COURT OF APPEALS
DECISION
DATED AND FILED

February 15, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1957-CR **Cir. Ct. No. 2012CF1130**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAVIER GARCIA,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Kenosha County: MARY KAY WAGNER, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Javier Garcia appeals from judgments convicting him of first-degree intentional homicide, aggravated battery (great bodily harm), attempted first-degree sexual assault, and false imprisonment in connection with the August 2012 death of L.M. On appeal, Garcia challenges the sufficiency of

the evidence to convict him of first-degree sexual assault[1] and whether the circuit court erred in barring his DNA expert from testifying at trial. We conclude that the evidence was sufficient, and we affirm the circuit court's evidentiary ruling. We affirm the judgments of conviction.

¶2 Garcia argues that the evidence was not sufficient to convict him of attempted first-degree sexual assault. Garcia's challenge to the evidence relies upon the absence of semen or male DNA in the victim's cervical, vaginal, and rectal swabs, or any proof as to how the victim came to be unclothed from the waist down, the condition in which her body was found the day after she disappeared.

¶3 "[W]e will not overturn a jury's verdict '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. Beamon***, 2013 WI 47, ¶21, 347 Wis. 2d 559, 830 N.W.2d 681 (citation omitted). Garcia has the burden to establish that the evidence "could not reasonably have supported a finding of guilt." ***Id.*** When the evidence supports more than one inference, we must accept the inference drawn by the jury. ***State v. Smith***, 2012 WI 91, ¶31, 342 Wis. 2d 710, 817 N.W.2d 410.

¶4 First-degree sexual assault requires that Garcia had sexual contact with the victim, the victim did not consent to the sexual contact, and Garcia caused great bodily harm to the victim. WIS JI—CRIMINAL 1201. A defendant is guilty of attempting this crime if the defendant committed acts towards the commission

[1] Garcia does not challenge any other aspect of the jury's verdict.

of the crime and the acts demonstrated unequivocally, under all of the circumstances, that the defendant intended to and would have committed the first-degree sexual assault except for the intervention of another person or some extraneous factor. WIS JI—CRIMINAL 580.

¶5 The following evidence was adduced at trial. The victim and Garcia had a prior sexual encounter. Garcia wanted a relationship with the victim, but the victim was in a relationship with someone else and did not want a relationship with Garcia. It is undisputed that Garcia and the victim were together the evening before she disappeared. The victim was found unclothed from the waist down, her remaining clothing was in disarray, and her waist-down clothing was found some thirty feet from her body. There was evidence of a struggle in the area around the body. The victim sustained great bodily harm[2] in the form of multiple blunt force injuries; cause of death was strangulation. Garcia had marks and injuries on his wrist and forehead which he attributed to a fall while descending stairs.[3]

¶6 Garcia's roommate testified that Garcia seemed tense the evening the victim disappeared, and Garcia said he had "messed up." The roommate observed Garcia soaking his white tennis shoes in bleach water.

¶7 Certain of the DNA evidence suggested Garcia's guilt. Blood at the crime scene matched the victim, and female DNA samples were found in blood in Garcia's vehicle from which the victim could not be excluded as the source. DNA

[2] Garcia does not challenge the jury's verdict that he battered the victim causing great bodily harm.

[3] In light of all of the evidence, the jury was not required to accept this explanation for Garcia's injuries.

evidence from under the victim's fingernails could have come from Garcia. From Garcia's residence, investigators retrieved tennis shoes and a blood-stained white hat. After DNA testing and statistical analysis, the scientist who tested and analyzed the shoes opined that while he could not conclude that the female DNA profile on the shoes was definitely the victim's, there was a one in 408 million chance that the DNA belonged to an individual other than the victim. Blood found on the white hat contained a female DNA profile that matched the victim. Other DNA evidence was inconclusive or excluded Garcia.

¶8 From all of the foregoing evidence, the jury could have reasonably inferred that Garcia attempted a first-degree sexual assault of the victim.[4] Garcia was with the victim the night before she died, Garcia had an unreciprocated interest in a relationship with the victim (which suggests lack of consent by the victim), the victim suffered great bodily harm, and the victim was found unclothed from the waist down, which the jury could have reasonably inferred occurred in the course of an attempted first-degree sexual assault. The evidence was sufficient to convict Garcia of attempted first-degree sexual assault.

