COURT OF APPEALS
DECISION
DATED AND FILED

February 25, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0463

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRUCE A. RUMAGE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: EMMANUEL VUVUNAS, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Bruce A. Rumage appeals from an order denying his § 974.06, STATS., motion challenging his 1992 convictions for two counts of second-degree sexual assault[1] contrary to § 940.225(2), STATS., 1989-90, on the

[1] Rumage was also convicted of misdemeanor battery. That conviction is not challenged in this appeal.

grounds that the charges were duplicitous or deprived him of his right to a unanimous jury verdict. We disagree and affirm.

Count 2 of the amended information alleged sexual intercourse with the victim by use of force (vaginal) and Count 3 alleged sexual intercourse "penal[sic]/oral" by use of force. The evidence adduced at trial indicated that Rumage attacked the victim in his apartment in February 1990. He committed an act of forcible penis-vagina intercourse, urinated in her mouth, committed another act of forcible penis-vagina intercourse and then an act of oral (mouth-vagina) intercourse. Rumage then took the victim to a friend's house. Count 2's vaginal intercourse charge encompassed three acts: two acts of penis-vagina intercourse and one act of mouth-vagina intercourse. Count 3 encompassed the penis-mouth act of urination.

At the close of the evidence, the parties and the court discussed presentation of the charges to the jury and the verdict forms in light of the two counts charged. Count 2 of the information alleged vaginal intercourse; Count 3 of the information was amended to reflect that it charged oral intercourse (which the parties agreed referred to the urination incident). The jury was advised that Count 2 referred to "sexual intercourse, to-wit: vaginal" and that Count 3 referred to "sexual intercourse, to-wit: penile oral." The prosecutor reminded the jurors during closing argument that the first sexual assault count (Count 2) referred to vaginal intercourse and the second count (Count 3) referred to penile/oral intercourse which occurred when Rumage urinated into the victim's mouth. When the trial court reviewed the verdict forms with the jury, it stated that Count 2 referred to vaginal intercourse. When it referred to the verdict form for Count 3, the court did not highlight that the charge related to oral intercourse. The verdict forms themselves did not describe the type of intercourse charged.

Rumage never filed a RULE 809.30, STATS., appeal from his convictions. In May 1996, Rumage filed a § 974.06, STATS., motion raising the duplicity/jury unanimity claim and alleging that postconviction counsel was ineffective for failing to preserve this claim.[2] The trial court denied the motion. Rumage appeals.

Preliminarily, we note that Rumage's failure to raise the duplicity/jury unanimity issue on direct appeal does not bar its presentation in a § 974.06, STATS., motion. Where a direct appeal is not taken, a defendant may raise an alleged error of constitutional dimension in a § 974.06 motion. *See* ***State v. Escalona-Naranjo,*** 185 Wis.2d 168, 183-84, 517 N.W.2d 157, 163 (1994).

Ineffectiveness of counsel occurs when counsel performs deficiently and the deficient performance prejudices the defendant. *See* ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984); *see also* ***State v. Pitsch,*** 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). However, we need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. *See* ***State v. Moats,*** 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990). Whether counsel's performance prejudiced the defendant is a question of law which we review de novo. *See* ***id.*** Rumage would have been prejudiced only if this case actually presents a duplicity/unanimity problem.

Duplicity is the improper joining in a single count of two or more separate criminal offenses. *See* ***State v. Lomagro,*** 113 Wis.2d 582, 586, 335 N.W.2d 583, 587 (1983). One of the purposes of the prohibition against

[2] Rumage's postconviction counsel filed a postconviction motion in March 1993 which did not include this claim. The motion was denied and Rumage never brought an appeal from it and the judgment of conviction.

duplicitous charging is to guarantee jury unanimity. *See* ***id.*** at 587, 335 N.W.2d at 587. A defendant's right to a jury trial includes the right to a unanimous jury verdict. *See* ***id.*** at 590, 335 N.W.2d at 588-89. Unanimity requires that each juror agree that the defendant committed a specific act prohibited by law. *See* ***State v. Thomas,*** 161 Wis.2d 616, 632, 468 N.W.2d 729, 735 (Ct. App. 1991). Rumage argues that his right to a unanimous jury was compromised by the submission of two counts of sexual assault to the jury when there was proof at trial of four acts of various forms of intercourse.

