

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 20, 2010

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. 2009AP600-CR

Cir. Ct. No. 2007CF4149

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JESSE BECERRA,

DEFENDANT-APPELLANT.

APPEAL from judgments¹ and an order of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 CURLEY, P.J. Jesse Becerra appeals from the judgment, entered following a jury trial, convicting him of battery, and from the judgment convicting

¹ Two separate judgments were entered in this matter, one for the battery charge and one for the kidnapping and false imprisonment charges.

him of kidnapping and false imprisonment, contrary to WIS. STAT. §§ 940.19(1), 940.31(1)(a) and 940.30 (2007-08).² Becerra also appeals from the order denying his postconviction motion. He argues on appeal that there was insufficient evidence to convict him of the crimes of kidnapping and false imprisonment and that the trial court erroneously exercised its discretion when it imposed a twenty-year sentence. Because the State proved all the elements of kidnapping and false imprisonment and the trial court properly exercised its discretion at sentencing, we affirm.

I. BACKGROUND.³

¶2 According to the trial testimony of the victim, Maria R., she and Becerra had been in a romantic relationship for approximately twelve years that resulted in the birth of twin girls who were, at the time of trial, eight years old. The relationship ended in May 2007 when they stopped living together, but they continued to see each other and Maria R. testified she had been hopeful that the relationship would be rekindled.

¶3 Maria R. stated that on August 25, 2007, she and Becerra were to meet at a friend's birthday party being held at a nightclub, but Becerra never showed up. She ended up going to a girlfriend's house at the end of the night. Shortly after she arrived, she was alone in the living room when Becerra walked into the house, surprising Maria R. According to Maria R., Becerra grabbed her

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

³ We note that Becerra's attorney failed to include citations to the record for the facts he asserts. *See* WIS. STAT. RULE 809.19(1)(d).

by the back of her hair, pulled her out of the house and took her to his vehicle where he placed her in the back seat while he got in the front seat. Already seated in the SUV was Miguel Del Aguila, a friend of Becerra's. Maria R. said that Becerra began driving the SUV and that he was very angry, screaming at her, and asking her why she did not answer her cell phone and who was she with during the evening. During the questioning Becerra slapped Maria R., and later he began punching her in the face and the side of her head. Becerra drove Del Aguila home, and when his friend reluctantly exited the SUV, Maria R. said she tried to open the back door to leave but was unsuccessful because Becerra began driving erratically. After dropping off Del Aguila, Becerra drove around. During the time they drove around Becerra was yelling and punching the windshield and rear view mirror, eventually breaking the latter and cracking the former.

¶4 Despite Maria R.'s request to be taken home, Becerra drove to Racine County where he finally stopped after Maria R. persuaded him that she had to use the bathroom. She told the jury that she got out of the SUV and squatted behind it until she saw a set of headlights approaching. As the vehicle got near her, she ran into the middle of the road and asked the driver to call the police, telling him that her boyfriend had just beaten her. When Becerra saw her approach the vehicle, he got out of his SUV and walked to the other vehicle and told the driver that Maria R. was intoxicated and not to listen to her. When the driver pulled away, Becerra grabbed Maria R. and walked her back to the SUV, where she got into the back seat.

¶5 According to Maria R., Becerra began driving around again, but just before a freeway entrance he pulled over and parked the SUV and got into the back seat with Maria R. Once in the back seat, Becerra tried to kiss her, stated he loved her and that they should have another baby. Becerra also smelled between

Maria R.'s legs to see if she had had sex that evening. Maria R. resisted his advances and almost immediately thereafter a sheriff's vehicle pulled up behind them.

¶6 Maria R. testified that Becerra told her not to tell the officer anything about what had transpired during the evening. An officer asked Maria R. if everything was all right. She said "no," and proceeded to explain some of the night's events. The police had Maria R. write out a statement and took pictures of her, but after she passed a breathalyzer test, the police told her to file a report against Becerra in Milwaukee County and permitted her to drive off in Becerra's SUV.⁴ Becerra, who was intoxicated, was arrested for disorderly conduct. Maria R. then drove to a Milwaukee police station where she filed a report against Becerra. Maria R. gave a statement that morning to Officer Cosgrove of the Sensitive Crimes Unit. In it, she forgot to tell the officer many of the events that she testified to at trial.