¶9 Garcia next complains that the circuit court erred when it declined to permit Dr. Mark Perlin to testify. The State crime laboratory isolated minor male DNA profiles; these profiles excluded Garcia. The crime laboratory did not submit the profiles to the national DNA database because the profiles did not qualify under the guidelines governing submission of DNA profiles to the

[4] Even if there were other theories about why the clothing from the lower half of the victim's body was found at a distance from her body, including that Garcia did not attempt a first-degree sexual assault of the victim, the jury was not required to accept these theories or draw inferences favorable to Garcia. ***State v. Smith***, 2012 WI 91, ¶31, 342 Wis. 2d 710, 817 N.W.2d 410.

database. Garcia's expert, Perlin, used proprietary technology to analyze these profiles. Garcia moved the circuit court to compel the state crime laboratory to submit to the DNA database for comparison and possible identification the profiles as analyzed by Perlin (hereafter Perlin's samples).

¶10 The State opposed Garcia's motion to compel. The State argued that there was no basis to compel the crime laboratory to submit Perlin's samples because the samples had been subjected to an analysis not used by the laboratory to analyze DNA evidence. In addition, the State argued that Perlin's proprietary technology had not been scientifically validated. The State also moved to either limit or exclude Perlin's testimony.

¶11 At a hearing on Garcia's motion, the State offered proof that the database will not accept DNA profiles with minor trace evidence components, a defining characteristic of Perlin's samples. In addition, Perlin's proprietary technology had not been accepted for creating profiles that meet the DNA database's national quality assurance standards.

¶12 The circuit court denied Garcia's motion to compel the crime laboratory to submit Perlin's samples to the DNA database. The State satisfied the court that Perlin's samples did not comply with the standards for DNA submitted to the database. The court also precluded Perlin's testimony at trial because his proprietary analysis was neither accepted nor used by the crime laboratory.

¶13 At a subsequent hearing, Garcia requested additional time to decide whether he would offer Perlin's testimony at trial. At a later hearing, Garcia confirmed that he was not going to call Perlin because the circuit court had precluded submission of Perlin's DNA samples to the database such that there would be no point to his testimony. The court would not permit Perlin to testify

about any other topic. Garcia stated that given the unidentified minor male trace components of DNA in the case, he intended to argue that an unknown person attempted the first-degree sexual assault.

¶14 On appeal, Garcia argues that the circuit court should have allowed Perlin to testify that more could have been done to identify the minor male component DNA profiles in the case.

¶15 The State counters that Garcia forfeited this appellate challenge when he decided not to call Perlin to testify at trial. ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612 (a party forfeits a claim by not making the claim in the circuit court). The totality of the record does not support the State's forfeiture argument. The circuit court ruled that the minor male DNA profile samples could not be submitted to the DNA database because the samples did not meet the submissions standards, and Perlin's proprietary technology was not used by the crime laboratory. Without the ability to testify about his DNA analysis using the proprietary technology, Perlin had no relevant testimony to offer. Recognizing this state of affairs by foregoing Perlin's testimony did not forfeit Garcia's appellate challenge to the circuit court's evidentiary ruling. We turn to the merits of that ruling.

¶16 Decisions to admit or exclude evidence are within the circuit court's discretion, and we will affirm if the circuit court properly exercised its discretion. ***State v. Hunt***, 2014 WI 102, ¶20, 360 Wis. 2d 576, 851 N.W.2d 434. A circuit court misuses its discretion when "it applies an improper legal standard or makes a decision not reasonably supported by the facts of record." ***Id.*** (citation omitted).

¶17 Garcia does not challenge the circuit court's underlying ruling denying his motion to compel the crime laboratory to submit Perlin's samples to the database. This was the finding that led the court to exclude Perlin's testimony.

¶18 Garcia does not offer any rationale for Perlin's testimony that rests upon other than the proprietary DNA analysis technology he applied to samples that could not be submitted to the database.[5] At the January 13, 2014 motion hearing, Garcia made clear to the court that he would only call Perlin to testify if he could testify about his proprietary technology and the DNA evidence he analyzed using that technology. Garcia stated that he would not call Perlin for any other purpose. It is apparent from the record that Perlin had no relevant evidence to offer once the circuit court determined that his samples could not be submitted to the database.

¶19 Based on the record, we conclude that the circuit court did not misuse its discretion when it precluded Perlin from testifying.

By the Court.—Judgments affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

[5] In his reply brief, Garcia suggests that Perlin could have been called to testify "that he checked over all the Crime Lab's work, pursuant to traditional [i.e., nonproprietary] methods, and these were his findings." The record does not substantiate that Garcia made this argument to the circuit court. Therefore, we do not consider it. ***State v. Schulpius***, 2006 WI 1, ¶26, 287 Wis. 2d 44, 707 N.W.2d 495 (we do not decide issues raised for the first time on appeal).