

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 15, 2026

Samuel A. Christensen
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. 2025AP695-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2020CF442

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADONIS I. MOSAY, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Polk County:
DANIEL J. TOLAN, Judge. *Affirmed.*

Before Stark, P.J., Hruz, and Gill, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Adonis I. Mosay, Jr., appeals from a judgment of conviction, entered following a jury trial, for attempted second-degree sexual

assault of an unconscious victim and felony bail jumping, both counts as a repeater.¹ Mosay was charged with second-degree sexual assault of an unconscious victim, and he argues that the circuit court erred by granting the State’s request for a jury instruction on the lesser-included offense of *attempted* second-degree sexual assault of an unconscious victim—the crime for which he was ultimately convicted. We reject this argument and affirm.

BACKGROUND

¶2 The charges against Mosay arose from allegations that he had sexually assaulted Sandra² while she was unconscious and while Mosay was released on bond in another felony case with a bond condition that prohibited him from committing any crimes.

¶3 At Mosay’s jury trial, Sandra testified that she and Mosay “[g]rew up together,” but they did not typically “hang out.” On the day before the assault, Sandra had a group of people over to her apartment for a get-together, including Mosay. That morning, Sandra gave Mosay a ride to the store, where he purchased a “jug” of vodka and Sandra purchased a “six pack of White Claws.” Sandra testified that both she and Mosay were drinking throughout the day, and she smoked marijuana and took Valium. At some point, Mosay passed out on

¹ The jury also convicted Mosay of a second count of felony bail jumping, as a repeater, which was based on Mosay’s consumption of alcohol while released on bond. However, Mosay does not challenge that conviction on appeal, and we therefore do not address it further.

² Pursuant to the policy underlying WIS. STAT. RULE 809.86(4) (2023-24), we refer to the victim using a pseudonym. All references to the Wisconsin Statutes are to the 2023-24 version.

Sandra's couch, and he was still asleep on the couch when Sandra went to bed that evening.

¶4 Sandra testified that in the middle of the night, she woke up to Mosay "having intercourse" with her. Specifically, she testified that she woke up because Mosay was "thrusting his parts in [her] parts," which she confirmed meant that his penis was in her vagina. Sandra further testified that she was wearing sweatpants when she went to sleep, but when she awoke, they were on the floor. After the assault, Sandra went into the living room, where Mosay was lying on the floor, and asked him to leave. She then called 911 and reported the assault. After officers responded, Sandra went to the hospital and participated in a SANE examination—i.e., a medical evaluation performed by a sexual assault nurse examiner.

¶5 Sandra testified that there was never any point during the day preceding the assault when Mosay would have had his hands on any part of her body or would have brushed up against her. She also testified that she did not consent to having sexual intercourse with Mosay. On cross-examination, Sandra conceded that there were parts of the evening before the assault that she did not remember.

¶6 Officer Anthony Brunner testified that he responded to Sandra's apartment following her 911 call and that when he arrived, Sandra was "extremely upset," "[b]arely able to form a sentence," and "[c]rying hysterically." Sandra was transported by ambulance to a hospital, where Brunner performed a preliminary breath test on her, which showed an alcohol concentration of 0.121. Sandra told Brunner that she had awoken to Mosay "on top of her and thrusting on her" and that he had ejaculated inside of her.

¶7 Melissa Vesperman, a nurse, testified that she performed Sandra's SANE examination, during which she took several samples from Sandra's internal and external genitalia. Vesperman also took blood and urine samples from Sandra. Vesperman testified that Sandra had several small abrasions just below her vaginal opening and was "quite uncomfortable" during Vesperman's physical examination of her genitalia, which "could be consistent with sexual contact or blunt force trauma."

¶8 Mary Powers, a toxicologist from the Wisconsin State Crime Laboratory, testified about her analysis of the blood and urine samples taken during Sandra's SANE examination. Powers testified that those samples showed the presence of alcohol, marijuana, and benzodiazepines in Sandra's system. Powers also testified that both alcohol and benzodiazepines are central nervous system depressants and that combining them would have "an additive effect," possibly causing a person to sleep more heavily.

