COURT OF APPEALS
DECISION
DATED AND FILED

March 24, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1398-CR **Cir. Ct. No. 2007CM2283**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SUSAN SUCHARSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed*.

¶1 SNYDER, J.[1] Susan Sucharski appeals from a judgment of conviction on one count of fourth degree sexual assault as party to a crime. She contends the circuit court failed to correctly instruct the jury and improperly barred character evidence from reaching the jury. She further appeals from an order denying her postconviction motion for a new trial. We affirm the judgment and the order.

¶2 On October 7, 2008, a jury convicted Sucharski of one count of fourth degree sexual assault as party to a crime, contrary to WIS. STAT. § 940.225(3m) and WIS. STAT. § 939.05. The victim of the assault testified that she was out socializing with Sucharski and Sucharski's fiance, Robert Jecevicus, at a bar in Kenosha. When the three left the bar, the victim hugged Sucharski. Jecevicus said he thought the two women were going to "make out." The victim said "no," and turned to leave.

¶3 The victim described what happened next. Sucharski "grabbed [the victim] and … stuck her tongue down [the victim's] throat." This lasted approximately five seconds. The victim backed away but Jecevicus then put his hand down the victim's pants, beneath her underwear, for approximately ten seconds. At this point, the victim was "backed up" against her vehicle and could not get in to leave. Jecevicus then pulled up the victim's shirt and bra and began to fondle her breasts for fifteen seconds. Sucharski made a comment about the victim's breast size and Jecevicus turned to lift Sucharski's shirt as well.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Jecevicus instructed the victim to touch Sucharski's breast, which she did and then "backed off as fast as [she] could."

¶4 Jecevicus reached his hand down the victim's pants again and then picked her up and sat her on top of her car. Jecevicus reached up under the victim's shirt to fondle her and began kissing her. Sucharski then moved in between the victim's legs and "bite [her] in [the] crotch." After about forty-five seconds, the victim slid off the top of her car and was able to leave. The victim testified that she did not consent to any of the acts that occurred that evening, with the exception of the initial hug with Sucharski as they left the bar.

¶5 Sucharski testified that she and the victim did kiss, that they both lifted their shirts to compare breast size, and that the victim touched Sucharski's breast. She testified that the victim was "still laughing and having a good time." During the trial, Sucharski attempted to introduce character evidence demonstrating her peaceful nature. The court refused to admit the evidence. Sucharski also moved to strike the party to a crime instruction and to add the unanimity instruction. *See* WIS JI—CRIMINAL 400; WIS JI—CRIMINAL 517. The court denied both motions.

¶6 The jury returned a verdict finding Sucharski guilty of fourth degree sexual assault as party to a crime. Sucharski moved for a new trial, arguing that the jury was improperly instructed and that the court erred when it barred the evidence intended to demonstrate her peaceful character. The circuit court reviewed the trial transcripts and the briefs of the parties. It concluded that the issues raised had been "vigorously argued" during the trial and the rulings by the court were proper. It therefore denied Sucharski's motion.

¶7 On appeal, Sucharski renews the arguments she made in the circuit court. The issues raised require a deferential standard of review by this court. *See* ***State v. Hubbard***, 2008 WI 92, ¶28, 313 Wis. 2d 1, 752 N.W.2d 839 (jury instruction lies within the sound discretion of the trial court and we will not reverse absent an erroneous exercise of that discretion); ***City of Milwaukee v. NL Indus.***, 2008 WI App 181, ¶64, 315 Wis. 2d 443, 762 N.W.2d 757, *review denied*, 2009 WI 34, 316 Wis. 2d 719, 765 N.W.2d 579 (No. 2007AP2873) (trial courts have broad discretion in determining the relevance of evidence and will not be reversed absent an erroneous exercise of that discretion).

¶8 In her appellate brief, Sucharski asserts that there was insufficient evidence to support an aiding and abetting theory and thus the party to a crime instruction was improper. The State responds that the evidence presented allowed the jury to convict Sucharski of fourth degree sexual assault as party to a crime on the theory that Sucharski aided and abetted Jecevicus in committing the assault or by directly committing the assault. The jury was instructed that it could convict on grounds that Sucharski intentionally aided and abetted the commission of a crime if she was:

> [A]cting with knowledge or belief that another person is committing or intends to commit a crime [and] she knowingly either: assists the person who commits the crime; or is ready and willing to assist the person who commits the crime who knows of the willingness to assist ….
>
> To intentionally aid and abet fourth degree sexual assault, Susan Sucharski must know that another person is committing or intends to commit the crime of fourth degree sexual assault and have the purpose to assist in the commission of that crime.
>
> However, a person does not aid and abet if she is only a bystander or spectator and does nothing to assist the commission of a crime.

¶9 The State asserts that the jury could reasonably have found that Jecevicus committed a fourth degree sexual assault, Sucharski knew Jecevicus was committing a crime, Sucharski was ready and willing to assist, and Jecevicus knew of Sucharski's willingness to assist.

¶10 When Sucharski objected to the instruction, the circuit court summarized the relevant testimony from the trial. The jury heard that Jecevicus touched the victim in a sexual way multiple times without the victim's consent. The jury also heard evidence that Sucharski initiated the unwanted contact by grabbing the victim and kissing her after they hugged. Also, Sucharski allowed her breasts to be exposed and touched by the victim at Jecevicus' direction, and ultimately assaulted the victim by biting her. The circuit court held, "The whole context and the whole circumstance[] described here are enough [for the party to a crime question] to go to a jury." Thus, the court considered the relevant facts, applied the law and reached a reasonable conclusion. We see nothing in the record to demonstrate that the party to a crime instruction was erroneous.