¶7 Initially Becerra was charged with battery and kidnapping. Later, an amended information was filed adding a charge of false imprisonment. At trial Maria R. testified that she gave no consent to Becerra to confine her in the SUV, strike her or transport her to Racine County. The State also called one of the Racine county deputy sheriffs who pulled up behind Becerra when he was parked on the side of the road. As pertinent to this appeal, Becerra argues that the deputy testified that Maria R. never told him that she had been confined, imprisoned or held to service against her will, but there is no such testimony. It is true, however,

⁴ The SUV was actually titled in Maria R.'s name but Becerra was making the payments on it.

that the deputy never arrested Becerra for kidnapping or false imprisonment, suggesting that the reason may have been because the deputy was not told all the details of the night's events. Further, this deputy also stated that Maria R. told him she walked back to the SUV after being allowed out of the SUV to go to the bathroom and asking for help from an unknown driver. She also told the deputy that she fell in a mud puddle on her way back to the SUV.

¶8 Besides Becerra, several other people were called to testify as defense witnesses at the trial. They included Del Aguila, Becerra's friend who was sitting in the SUV when Maria R. was first brought to the SUV, and Officer Cosgrove, who had interviewed Maria R. the morning of her return to Milwaukee County.

¶9 Becerra's friend, Del Aguila, testified that while he saw Becerra strike Maria R. when she was in the SUV and observed Becerra screaming at her, he claimed that Maria R. walked to the SUV voluntarily and was not being pulled by her hair or restrained in any fashion. Further, he stated that Maria R. entered the SUV voluntarily and did not scream or object. He also claimed that Maria R. never attempted to get out of the SUV when he was dropped off.

¶10 Officer Cosgrove testified that many of the details testified to by Maria R. at trial were not mentioned by Maria R. when she gave a statement to the officer. Finally, Becerra testified on his own behalf.

¶11 Becerra confirmed that he did pull Maria R.'s hair when he first entered the house, but he said that Maria R. voluntarily walked out of the house and entered the SUV. He admitted that he and Maria R. were arguing in the SUV, but he contended that Maria R. never asked to be taken home or asked to get out of the SUV. He also denied initially striking the windshield or the rear view mirror.

Rather, he claimed the windshield cracked when he made a sudden stop at a stop light and Maria R. flew into the windshield from the back seat and struck the windshield and the rear view mirror came off at the same time. After the windshield was already cracked, Becerra did admit to striking it because he was angry with Maria R. Becerra testified that after he punched the windshield, Maria R. got out of the SUV, but he persuaded her to get back in because they were driving in a bad neighborhood. With respect to the incident where Maria R. asked to get out of the SUV to use the bathroom, Becerra said that they both exited the SUV to urinate, but when he got back in he saw Maria R. walking out of a driveway and he asked her to get back in the SUV. After Maria R. got into the SUV, Becerra said he then pulled to the side of the road, and it was at this point—not when Maria R. said she had to go to the bathroom—that Maria R. got out of the SUV and attempted to flag down an oncoming vehicle. Becerra denied carrying Maria R. back to the SUV. According to Becerra, it was after the vehicle drove off that Maria R., while walking back to the SUV, fell into a mud puddle. Becerra also denied ever being in the back seat with Maria R.

¶12 After the jury found Becerra guilty of all three counts, the trial court sentenced him on count one, battery, to nine months of incarceration. On the kidnapping charge, count two, the trial court sentenced Becerra to ten years of initial confinement, to be followed by ten years of extended supervision, to be served consecutively to count one. On the false imprisonment charge, count three, the trial court sentenced Becerra to two years of initial confinement, to be followed by two years of extended supervision. This sentence was ordered served concurrent to count two, but consecutive to count one. Becerra brought a postconviction motion which was denied.

II. ANALYSIS.

A. *The State proved all the elements of kidnapping and false imprisonment.*

¶13 Becerra argues that there was insufficient evidence to convict him of kidnapping and false imprisonment. He contends that the “testimony of [Maria R.] was not corroborated and was inconsistent with regard to the elements of confinement, restraint, imprisonment or service against her will.”⁵ We disagree.

¶14 An appellant attacking a jury verdict on grounds of insufficiency of the evidence has a heavy burden because the rules governing our review strongly favor the verdict. *State v. Allbaugh*, 148 Wis. 2d 807, 808-09, 436 N.W.2d 898 (Ct. App. 1989). When reviewing the sufficiency of the evidence, we will reverse a conviction only if “the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶15 While there are discrepancies between what Maria R. told the two police officers and her trial testimony, discrepancies in recounting what occurred does not require overturning a verdict because it is the jury’s job to decide all factual disputes. “It is the function of the jury to determine where the truth lies in

⁵ Although Becerra initially argued that the State failed to prove the kidnapping element of “imprisonment,” this argument was replaced with the contention that the State failed to prove Maria R. was “transported forcibly.” Perhaps the change in the argument was due to the fact that imprisonment is not an element of the subset of the charge of kidnapping that the State charged.

a normal case of confusion, discrepancies, and contradictions in testimony of a witness.” *State ex rel. Brajdic v. Seber*, 53 Wis. 2d 446, 450, 193 N.W.2d 43 (1972). Only the trier of fact may resolve conflicts in the testimony, weigh the evidence and draw reasonable inferences from the facts. *See Poellinger*, 153 Wis. 2d at 506.