"The first step in determining whether a charge is duplicitous is to examine its factual allegations to determine whether it states more than one offense." ***Lomagro***, 113 Wis.2d at 587, 335 N.W.2d at 587. "[A]cts which alone constitute separately chargeable offenses, 'when committed by the same person at substantially the same time and relating to one continued transaction, may be coupled in one count as constituting but one offense' without violating the rule against duplicity." ***Id.*** (quoted source omitted). If the defendant's conduct in committing the separate offenses may be viewed as one continuing offense, the State has discretion to charge "'one continuous offense or a single offense or series of single offenses.'" ***Id.*** (quoted source omitted).

Here, there is no basis for disputing that the four acts of intercourse (three involving the victim's vagina and one involving the victim's mouth) were committed by Rumage in the course of one continuing transaction. Therefore, under ***Lomagro***, there was no duplicity problem in charging the acts in two counts rather than four separate counts. By virtue of the amended information and the court's description of the charges and instructions to the jury, it was clear to the jury that Count 3 referred to the act of urinating in the victim's mouth. Therefore,

we turn to whether the joining in Count 2 of three acts of intercourse involving the victim's vagina presented a unanimity problem.

Where there is no conceptual distinction among the acts which constitute the charged crime, the jury need not agree as to the precise acts committed by the defendant if any one of those acts constitutes the crime charged. *See* ***id.*** at 593-94, 335 N.W.2d at 590. Here, each of the two acts of penis-vagina intercourse and the one act of mouth-vagina intercourse constituted sexual intercourse for purposes of the sexual assault statute.[3] There is no conceptual distinction among the various types of vaginal intercourse. *See* ***id.*** "'Unanimity is required only with respect to the ultimate issue of the defendant's guilt or innocence of the crime charged.'" ***Id.*** at 595-96, 335 N.W.2d at 591 (quoted source omitted). The jury need not have agreed on the type of intercourse Rumage forced upon the victim in order to convict him on Count 2.

"In conclusion, we hold that the sexual assault [charged in Count 2] in this case can be characterized as one continuing criminal episode and properly chargeable as one offense. Under these circumstances, even though evidence of different acts was introduced at trial, the jury did not have to be unanimous as to which specific act the defendant committed in order to convict the defendant, since the acts were conceptually similar." ***Id.*** at 598, 335 N.W.2d at 592.

Rumage relies upon ***State v. Marcum,*** 166 Wis.2d 908, 480 N.W.2d 545 (Ct. App. 1992). In ***Marcum,*** we reversed the defendant's conviction on unanimity grounds because it was impossible to discern from the record which of

[3] Section 940.225(5)(c), STATS., 1989-90, defines sexual intercourse as vulvar penetration as well as cunnilingus and fellatio.

the several acts of sexual assault led to a conviction in light of the jury's acquittal of the defendant on two of the counts. *See* ***id.*** at 919, 480 N.W.2d at 551. ***Marcum*** is distinguishable, primarily because Rumage was not acquitted of any counts. Additionally, there is no likelihood of jury confusion regarding the charges in Rumage's case. The difference between the two counts was clarified for the jury on several occasions.

Having held that the charging of the sexual assaults did not present a duplicity or unanimity problem, we conclude that counsel was not ineffective for failing to raise this claim. We also reject Rumage's request for a new trial because it is premised on previously rejected claims of error. A final catch-all plea for discretionary reversal based on the cumulative effect of non-errors cannot succeed. *See* ***State v. Marhal***, 172 Wis.2d 491, 507, 493 N.W.2d 758, 766 (Ct. App. 1992).

By the Court.—Order affirmed.

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