¶9 Katrina Melichar, a forensic scientist from the Wisconsin State Crime Laboratory, testified about the results of DNA testing that was performed on Sandra's sweatpants and on the genital swabs taken during Sandra's SANE examination. Melichar testified that a swab taken from the waistband of Sandra's sweatpants contained a mixture of DNA from two individuals, and there was "very strong support" for the inclusion of Mosay in that mixture. Stated differently, Melichar explained that it was "at least one quadrillion times more likely that ... that DNA mixture" on the sweatpants came from Sandra and Mosay than that the mixture came from Sandra and a random, unrelated male individual.

¶10 Melichar testified, however, that the DNA analysis of the genital swabs from Sandra's SANE examination was inconclusive. Both the vaginal swab

and the cervical swab contained the DNA of at least two males—a major contributor and a minor contributor. For both of those swabs, Mosay was excluded as the major contributor, but the comparison of his DNA to the profile for the minor contributor was inconclusive due to the limited amount of DNA available. The swabs from Sandra’s external genitalia had a DNA mixture from at least three males, but because of the complexity of the mixture and the limited amount of genetic information, Melichar could not make any DNA comparisons.

¶11 Mosay testified in his own defense. He denied going into Sandra’s room, removing her pants, or sexually assaulting her. Instead, he testified that he was sleeping on Sandra’s couch when he woke up to her yelling at him to get out of her house.

¶12 After the close of testimony, the State asked the circuit court to instruct the jury on the lesser-included offense of attempted second-degree sexual assault of an unconscious victim. When the court asked the State what reasonable view of the evidence would support the inclusion of an instruction for that offense, the prosecutor explained:

I think the jury could read the DNA results to indicate that Mr. Mosay was attempting to sexually assault the victim in this case. That his DNA is on the waistband of her pants. That he was attempting to pull them off or had pulled them off. And if they read into the DNA results in a way that [defense counsel] would have them believe, they would believe that his DNA is not in the vaginal swabs or the cervical swabs or external genital swabs. And if they were to believe that, they might also believe then that he didn’t actually sexually assault [Sandra]. He didn’t commit sexual intercourse. They would believe then that he attempted to, but that she woke up.

In response, defense counsel argued that an instruction on attempted second-degree sexual assault of an unconscious victim would be inconsistent with

Sandra’s “very clear[.]” testimony “that she was sexually assaulted” and that the DNA on Sandra’s sweatpants was insufficient to prove an attempted sexual assault.

¶13 The circuit court granted the State’s request to instruct the jury on attempted second-degree sexual assault of an unconscious victim, concluding that there was a reasonable view of the evidence that would support a finding that Mosay was guilty of that offense, but not guilty of the completed sexual assault. The court reasoned:

There had already been a motion for directed verdict. I denied that because I found that [a] reasonable jury could find all three of those elements [of second-degree sexual assault]. A reasonable jury could also find—and I think that’s what’s being argued by the state—that ... any suggestion about DNA in the vaginal opening, cervical exam, or external swabs is speculation as to being Mr. Mosay’s. Which I agree with you, [defense counsel]. I think that is a dangerous road to go down to make some suggestions about that.

But, could a reasonable jury based on DNA swabs find that he didn’t have intercourse with her? And that’s your defense and your position. And the answer is, based upon the DNA, is it reasonable they could have found that? Yes. Is it reasonable that they could have looked at the touch DNA that appeared on the waistband and believe that he did an act in furtherance of those things? Yes. Is [it] an appropriate lesser included? Yes.

¶14 Thus, the circuit court instructed the jury on both second-degree sexual assault of an unconscious victim and the lesser-included offense of attempted second-degree sexual assault of an unconscious victim. The jury found Mosay guilty of the lesser-included offense, as well as felony bail jumping based on his attempted sexual assault of Sandra. Mosay now appeals, arguing that the court erred by instructing the jury on the lesser-included offense.