1. False imprisonment

¶16 Applying the elements of false imprisonment found in WIS JI—CRIMINAL 1275 to the facts of this case required the State to prove the following elements: that (1) Becerra confined or restrained Maria R.; (2) the confinement or restraint was done intentionally; (3) Maria R. did not give her consent; (4) Becerra had no lawful authority to confine or restrain Maria R.; and (5) Becerra knew that Maria R. did not consent and knew that he did not have lawful authority to confine or restrain her.

¶17 Becerra contends that the State failed to prove that Maria R. was either confined or restrained. According to WIS JI—CRIMINAL 1275, confined or restrained:

requires genuine restraint or confinement, it does not require that it be in a jail or prison. If the defendant deprived [the victim] of freedom of movement, or compelled [her] to remain where [she] did not wish to remain, then [the victim] was confined or restrained. The use of physical force is not required. One may be confined or restrained by acts or words or both.

(Footnotes omitted.)

¶18 The element of confinement or restraint was satisfied by the testimony of Maria R. She testified that she was pulled out of her friend’s house and that she had no choice but to leave when Becerra came in uninvited and pulled

her hair. She also testified that he forced her into the back seat of the SUV. Contrary to Becerra's argument that Maria R. never attempted to exit the SUV, Maria R. testified that: "As his friend tried to get out, I tried to get out of the vehicle at that time. As soon as [Becerra] saw me opening my door is when he took off again and started driving erratically to try to get the door to close." According to Maria R., she asked Becerra several times to take her home, without success. Consequently, her freedom of movement was compromised and she was compelled to remain where she did not wish to be. It is obvious that Maria R. was confined and restrained. Why else would she attempt to escape from Becerra by flagging down an unknown driver and asking him to call the police?

¶19 Further, Becerra complains that he should not have been convicted of false imprisonment or kidnapping because Maria R. never screamed for help or put up a struggle. The elements of false imprisonment do not require the victim to either scream for help or put up a struggle. Given that Maria R. testified that she was slapped and punched by Becerra while being held in the back seat of the SUV, it is understandable that she may have decided that screaming for help would result in Becerra causing her further harm. Further, she testified that she did put up a struggle when Becerra jumped into the back seat with her and became amorous.

2. Kidnapping

¶20 Becerra argues that the State failed to prove the kidnapping elements of being forcibly transported and being held to service against her will. Applying the elements of kidnapping found in WIS JI—CRIMINAL 1280 to this case required the State to prove the following elements: that (1) the defendant transported Maria R. from one place to another; (2) the defendant transported Maria R.

without her consent; (3) the defendant transported Maria R. from one place to another forcibly; and (4) the defendant transported Maria R. from one place to another with the intent that Maria R. be held to service against her will.

¶21 Becerra contends that the State did not prove the last two elements, that Maria R. was transported from one place to another forcibly and with the intent that Maria R. be held to service against her will. Becerra claims that this last element of kidnapping required the State to prove that she was forced to commit acts at Becerra's command. He submits that there was absolutely no evidence of any sexual acts being performed by Maria R. at his command.

¶22 As noted, according to Maria R.'s testimony she was forced to enter Becerra's SUV after Becerra pulled on her hair and made her leave her friend's house. She testified that she tried to exit the SUV when Becerra's friend was dropped off but was unable to do so. She stated that she asked to be taken home repeatedly but Becerra refused. According to Maria R., when Becerra drove away from her friend's house he slapped and struck her. She stated that she was only able to get out of the SUV by telling Becerra that she had to go to the bathroom, and once out of the SUV, she approached an oncoming vehicle and asked the driver to call the police. She was then caught by Becerra, and after he "bear hugged" her, she walked back in the SUV. These facts prove the first three elements of kidnapping: that is, Becerra transported her from one place to another, forcibly and without her consent.

¶23 With respect to the fourth element of kidnapping, the State charged Becerra with "intent to cause her to be held to service against her will." Contrary to Becerra's argument, this element does not require sexual acts, only that acts are done at the command of another. In *State v. Clement*, 153 Wis. 2d 287, 450

N.W.2d 789 (Ct. App. 1989), we held that “[t]he word ‘service,’ as it is used in [WIS. STAT. §] 940.31 [i.e., Wisconsin’s Kidnapping Statute], includes acts done at the command of another.” *Clement*, 153 Wis. 2d at 293. The acts need not be sexual in nature.⁶ *See id.* (providing only that the word “service” in this context can encompass “sexual acts performed at the command of another”).

