COURT OF APPEALS
DECISION
DATED AND FILED

May 5, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1451-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID P. BAKER,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. David P. Baker appeals from judgments convicting him of attempted third-degree sexual assault, misdemeanor exposing genitals to a child and disorderly conduct. Baker confines his appeal to a challenge to the attempted third-degree sexual assault conviction. Because we conclude that the evidence is sufficient to support the jury's verdict, we affirm.

On appeal, Baker argues that the evidence was insufficient to convict him of attempted third-degree sexual assault. The charges arose out of an incident involving a then seventeen-year-old male customer of Baker's tanning salon who refused Baker's demands for sex.

Upon a challenge to the sufficiency of the evidence to support a jury's guilty verdict, we may not substitute our judgment for that of the jury "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force" that no reasonable jury "could have found guilt beyond a reasonable doubt." ***State v. Poellinger,*** 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990). We will uphold the verdict if any possibility exists that the jury could have drawn the inference of guilt from the evidence. *See* ***id.*** at 507, 451 N.W.2d at 758. It is the jury's province to fairly resolve conflicts in the testimony, weigh the evidence and draw reasonable inferences from the facts. *See* ***id.*** at 506, 451 N.W.2d at 757. If more than one inference can be drawn from the evidence, the inference which supports the jury's finding must be followed unless the testimony was incredible as a matter of law. *See* ***State v. Witkowski,*** 143 Wis.2d 216, 223, 420 N.W.2d 420, 423 (Ct. App. 1988) (quoted source omitted).

Baker was charged under §§ 940.225(3) and 939.32, STATS., with attempted third-degree sexual assault, sexual intercourse[1] without consent.

> An attempt to commit a crime requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that the actor does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that the actor formed that intent and would commit the

[1] Intercourse includes the mouth-penis contact attempted in this case. *See* § 940.225(5)(c), STATS.

> crime except for the intervention of another person or some other extraneous factor.

Section 939.32(3). "Unequivocally" means that "no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances." WISCONSIN J I—CRIMINAL 580.

The State was required to prove that Baker intended to commit third-degree sexual assault and did acts which demonstrated unequivocally, under all the circumstances, that he intended to and would have committed third-degree sexual assault except for the intervention of another person or some other extraneous factor. *See* § 939.32(3), STATS.; *see also* WIS J I—CRIMINAL 580.

We turn to the evidence adduced at trial. The victim testified that when he arrived for his tanning session, Baker was at the front counter discussing with a female customer a sexual encounter from the previous evening. Baker then turned to the victim and said that now that the victim knew Baker was bisexual would the victim "ever be interested in doing anything with" Baker. The victim emphatically responded, "No." Baker then followed the victim to his tanning booth and stood in the doorway. Baker offered to oil down the victim. The victim declined. Baker then touted the benefits of sexual encounters with a man. The victim declined and tried to close the tanning booth door. Baker's foot was in the door and the door popped back open. Baker got down on his knees in front of the victim in the booth, which the victim described as "close quarters." The victim backed away and bumped into a plastic chair, which he tried to move so that he could back up further.

Baker then knelt in front of the victim at a distance of approximately six inches from the victim's crotch. Baker asked the victim to let him "do all the

work." Baker's hands were approximately three inches away from the victim's belt. It appeared that Baker was going to make a motion to take off the victim's belt. The victim pushed the plastic chair out of the way, backed up and told Baker he needed to leave. Baker got up slowly and moved away. As the victim moved toward the tanning booth door to shut it, Baker turned around and exposed himself to the victim. Baker then asked the victim to expose himself to Baker. The victim, who was "pretty hysterical," declined and asked Baker to leave. Baker finally left. The victim estimated that he expressed his lack of interest and consent to Baker at least fifteen to twenty times.

On cross-examination, the victim acknowledged giving a statement to police approximately two weeks after the incident. In the statement he described how Baker followed him to the tanning booth, cornered him in the booth and asked for sex. Baker never tried to grab the victim, never grabbed his belt, and did not threaten the victim to get him to engage in sexual conduct with Baker. The victim testified that Baker repeatedly asked for sex and the victim repeatedly declined. No one interrupted Baker and the victim in the booth. The victim testified that he did not think Baker made a motion to grab him, but the victim backed up because he felt very uncomfortable. The victim assumed Baker left the room because the victim turned him down repeatedly and forcefully.

On redirect examination, the victim testified that while kneeling in front of him, Baker put up his arms as if to grab the victim's belt. The victim affirmed that when he described the incident to the police and denied that Baker had touched him, he was describing the fact that Baker gestured for, but did not touch, his belt.

The police officer who took the victim's statement testified that the victim was very upset when he related the incident to the officer. The officer testified that the victim told him Baker reached for the victim's belt as if he were going to grab it.

Baker testified and denied that he followed the victim to the tanning booth and propositioned him for sex. In rebuttal, the victim's employer testified that the victim was very upset, red-faced and shaking when he arrived at work a few hours after his encounter with Baker. The victim told the employer that a man had exposed himself to him and that he had tried to get away from the man by backing away.

On appeal, Baker argues that there is insufficient evidence that he attempted to commit a third-degree sexual assault. He argues that the evidence shows that he attempted to convince the victim to have consensual sex; he did not attempt a sexual assault. Baker notes the victim testified that Baker never touched, grabbed or lunged at the victim.

We agree that the record contains some inconsistent testimony from the victim on the question of whether Baker reached for his belt while kneeling six inches in front of the victim's crotch. However, it was for the jury to resolve this inconsistency. The victim testified that Baker made a motion to reach for his belt after the victim had repeatedly and forcefully declined Baker's requests for sex. In gesturing toward the victim's belt from a position six inches from the victim's crotch after cornering the victim in a small tanning booth, the jury could infer that Baker went beyond his persistent demands for sex and demonstrated an intent to sexually assault the victim. A defendant's intent "may be inferred from the defendant's conduct, including his words and gestures taken in the context of the

circumstances." ***State v. Thiel,*** 183 Wis.2d 505, 541, 515 N.W.2d 847, 861 (1994) (quoted source omitted).

In order to prove attempt, the State had to prove that Baker committed acts toward the commission of the sexual assault which demonstrated unequivocally, under all the circumstances, that Baker would have committed the assault except for the intervention of another person or some other extraneous factor. *See* § 939.32(3), STATS.

Here, we conclude that the extraneous factor which led Baker to desist was the victim's resistance, backing into a corner and becoming hysterical. The victim's resistance can constitute an extraneous factor for purposes of the attempt statute. *See* ***Thiel,*** 183 Wis.2d at 541, 515 N.W.2d at 861-62 (victim's conduct in leaving scene of crime satisfied requirement of intervention in defendant's conduct); *cf.* ***State v. Wagner,*** 191 Wis.2d 322, 329, 528 N.W.2d 85, 88 (Ct. App. 1995) (victim's resistance to kidnapping is extraneous factor). We conclude that the evidence was sufficient to satisfy the attempt statute. *See* ***State v. Stewart,*** 143 Wis.2d 28, 41-42, 420 N.W.2d 44, 49-50 (1988).

By the Court.—Judgments affirmed.

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