DISCUSSION

¶15 “When considering a request for a lesser-included offense instruction, the court must first determine whether ‘the lesser offense is, as a matter of law, a lesser[-]included offense of the crime charged.’” *State v. Fitzgerald*, 2000 WI App 55, ¶8, 233 Wis. 2d 584, 608 N.W.2d 391 (citation omitted). “If so, then the court considers whether the evidence justifies the instruction.” *Id.* Here, the parties agree that attempted second-degree sexual assault of an unconscious victim is a lesser-included offense of second-degree sexual assault of an unconscious victim. See WIS. STAT. § 939.66(4) (stating that an attempt to commit a crime is a lesser-included offense of that crime). We therefore proceed to the second step of the analysis.

¶16 Whether the evidence supports the submission of a lesser-included offense is a question of law that we review independently. *Fitzgerald*, 233 Wis. 2d 584, ¶7. “The test for submitting a lesser-included offense is whether ‘there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense.’” *Id.* (citation omitted). Any doubt should be resolved in favor of submitting a lesser-included offense to the jury upon a party’s request. See *Zenou v. State*, 4 Wis. 2d 655, 668, 91 N.W.2d 208 (1958).

¶17 In the instant case, we agree with the circuit court that the evidence provided reasonable grounds for the jury to acquit Mosay of the greater offense—second-degree sexual assault of an unconscious victim—but convict him of the lesser offense—attempted second-degree sexual assault of an unconscious victim. To obtain a conviction for second-degree sexual assault of an unconscious victim, the State needed to prove the following elements beyond a reasonable

doubt: (1) Mosay had sexual intercourse with Sandra; (2) Sandra was unconscious at the time of the sexual intercourse; and (3) Mosay knew that Sandra was unconscious at the time of the sexual intercourse. *See* WIS JI—CRIMINAL 1213A; *see also* WIS. STAT. § 940.225(2)(d). To prove that Mosay attempted to commit that crime, the State needed to prove that Mosay had “an intent to perform acts and attain a result which, if accomplished, would constitute such crime” and that he “d[id] acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that [he] formed that intent and would [have committed] the crime except for the intervention of another person or some other extraneous factor.” *See* WIS. STAT. § 939.32(3).

¶18 In this case, the disputed element of the second-degree sexual assault charge was whether Mosay had sexual intercourse with Sandra. At trial, Sandra expressly testified that Mosay had penis-to-vagina intercourse with her. However, the DNA evidence—specifically, the lack of any conclusive evidence showing that Mosay’s DNA was present on the swabs taken from Sandra’s genitalia—provided reasonable grounds for the jury to conclude that a completed sexual assault did not occur. As such, there were reasonable grounds for the jury to acquit Mosay of the second-degree sexual assault charge.

¶19 On the other hand, the evidence also provided reasonable grounds for the jury to convict Mosay of attempted second-degree sexual assault of an unconscious victim. The jury could have believed Sandra’s testimony about Mosay’s actions, in part, but concluded, based on Sandra’s consumption of drugs and alcohol that night and the DNA evidence from the genital swabs, that Sandra’s recollection of the events was not entirely accurate. Nevertheless, the jury could have reasonably concluded that the presence of Mosay’s DNA on the waistband of Sandra’s sweatpants, together with Sandra’s testimony, showed that Mosay

attempted to sexually assault Sandra. More specifically, based on the evidence, the jury could have reasonably concluded that Mosay removed Sandra's sweatpants before getting on top of Sandra and thrusting, even if the jury did not believe that intercourse actually took place. Consequently, there were reasonable grounds for the jury to conclude that Mosay performed an act toward the commission of the crime of second-degree sexual assault of an unconscious victim which demonstrated unequivocally that he had formed the intent to commit that crime and would have done so but for the intervention of an extraneous factor—i.e., Sandra waking up. *See id.*

¶20 Mosay asserts that given Sandra's "undeniably clear and graphic [statements] regarding the issue of vaginal penetration" and his own denial of any sexual contact, the jury was presented with a binary choice—"[i]t was either a completed act, or it did not happen." We agree with the State, however, that Mosay's argument in this regard "presents a false choice that is inconsistent with the complexity of the evidence before the jury."

