COURT OF APPEALS
DECISION
DATED AND FILED

September 22, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2098-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICHOLAS D. DEKKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed.*

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

PER CURIAM. Nicholas D. Dekker appeals from a judgment convicting him of third-degree sexual assault and from an order denying his postconviction motion for a new trial or sentence modification. On appeal, Dekker claims that the evidence was insufficient to convict him, the conviction for

sexual assault was inconsistent with the acquittal for bail jumping and his sentence was excessive. We disagree and affirm.

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 trier of fact, acting reasonably, 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. *See* ***State v. Witkowski***, 143 Wis.2d 216, 223, 420 N.W.2d 420, 423 (Ct. App. 1988).

The victim testified that Dekker attended a party at her house. A few months before the party, Dekker and the victim had terminated a dating relationship. Dekker and the victim went to her bedroom where they began kissing. When Dekker lifted her shirt and touched her breasts, the victim objected. The victim also objected when Dekker inserted his finger into her vagina. Dekker then inserted his penis into the victim's vagina. The victim objected and struggled to push Dekker away. Dekker desisted and they left the bedroom. The victim testified that she was distraught afterward. The victim's emotional state was confirmed by other witnesses at trial.

Dekker testified that he had sexual contact and intercourse[1] with the victim at the party. He testified that the victim consented to all of the sexual activity until he inserted his penis. At that point she objected, and he immediately desisted and left the room. Dekker contends that he and the victim had consensual sexual contact and finger-vagina intercourse and that the penis-vagina intercourse ceased when the victim objected. From this, Dekker argues that there was insufficient evidence to convict him of third-degree sexual assault, which includes an element of lack of consent. *See* § 940.225(3), STATS.

We reject Dekker's challenge to the sufficiency of the evidence to convict him of third-degree sexual assault. The conflicts in the testimony regarding the victim's lack of consent and the time that she manifested that lack of consent were for the jury to resolve. Based upon the victim's testimony, a reasonable jury could, and did, find a lack of consent and Dekker's guilt beyond a reasonable doubt.

Dekker claims that a new trial is necessary due to inconsistent verdicts: the jury convicted him of sexual assault but acquitted him of a bail jumping charge[2] which was premised on commission of the sexual assault. In deciding Dekker's postconviction motion for a new trial, the circuit court noted that any inconsistency did not automatically require a new trial. The court denied Dekker's request for a new trial because the verdicts may have been the result of a jury compromise or a belief that Dekker did not intentionally violate the terms of

[1] Insertion of a finger or penis into the vagina constitutes intercourse. *See* § 940.225(5)(c), STATS.

[2] At the time of the sexual assault, Dekker was released on bond relating to a pending misdemeanor charge.

his bond, *see* WIS J I—CRIMINAL 1795 (intentional failure to comply with the terms of the bond is an element of bail jumping).

Dekker argues that the jury, having found him guilty of sexual assault, should also have found him guilty of bail jumping because the sexual assault violated the terms of his bond. Therefore, the jury must have been confused and a new trial is required. We disagree and conclude that the circuit court did not misuse its discretion in denying Dekker's request for a new trial. *See* ***State v. Delgado***, 223 Wis.2d 270, 272, 588 N.W.2d 1, 2 (1999) (decision on request for a new trial is discretionary with circuit court). Even if the verdicts were inconsistent, that inconsistency does not automatically require a new trial. *See* ***State v. Johnson***, 184 Wis.2d 324, 347-48, 516 N.W.2d 463, 471 (Ct. App. 1994); *see also* ***State v. Mills***, 62 Wis.2d 186, 191-92, 214 N.W.2d 456, 458-59 (1974) (discussion of inconsistent verdicts). The jury could have reasonably determined that Dekker did not intend to violate his bond when he committed the sexual assault.

Finally, Dekker complains that his sentence was a misuse of the court's discretion. The record does not support Dekker's claim. The court imposed a three-year sentence after considering the gravity of the offense, Dekker's character, his prior history of undesirable conduct and the fact that he had not accepted responsibility for his conduct, and the need to protect the public. These are proper considerations at sentencing. *See* ***State v. Paske***, 163 Wis.2d 52, 62, 471 N.W.2d 55, 59 (1991). The court noted that Dekker had twice appeared at the victim's place of employment, which the court characterized as demonstrating an abominable lack of sensitivity. The court considered the proper factors, its sentence was within statutory limitations and the sentence does not shock the

public conscience. *See* ***State v. Owen***, 202 Wis.2d 620, 645, 551 N.W.2d 50, 60 (Ct. App. 1996).

By the Court.—Judgment and order affirmed.

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