COURT OF APPEALS
DECISION
DATED AND FILED

September 30, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0144-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL L. KEARNEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

ROGGENSACK, J. Michael L. Kearney appeals from a judgment of conviction of kidnapping by deceit, contrary to § 940.31(1)(c), STATS. He claims the circuit court committed reversible error by prohibiting certain testimony of Dr. Michael Spierer, a clinical psychologist who testified for the defense.

Kearney claims that barring this testimony infringed upon his constitutional right to present a defense and warrants a new trial because the real controversy was not fully tried. Finally, Kearney claims that his conviction should be overturned because there was insufficient evidence of deceit, one of the elements of § 940.31(1)(c). Although it allowed much of the testimony of Spierer, the circuit court did not allow him to testify that Kearney's attack on the motel clerk was not sexually motivated. The circuit court also concluded that there was sufficient evidence of deceit, to warrant conviction. We conclude that the circuit court properly excluded Spierer's testimony relating to the motivation for the attack. We also conclude that there was sufficient evidence for a trier of fact to find deceit. Accordingly, we affirm.

BACKGROUND

Kearney battered and choked the night clerk of a Madison motel when the clerk came to his room, at his request, to fix the TV. Kearney pled no contest to substantial battery and false imprisonment. He was sentenced to eight years, consecutive, for each offense. Kearney does not challenge these convictions and sentences on appeal.

Kearney was also charged with kidnapping by deceit pursuant to § 940.31(1)(c), STATS. Kearney pled not guilty to that offense and was tried before the Dane County Circuit Court. Kearney stipulated to the existence of the first element of kidnapping by deceit, namely that he induced the clerk to come to his room. Kearney disputed the other two elements: (1) that he deceived the victim, and (2) that he intended to hold her "to service against … her will."

The State sought to prove that Kearney held the victim to service against her will by arguing that Kearney intended to have forced sexual contact

with her. It then sought to prove that Kearney deceived the victim by demonstrating that in requesting the clerk to come into his room, Kearney's intent was not to have the clerk fix the television, but to sexually assault her.

Kearney disputed the State's contentions by offering the testimony of Spierer. The circuit court allowed Spierer to testify that Kearney's profile was consistent with individuals who are severely paranoid, and that the tests he performed on Kearney revealed no evidence that Kearney suffered from any sexual psychopathology. However, the court refused to permit Spierer to testify that the attack on the clerk was not sexually motivated.[1]

At the close of the trial, the circuit court concluded that Kearney did deceive the clerk and that he was motivated by a desire to sexually assault her. The court based this conclusion on Kearney's attempts to tie up the motel clerk with twine he had brought into the motel room; his statements to the clerk not to scream because he did not intend to hurt her; his repeated attempts to gag her; the pornographic videos and materials in Kearney's possession at the time of the assault; and the camcorder he brought into the motel room. The court also noted the suicide note Kearney wrote to his mother that same day, describing himself as

[1] Specifically, the court sustained the State's objection to the following three questions:

1. "Was it your finding, based upon [Kearney's] history, the criminal complaint, and your clinical evaluation, that the attack was not sexually motivated?"

2. "Further on in your report, Doctor, you indicate that there was no evidence to suggest that he was sexually aroused during the assault or that he … initiated the assaultive behavior for any sexual purpose. Was that your finding?"

3. "My question is, did your testing confirm that the attack was not sexually motivated?"

a sexual pervert and a sexual predator. Kearney appeals from his conviction of violating § 940.31(1)(c), STATS.

DISCUSSION

Standard of Review.

Expert testimony is admissible if it helps the trier of fact to understand the evidence or to determine a fact in issue. *See* § 907.02, STATS. Determining whether expert testimony assists the fact finder is a discretionary decision of the circuit court. *See* ***State v. Pittman***, 174 Wis.2d 255, 268, 496 N.W.2d 74, 79 (1993). We will uphold a circuit court's discretionary decision "if the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach." ***State v. Keith***, 216 Wis.2d 61, 69, 573 N.W.2d 888, 892-93 (Ct. App. 1997), *review denied*, 217 Wis.2d 518, 580 N.W.2d 689 (1998). In considering whether the proper legal standard was applied, however, no deference is due. This court's function is to correct legal errors. *See* ***id.*** at 69, 573 N.W.2d at 893.

Additionally, whether a defendant's right to present a defense has been violated is a question of constitutional fact which we review *de novo*. *See* ***State v. Heft***, 185 Wis.2d 288, 296, 517 N.W.2d 494, 498 (1994).