¶21 The jury was instructed "to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole." Moreover, it is well established that a jury may believe part of a witness's testimony and disbelieve another part of the same witness's testimony. *See State v. Saunders*, 196 Wis. 2d 45, 53-54, 538 N.W.2d 546 (Ct. App. 1995). In this case, the jury could reasonably conclude that neither Sandra nor Mosay had testified to a completely accurate version of what occurred on the night in question, but that Sandra had testified truthfully as to her recollection of what happened that night. Given the DNA evidence on Sandra's sweatpants, for which there was no evidence of an innocent explanation, and Sandra's consistent testimony that she woke up to Mosay thrusting on top of her, there were reasonable grounds for the

jury to conclude that Mosay attempted to sexually assault Sandra, but that his attempt was thwarted when Sandra woke up.

¶22 Mosay also argues that “[t]here was no evidence that due to controlled substances, [Sandra] could not accurately report the alleged assault after she woke up to Mosay thrusting inside of her.” However, Sandra specifically testified at trial that she had consumed alcohol, marijuana, and Valium prior to the assault. After she arrived at the hospital, a preliminary breath test showed an alcohol concentration of 0.121. Sandra’s blood and urine samples confirmed that alcohol, marijuana, and benzodiazepines were present in her system. Additionally, a toxicologist testified that the alcohol and benzodiazepines would have had an “additive effect” when combined. Given this evidence—and also considering the DNA evidence from Sandra’s sweatpants and the lack of conclusive DNA evidence from the genital swabs—the jury could reasonably conclude that Sandra did not accurately remember the assault due to the alcohol and substances she had consumed and that, contrary to Sandra’s testimony, only an attempted assault occurred.³

¶23 Finally, Mosay relies on *Ross v. State*, 61 Wis. 2d 160, 211 N.W.2d 827 (1973), to support his claim that the circuit court erred by instructing the jury on attempted second-degree sexual assault of an unconscious victim. In *Ross*, the defendant challenged as unconstitutional the standard that Wisconsin courts use when determining whether there is sufficient evidence to instruct a jury on a

³ The jurors were instructed that, in weighing the evidence, they could “take into account matters of [their] common knowledge and [their] observations and experience in the affairs of life.” See WIS JI—CRIMINAL 195. The fact that alcohol and drugs can affect a person’s ability to accurately remember events is a topic within jurors’ common knowledge and experience.

lesser-included offense. *Id.* at 169. The defendant argued that the standard violated due process because it required the circuit court to weigh the evidence and therefore invaded the province of the jury. *Id.* In rejecting this argument, our supreme court explained:

It apparently is the contention of the defendant that, if there is an iota of evidence to support the lesser[-]included offense, that offense must be submitted even though, in the judgment of the trial judge either prior to the verdict or after it, to so view the evidence would be completely unreasonable. We cannot conclude that due process requires the giving of instructions that are unreasonable in light of the facts elicited at trial.

To give an instruction on a lesser[-]included offense when the commission of that lesser[-]included offense is not reasonably shown by the evidence is no favor to a defendant. The inclusion of a doubtful lesser[-]included offense is likely to result in a jury's compromise to the detriment of the defendant. Numerous cases arise in which the proper alternative for the jury is either the conviction on the major crime or a complete acquittal. To superfluously add to the verdict a lesser[-]included offense may well in some cases result in the defendant being found guilty of that offense when a verdict of not guilty should have been returned.

Id. at 170.

¶24 Contrary to Mosay's argument, **Ross** does not support a conclusion that the circuit court erred by instructing the jury on the lesser-included offense of attempted second-degree sexual assault of an unconscious victim under the circumstances of this case. As we have already explained, the evidence introduced at trial satisfied the applicable standard, as it provided reasonable grounds for the jury to acquit Mosay of second-degree sexual assault of an unconscious victim but convict him of attempted second-degree sexual assault of an unconscious victim. To the extent Mosay means to argue that the State presented only "an iota of

evidence to support the lesser[-]included offense,” see *id.*, we reject that contention, for the reasons set forth above.

¶25 Because we conclude that the circuit court did not err by instructing the jury on attempted second-degree sexual assault of an unconscious victim, we affirm Mosay’s judgment of conviction.

By the Court.—Judgment affirmed.

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

