidence of confinement is that which is necessary to accomplish the other crime. *See generally*, Frank J. Parker, S.J., *Aspects of Merger in the Law of Kidnapping*, 55 CORNELL L. REV. 527 (1970).

¶15 Wisconsin adheres to the "elements only" test to determine whether different charges are multiplicitous. ***State v. Carrington***, 134 Wis. 2d 260, 264, 397 N.W.2d 484 (1986). Offenses are different in law if each requires proof of an essential element that is not present in the other offense. ***State v. Sauceda***, 168 Wis. 2d 486, 493-94 n.8, 485 N.W.2d 1 (1992). We have set forth the elements of both first-degree sexual assault and kidnapping earlier in this opinion. The elements are not the same. To prove kidnapping, the state must prove "confinement" and "intent to hold to service against one's will." Neither element is required for proving first-degree sexual assault. Conversely, to prove first-

degree sexual assault, the state must prove that sexual contact or sexual intercourse occurred, which is not needed to prove kidnapping. Accordingly, the crimes are different and do not violate multiplicity rules. *See* ***State v. Simpson***, 118 Wis. 2d 454, 462, 347 N.W.2d 920 (Ct. App. 1984).

¶16 Third, Liggins contends that the State did not have to prove any different elements on the kidnapping charge, and that the State needed to prove something other than the sexual assault to sustain the kidnapping charge. We reject Liggins's contention. As noted above in our "elements only" analysis, the kidnapping charge does require proof different from the sexual assault. Under Wisconsin law, nonconsensual, forced "confinement" of a person need not be more than incidental to a completed or attempted act of sexual assault. *See* ***Simpson***, 118 Wis. 2d at 455-63. Thus, even if the kidnapping was incidental to the sexual assaults, there is sufficient evidence to uphold the conviction. Here, the State proved that Liggins forcibly confined Dorothy against her will.

¶17 Moreover, our legislature clearly contemplated that the "service against will" element of kidnapping could include an act of sexual assault. *See* ***State v. Clement***, 153 Wis. 2d 287, 293, 450 N.W.2d 789 (Ct. App. 1989). From our review, we conclude that the record contains sufficient evidence of each element of both first-degree sexual assault and kidnapping to sustain the convictions.

B. Ineffective Assistance.

¶18 Next, Liggins contends his trial counsel provided ineffective assistance by: (1) stipulating to fingerprint evidence instead of presenting it through live testimony; and (2) failing to move *in limine* for the introduction of

prior acts evidence involving Dorothy's use of a knife against Liggins. Like the trial court, we reject these arguments.

¶19 In order to establish that he did not receive effective assistance of counsel, Liggins must prove two things: (1) that his lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 548 N.W.2d 69 (1996). A lawyer's performance is not deficient unless he "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. Even if a defendant can show that his counsel's performance was deficient, he is not entitled to relief unless he can also prove prejudice; that is, he must demonstrate that his counsel's errors "were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." ***Id***. Stated another way, to satisfy the prejudice-prong, "'[a] 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Sanchez***, 201 Wis. 2d at 236 (citation omitted).

¶20 The issues of performance and prejudice present mixed questions of fact and law. ***Sanchez,*** 201 Wis. 2d at 236. Findings of historical fact will not be upset unless they are clearly erroneous, ***id.***, and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently. ***Id.*** at 236-37.

¶21 Here, Liggins complains that his trial counsel stipulated to the fingerprint evidence. Specifically, Liggins was concerned about the fact that his

fingerprints were not found on the knife. He argues that the fingerprint evidence would have been more persuasive if the jury heard it from a live witness, rather than read as a stipulation. The trial court rejected this claim on the basis that Liggins could not prove prejudice because the jurors were expressly told that Liggins's fingerprints were not found on the knife. We agree. There is no way Liggins can prove that hearing the fingerprint evidence live would have had any effect on the outcome. The record reflects that the jury heard the fingerprint stipulation, not once, but three times. Moreover, the trial court instructed the jury, in response to a question from the jury during deliberations, that there was no evidence of Liggins's fingerprints on the knife. Accordingly, we agree that even if trial counsel had presented the fingerprint evidence through live testimony, it would not have resulted in a different outcome.

¶22 Next, Liggins contends his trial counsel was ineffective for failing to move *in limine* to introduce into evidence other specific acts of Dorothy's use of a knife against him. He argues that this evidence would have been admissible on the issue of Dorothy's credibility. We are not persuaded.

¶23 Specific acts of Dorothy using a knife against Liggins would not be admissible for credibility purposes. Under WIS. STAT. § 906.08(2), "[s]pecific instances of the conduct of a witness, for the purpose of attacking … the witness's credibility … may not be proved by extrinsic evidence." Exceptions are made to this general rule if: (1) the evidence constitutes a witness's prior convictions or delinquency adjudications; or (2) if the evidence demonstrates a pertinent trait or character of the victim. WIS. STAT. 904.04(1)(b). However, character trait evidence is only admissible if the character trait is "an essential element of a … defense," such as a statutory defense or self-defense. WIS. STAT. § 904.05(2); *see* ***State v. Evans***, 187 Wis. 2d 66, 80-82, 522 N.W.2d 554 (Ct. App. 1994). Here,

Liggins was not claiming self-defense, and there is no suggestion that this evidence was probative of the issue of untruthfulness. *See* WIS. STAT. § 906.08(2). Therefore, trial counsel's failure to seek admission of the other acts evidence on the issue of credibility was not deficient conduct because it would not have been admissible for that purpose.

¶24 Further, the record demonstrates that, through Liggins's testimony, trial counsel did manage to reveal this evidence to the jury. The jury was repeatedly told that Dorothy had used knives against him in prior encounters. Accordingly, failure to file a motion *in limine* on this issue was not prejudicial. The evidence came in regardless of trial counsel's failure to move *in limine* for its admission.

By the Court.—Judgments and order affirmed.

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