¶24 The State argues, and the trial court found in denying Becerra’s motion to dismiss the kidnapping charge, that the acts of interrogating Maria R. as to where she was during the evening and who was with her were “commands for information” that satisfy the “held to service against [her] will” element. *See* WIS JI—CRIMINAL 1280. We agree.

¶25 Maria R. was whisked away by force from her friend’s home, forced into the back seat of Becerra’s SUV, and physically struck by Becerra while he repeatedly questioned her. Her attempt to escape proved unsuccessful when Becerra grabbed her and she walked back to the SUV, falling into a mud puddle on the way back. This entire episode occurred over the course of several hours. Maria R. was clearly held to service against her will. Consequently, the State proved all of the elements of both charges.

¶26 Moreover, the jury was entitled to believe the version of the events that resulted in Becerra’s convictions. It is understandable that Maria R.’s statements might appear inconsistent. First, Del Aguila, who testified that

⁶ While this is true, the jury could have inferred that Becerra did attempt to force Maria R. to perform sexual acts with him when he entered the back seat after stopping the SUV shortly before the freeway entrance. According to Maria R., while in the back seat of the SUV Becerra got on top of her, pinned her down, told her that he loved her, attempted to kiss her and smelled her between her legs. During this time he also made statements such as, “Let’s have another baby.” Only the presence of the police vehicle interrupted his actions.

Maria R. willingly entered the SUV and never attempted to escape, may have wanted to protect Becerra from being convicted of two felonies. As to the deputy sheriff who let the visibly shaken Maria R. drive back to Milwaukee and make a complaint to the police, he did little investigation into what occurred because he assumed the Milwaukee police were going to handle the matter. Had he done a complete investigation, he probably would have learned of the other offenses. Finally, Officer Cosgrove, the Milwaukee police officer assigned to handle the complaint, stated that at the time she interviewed Maria R., Maria R. had been up all night. In addition, Officer Cosgrove explained that often victims fail to recall significant events because they continue to suffer the effects of the trauma or they suffer from embarrassment. Here, there was sufficient evidence to permit a reasonable jury to convict Becerra of the crimes.

B. The trial court properly exercised its discretion at sentencing.

¶27 Becerra contends that the trial court, in meting out a twenty-year sentence (ten years initial confinement and ten years extended supervision) for kidnapping, erroneously exercised its discretion. Becerra asserts the sentence was harsh and unwarranted. We disagree.

¶28 When reviewing a trial court's sentencing determination, we apply an erroneous exercise of discretion standard. *See State v. Lechner*, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998). We commence our review with the presumption that the trial court acted reasonably when imposing its sentence. *Id.* at 418. In contrast, a defendant challenging a sentence has the heavy burden to demonstrate that the sentencing court relied on some unreasonable or unjustified basis in imposing the sentence. *See id.*

¶29 A sentence is unduly harsh when it is “so excessive and unusual and 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 (1975). There are three primary factors that the trial court must consider at sentencing: the gravity of the offense, the character of the offender and the need to protect the public. *State v. Smith*, 207 Wis. 2d 258, 281-82 n.14, 558 N.W.2d 379 (1997). The sentencing court may consider other factors, but it is not required to specifically address all of the other factors of record, *State v. Echols*, 175 Wis. 2d 653, 683, 499 N.W.2d 631 (1993), and may base the sentence on any one of the three primary factors. Furthermore, the sentencing court has wide discretion in assigning various values to each of the relevant factors. *State v. Larsen*, 141 Wis. 2d 412, 428, 415 N.W.2d 535 (Ct. App. 1987).

¶30 Here, the trial court touched on the three primary sentencing factors. First, the trial court found the offenses very serious. In addressing the character of Becerra, the trial court remarked that Becerra’s conduct that evening was “[v]ery scary behavior.” The trial court explained that it was most concerned that Becerra was not taking responsibility for his actions and “[did not] get it.” During the sentencing proceeding Becerra continued to minimize his behavior. He told the trial court that “it wasn’t the biggest crime of the century,” and when the court inquired whether Becerra believed Maria R. went with him voluntarily, he said: “Well, she had called me to—to be with me.... And she made it seem way out of proportion....”

¶31 The trial court also found that Becerra’s conduct had a significant negative impact on Maria R. The trial court told Becerra that when Maria R. testified, “There was clearly fear in her voice when she was speaking to this Court

and to the jurors during the jury trial.” The trial court stated that during the incident, Maria R. “was frightened, scared, had no idea what was going to happen.” Further, the trial court told Becerra that the court had to protect Maria R. from his abhorrent behavior. Given the circumstances, the sentence was not harsh. The trial court explained its twenty-year sentence and properly exercised its discretion.

¶32 For the reasons stated, the judgments and order of the trial court are affirmed.

By the Court.—Judgments and order affirmed.

Not recommended for publication in the official reports.