¶11 Next, Sucharski argues that the circuit court violated her right to due process when it failed to instruct the jury on unanimity. *See* WIS JI—CRIMINAL 517. That instruction states:

> The defendant is charged with one count of _____. However, evidence has been introduced of more than one act, any one of which may constitute _____.
>
> Before you may return a verdict of guilty, all 12 jurors must be satisfied beyond a reasonable doubt that the defendant committed the same act and that the act constituted the crime charged.

Id. (footnote omitted).

¶12 The threshold question in a unanimity challenge is whether the relevant criminal statute creates multiple offenses or a single offense with multiple modes of commission. *See* ***State v. Derango***, 2000 WI 89, ¶14, 236 Wis. 2d 721, 613 N.W.2d 833. Here, the relevant statute is WIS. STAT. § 940.225(3m), which describes fourth degree sexual assault as "sexual contact with a person without the consent of that person." Sucharski contends that a unanimity instruction was required because the State introduced evidence of six acts, but the jury was not instructed to reach a unanimous verdict on any single act. She asserts, "The sexual assaults that [the victim] claim (sic) occurred varied from breast fondling, vagina touching, and vagina biting. Further, each touching episode occurred at separate stages and required a new volitional act."

¶13 The State counters that the unanimity instruction was not required under the facts presented. It directs us to ***Holland v. State***, 91 Wis. 2d 134, 143, 280 N.W.2d 288 (1979), for the proposition that unanimity is not required regarding the alternate ways in which a single crime can be committed. The unanimity requirement derives from the due process requirement that the prosecution prove each essential element of the offense beyond a reasonable doubt. ***Id.*** at 138. The ***Holland*** court addressed the question presented here: "[W]hether this unanimity principle is violated where the trial court instructs the jury, in the disjunctive, as to the various ways a person might be guilty as a party to a crime without requiring the jurors to agree on the applicable theory or theories." ***Id.***

¶14 The circuit court considered Sucharski's motion and, after consulting the jury instruction and case law, denied the request to give the unanimity instruction. The court specifically relied on ***State v. Lomagro***, 113 Wis. 2d 582, 594, 335 N.W.2d 583 (1983), where our supreme court held that the single charge

of first degree sexual assault was appropriate under circumstances where two acts of sexual intercourse "were one continuous, unlawful event." The ***Lomagro*** court held that unanimity was achieved when the jury agreed that a sexual assault was committed. ***Id.***

¶15 Likewise, the State's single charge of fourth degree sexual assault as party to a crime rested on one continuous event. The conduct underlying the charge occurred in one place, without interruption, over a short period of time. *Cf.* ***State v. Giwosky***, 109 Wis. 2d 446, 456, 326 N.W.2d 232 (1982) (an encounter lasting only a few minutes with no "break in the action" was properly considered "one continuous event"). Sucharski's jury was instructed that a sexual assault occurred if Sucharski or Jecevicus had sexual contact with the victim and the victim did not consent. The unanimity requirement was met when the jury determined that Sucharski had sexual contact with the victim without the victim's consent during the continuing course of conduct underlying the charge. *See* ***Lomagro***, 113 Wis. 2d at 593-94 (where conduct underlying sexual assault charge occurred over two hours and included two types of penetration, each one defined as sexual intercourse, unanimity was achieved when jurors agreed a sexual assault was committed).

¶16 The jury was also instructed that they should return a guilty verdict if they were satisfied that Sucharski directly committed the two elements of sexual assault or if she aided and abetted in the commission of the crime. This is not error. *See* WIS JI—CRIMINAL 517, cmt. ("There are a number of situations where jury agreement is not required [including] … liability as a principal distinguished from liability as an aider and abetter, ***Holland v. State***, 91 Wis. 2d 134, 280 N.W.2d 288 (1979), ***May v. State***, 97 Wis. 2d 175, 293 N.W.2d 478 (1980).").

¶17 Sucharski's final appellate issue stems from the circuit court's refusal to admit certain character evidence. WISCONSIN STAT. § 904.04(1)(a) allows a defendant to present evidence of "a pertinent" character trait to suggest that the defendant would not have acted contrary to that trait by committing the crime charged. Sucharski sought to introduce testimony from coworkers who could speak to her peaceful, nonviolent nature. She offered this evidence to contradict the suggestion that she would participate in a violent crime. Specifically, she sought to rebut the victim's testimony that Sucharski bit her and it caused her pain.

¶18 The State asserts that the crime charged had only two elements, neither of which involved violence. It directs us to the victim's own testimony that Sucharski and Jecevicus did not threaten her or have any violent contact with her. Accordingly, the State argues, additional evidence concerning Sucharski's nonviolent nature would be cumulative and irrelevant. The circuit court agreed and did not permit the testimony, holding that the conduct underlying the sexual assault charge was not violent, but rather was for sexual gratification.

¶19 The question of admissibility of evidence generally lies within the trial court's discretion. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational and legally sound conclusion. ***Burkes v. Hales***, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991). Here, the court considered the nature of the charge, the alleged conduct of the defendant, and the potential relevance of the proffered testimony. Because the court reasonably determined that the character evidence was not relevant, the court's ruling was proper.

¶20 We conclude that the circuit court properly exercised its discretion when it instructed the jury and when it barred the character evidence. We affirm the judgment and the order.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809. 23(1)(b)4.