And finally, in reviewing the sufficiency of the evidence to support a criminal conviction, we do not substitute our judgment for that of the trier of fact unless the evidence, viewed in the light most favorable to the State and the conviction, is so lacking in probative value and force that no reasonable trier of fact could have found guilt beyond a reasonable doubt. *See* ***State v. Steenberg***

Homes, Inc., 223 Wis.2d 511, 517, 589 N.W.2d 668, 671 (Ct. App. 1998), *review denied*, 225 Wis.2d 489, 594 N.W.2d 384 (1999) (citation omitted).

Expert Testimony.

In Wisconsin, the admissibility of expert opinion evidence is assessed in light of § 907.02, STATS. *See* ***Pittman***, 174 Wis.2d at 267, 496 N.W.2d at 79. That section allows expert testimony if it "assist[s] the trier of fact to understand the evidence or to determine a fact in issue." Section 907.02. Expert testimony does not assist the fact finder if it usurps the fact finder's role. *See* ***Pittman***, 174 Wis.2d at 267-68, 496 N.W.2d at 79. Whether expert testimony violates this standard is determined by examining the purpose for which the testimony is submitted and the effect of the testimony. *See* ***State v. Richardson***, 189 Wis.2d 418, 423, 525 N.W.2d 378, 380-81 (Ct. App. 1994).

Kearney argues it was error for the circuit court to bar Spierer's testimony that the attack on the motel clerk was not sexually motivated. Kearney claims that expert testimony is prohibited only when it is offered to show a defendant's capacity to form the requisite intent. He claims that Spierer's testimony does not specifically address Kearney's capacity to form intent; and therefore, it is admissible. We disagree.

In ***Richardson***, 189 Wis.2d at 421-22, 525 N.W.2d at 380, Richardson sought to present testimony from a psychologist describing the battered woman's syndrome to the jury. She also sought to present the expert's opinion about her state of mind before, during and after she stabbed her boyfriend, who had physically abused her for years. *See* ***id.*** at 422, 525 N.W.2d at 380. We concluded that it was error for the circuit court to exclude the psychologist's testimony about the battered woman's syndrome. *See* ***id.*** at 426, 525 N.W.2d at

382. We determined that an expert may describe the behavior of the complainant and give an opinion about whether this behavior is consistent with the behavior of other victims. *See* ***id.*** at 425-26, 525 N.W.2d at 381.

However, we held that an expert may not testify "about the battered person's actual beliefs at the time of the offense, about the reasonableness of those beliefs or about the person's state of mind before, during and after the criminal act." ***Id.*** at 426, 525 N.W.2d at 382. We reasoned that it was for the jury, not the expert, to determine what was going on in a defendant's mind at the time of the violent act. *See* ***id.*** at 429, 525 N.W.2d at 383. Moreover, the reasonableness of those beliefs was not a matter within an expert's scientific knowledge. *See* ***id.*** In disallowing the testimony, we stated "science has not yet produced the technology which allows experts to put themselves inside the person's head at the time an event took place." ***Id.*** at 430, 525 N.W.2d at 383. Therefore, we concluded it "was not competent testimony." ***Id.*** at 429, 525 N.W.2d at 383 (citing ***Steele v. State***, 97 Wis.2d 72, 95, 294 N.W.2d 2, 12-13 (1980).

As in ***Richardson***, the testimony of Spierer related to Kearney's intent. The State objected to, and the circuit court excluded, testimony opining what Kearney's motivation was for the attack. Spierer cannot testify about what was in Kearney's head before, during or after the attack because that testimony invades the province of the fact finder and it is outside of scientific expertise. Stated another way, the fact finder was as competent as Spierer to determine Kearney's specific motivation for the attack. Therefore, it was impermissible for Spierer to give an opinion about Kearney's motivation or intent. *See* ***id.*** at 430, 525 N.W.2d at 383. Because the testimony did not assist the trier of fact in understanding the evidence, the circuit court did not erroneously exercise its discretion when it excluded the testimony.

Constitutional Right.

