COURT OF APPEALS
DECISION
DATED AND FILED

November 5, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0725-CR **Cir. Ct. No. 00-CF-692**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID D. BROWN,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. David Brown appeals judgments convicting him of burglary, three counts of sexual assault and false imprisonment. He also appeals an order denying his postconviction motion alleging ineffective assistance of trial counsel and requesting resentencing. He argues that his trial counsel was ineffective for failing to call a "critical witness to corroborate his testimony" and

that the sentences are unduly harsh. We reject these arguments and affirm the judgments and order.

¶2 The victim testified that she was awakened by a bumping noise outside her bedroom patio doors. When she went to investigate, an intruder pushed his way through the doorway, tackled her and repeatedly sexually assaulted her. The assailant told her that she and her children would die if she reported the incident to police. He then left through the patio door and jumped off a balcony to escape.

¶3 Brown admitted that he was in the victim's home and had intercourse with her, but claimed that she consented. The victim and Brown's wife were friends. He testified that he went to the victim's home after 1:00 a.m., uninvited and unexpected, to talk with her about his relationship with his wife and the victim's relationship with her ex-husband. He wanted to "clear the air" about animosity between himself and the victim. He testified that after they began having consensual sex, he made an offensive comment and she hit him in the face. He had to grab her upper arms and torso to defend himself. He told her that she had better not tell his wife what happened. When she did not respond, he ran from the bedroom through the patio door and jumped off the deck, hurting his ankle. The next morning, he was diagnosed with a heel bone fracture.

¶4 Brown told the same story to his pastor three days after his arrest. He argues that his trial counsel should have called Pastor Lenz to testify at trial to "corroborate" Brown's testimony. Brown has not established that he was prejudiced by his counsel's failure to call Pastor Lenz. To establish prejudice, he must show a reasonable probability that, but for his counsel's unprofessional

errors, the result of the trial would have been different. *See* ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). A reasonable probability is one that undermines confidence in the outcome. ***Id.***

¶5 Lenz's testimony may have been admissible under WIS. STAT. § 809.01(4)(a)2 (1999-2000), to rebut an allegation of recent fabrication, but it was not persuasive. Lenz's testimony would not have corroborated Brown's testimony. Lenz had no independent knowledge of any of the facts. The sole source of his information was Brown himself. Lenz's testimony would merely have established that Brown told the same story after his arrest as he presented at trial. Counsel's failure to call Lenz does not undermine our confidence in the verdicts.

¶6 The trial court properly exercised its sentencing discretion when it sentenced Brown to eleven and one-half years' confinement and eighteen and one-half years' extended supervision followed by five years' probation. In his postconviction motion, Brown complained that the sentencing court's decision rested on an incomplete record because Lenz's testimony was not presented. Lenz's testimony would not have mitigated the seriousness of the crimes, the primary factor upon which the court based its sentence. The trial court reaffirmed its sentences after it heard Lenz's postconviction testimony. In light of the seriousness of the crimes and Brown's lack of empathy for the victim or remorse for his crimes, the sentences imposed are not so disproportionate to the offenses as to shock public sentiment. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).