Kearney also contends that the circuit court's exclusion of Spierer's testimony regarding whether the attack was sexually motivated, violated his constitutional right to present a defense. It is true that a defendant has a due process right to a fair opportunity to defend against the State's accusations. *See* ***State v. Evans***, 187 Wis.2d 66, 82, 522 N.W.2d 554, 560 (Ct. App. 1994) (citation omitted). The right to present evidence "is rooted in the Confrontation and Compulsory Process Clauses of the United States and Wisconsin Constitutions." ***Id.*** at 82-83, 522 N.W.2d at 560 (citation omitted). While the rights granted by the Confrontation and Compulsory Process Clauses are fundamental and essential to achieving the constitutional objective of a fair trial, *see* ***Chambers v. Mississippi***, 410 U.S. 284, 294 (1973), there is no constitutional right to present incompetent evidence. *See* ***State v. Morgan***, 195 Wis.2d 388, 430, 536 N.W.2d 425, 441 (Ct. App. 1995).

We have already determined above that the evidence regarding the motivation for the attack was incompetent evidence which did not assist the fact finder in its task. Therefore, it was properly excluded. Accordingly, Kearney had no constitutional right to present the evidence and his contention that he was denied an opportunity to defend himself by its exclusion is without merit.

Sufficiency of Evidence.

The essential elements of kidnapping by deceit are defined in § 940.31(1)(c), STATS., as (1) an exercise of deceit; (2) that causes another person to be induced by this deceit to go from one place to another; and (3) evinces an intent to cause that person to be secretly confined or imprisoned, carried out of the

state, or held to service against his or her will. *See* ***State v. Dalton***, 98 Wis.2d 725, 737-38, 298 N.W.2d 398, 403 (Ct. App. 1980); § 940.31(1)(c).

Kearney does not challenge the evidence of any of the elements of the kidnapping charge except deceit. Kearney claims that his request for the motel clerk to come into his room to fix a malfunctioning television was not deceitful because the television was not operating properly and it was "perfectly reasonable" for Kearney to seek assistance from the clerk. We disagree.

In ***Dalton***, 98 Wis.2d at 740, 298 N.W.2d at 404-05, we declined to interpret deceit under the statute as requiring proof of express or implied misrepresentations. That is, deceit could occur when a defendant made a statement that was factually correct, but was used to further defendant's illegal purposes. In doing so, we reasoned that "[l]imiting proof of deceit to express or implied misrepresentations would offer no protection to the victim who was artfully deceived by a person who lured and trapped his victim without resort to misrepresentation." ***Id.*** at 740, 298 N.W.2d at 405.

The evidence demonstrates that Kearney possessed commercial and private pornographic videos, several pornographic magazines, a number of pornographic photographs he had taken and a camcorder. He also brought a quantity of twine into the motel room, with which he tried to tie up the motel clerk. He repeatedly told the clerk not to scream because he did not intend to hurt her, although he struck her head against the floor several times and cut her arm with a sharp object. He twice attempted to gag her. Subsequent to the attack, Kearney wrote a suicide note to his mother in which he described himself as a sexual pervert and a sexual predator.

The combination of all this evidence, viewed in the light most favorable to the State and the conviction, is not "so lacking in probative value and force that no reasonable trier of fact could have found guilt beyond a reasonable doubt." *See* ***Steenberg Homes,*** 223 Wis.2d at 517, 589 N.W.2d at 671. Under ***Dalton***, Kearney's conduct was sufficient to constitute kidnapping by deceit, pursuant to § 940.31(1)(c), STATS., irrespective of whether Kearney's statements to the clerk are express or implied misrepresentations. Therefore, a reasonable trier of fact could find that the deceit was asking the clerk to come to his room to fix the television, when he actually wanted her there so he would have the opportunity to have sexual contact with her. Accordingly, we affirm the circuit court's finding of deceit because the evidence was sufficient to satisfy the requirements of § 940.31(1)(c).

New Trial.

Kearney also argues that he is entitled to a new trial in the interest of justice because the real controversy has not been fully tried. *See* § 752.35, STATS. He contends that the trier of fact was not given the opportunity to hear all of Spierer's testimony regarding his motivation at the time of the attack, and the exclusion of such evidence was error. Therefore, he claims he is entitled to a new trial with the inclusion of the excluded evidence.

We have already rejected Kearney's argument that the testimony was improperly excluded. Accordingly, we conclude that the real controversy has been fully tried, and we decline to exercise our power of discretionary reversal.

CONCLUSION

We conclude that the circuit court properly excluded Spierer's testimony relating to the motivation for the attack. We also conclude that there was sufficient evidence for a trier of fact to find deceit. Accordingly, we affirm.

By the Court.—Judgment affirmed.

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