COURT OF APPEALS
DECISION
DATED AND FILED

March 8, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0757 **Cir. Ct. No. 00CF000001**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDY A. SCHILL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: PETER J. NAZE, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Randy Schill appeals an order denying his WIS. STAT. § 974.06[1] postconviction motion in which he alleged ineffective assistance

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

of postconviction counsel based on counsel's failure to raise three issues. Schill's initial postconviction motion and appeal challenged his convictions for second-degree sexual assault of an unconscious person, kidnapping and battery. In the present motion, he argues that his postconviction counsel was ineffective for not raising three additional issues: (1) the three charges are multiplicitous; (2) his trial counsel was ineffective for not arguing multiplicity, for not objecting to the State's theory that Schill drugged the victim, and for failing to request a jury instruction on the State's theory of drugging; and (3) he was denied his due process rights because the State presented two different theories to prove the kidnapping charge and it is unclear which one the jury relied on.[2] The trial court denied the motion without a hearing. We affirm the trial court's decision.

¶2 All three charges arise from incidents that occurred December 5, 1999. Schill and his date, Debra H., went to a comedy club, an area bar and a casino. Debra testified that after she drank coffee Schill provided in the casino, she experienced a severe headache and pain when she attempted to keep her eyes open. Other than vague flashes of memory, her next complete memory was being naked in bed with Schill on her hands and knees. She attempted to crawl away from him, but Schill pulled her back and told her he was not finished yet. She testified that things she looked at appeared to have an aura around them, her head was pounding and her body "felt like [she] had been hit by a truck." She felt that she could not move. Schill eventually took Debra home where she discovered

[2] The postconviction motion raised other issues that are not pursued on appeal. Schill also raises additional issues for the first time in his reply brief. Those issues will not be considered. *See* ***Northwest Wholesale Lumber v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995).

marks on her body with a particularly severe bite on her left breast that resulted in bleeding.

¶3 Schill testified that he had consensual intercourse with Debra. He denied getting coffee for her at the casino and denied drugging her.

¶4 In his closing argument, the prosecutor argued that Schill put some kind of drug in Debra's coffee that affected her perception and consciousness. He argued that confining Debra on the bed, grabbing her by the hips and pulling her back when she attempted to crawl away constituted force for the purpose of the kidnapping charge. The injury to Debra's left breast constituted battery.

¶5 The trial court properly denied Schill's WIS. STAT. § 974.06 motion without a hearing because the facts alleged, even if proved, would not entitle Schill to relief, and some of his issues are merely undeveloped conclusory allegations. *See* ***State v. Bentley***, 102 Wis. 2d 303, 309-11, 548 N.W.2d 50 (1996).

¶6 The three charges are not multiplicitous because each charge requires proof of an element not found in the other two charges and nothing in the legislative history suggests the legislature intended to prohibit multiple punishments for these offenses. *See* ***State v. Lechner***, 217 Wis. 2d 392, 402-03, 576 N.W.2d 912 (1998). To establish sexual assault, the State was required to prove sexual contact with an unconscious person. The kidnapping charge includes an element of seizing or confining another by force or threat of imminent force. The battery charge requires proof of infliction of pain. Because none of these crimes is a lesser-included offense of the other, the court presumes that the legislature intended to permit cumulative punishments for the three offenses. ***Id.*** at 407.

¶7 Schill argues that battery is a component of sexual assault, citing ***State v. Bonds***, 165 Wis. 2d 27, 477 N.W.2d 265 (1991). In ***Bonds***, the question was whether a defendant's use of force in making sexual contact with his victim by forcibly grabbing her nipple and then squeezing and pulling it constituted second-degree sexual assault. The sexual assault in ***Bonds*** was based on use of force while making sexual contact. It is not applicable here because the sexual assault was based on Debra being unconscious.

¶8 Schill's motion does not establish any basis for finding his trial counsel ineffective. Counsel cannot be faulted for his failure to argue that the charges were multiplicitous, because that argument has no merit. ***State v. Cummings***, 199 Wis. 2d 721, 748 n.10, 546 N.W.2d 406 (1996). Schill's other arguments, that his trial counsel should have challenged the admissibility of the State's drugging allegation and should have requested a jury instruction lack specificity. Schill does not identify any legitimate basis for objecting to the State's drugging theory. The prosecutor asked the jury to infer from the victim's symptoms that she was drugged, causing her to become unconscious. The prosecutor is entitled to ask the jury to make that determination because it is supported by adequate circumstantial evidence. *See* ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979).

¶9 Schill's argument that his trial counsel should have requested a jury instruction also lacks merit. At his initial postconviction hearing, Schill presented evidence that Debra's urine tested negative for one particular drug, Rohypnol. At that time, he argued that his trial counsel was ineffective for failing to introduce that evidence at trial. We rejected that argument, noting that the negative urinalysis could have been countered with evidence regarding numerous other substances that may have been administered, as well as an explanation why

Rohypnol may have gone undetected. In his present motion, Schill argues that the court should have given a jury instruction regarding the negative Rohypnol test. In the absence of any evidence regarding the negative urinalysis, there would be no basis for the court to give that instruction. To the extent Schill again argues that counsel should have presented that evidence, he may not reassert an argument previously rejected by this court. *See* ***State v. Witkowski,*** 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991)

¶10 Finally, Schill's motion does not establish any due process violation based on the State presenting two theories to support the kidnapping charge. The State focused on Schill's restraining Debra as she attempted to crawl away. During deliberations, the jury inquired whether drugging someone is considered force and taking away consent. The court answered that the jury had to determine the answer to its question based on the instructions given. Schill contends that it is unclear which of the two alternate theories of force the jury relied on.

¶11 Jury unanimity in determining the mode of committing an offense is not required. *See* ***State v. Crowley***, 143 Wis. 2d 324, 333, 422 N.W.2d 847 (1988). When it is unclear which of two modes of proof of an element the jury accepted, the verdict must be upheld if the State presented sufficient evidence to support both modes of proof. ***Id.*** at 335. Either the State's theory that pulling back on Debra's hips as she attempted to crawl away or the theory that she was restrained by the force of a substance Schill put in her coffee would be sufficient to sustain the kidnapping charge. Debra's testimony is sufficient to support the first theory. Circumstantial evidence derived from her description of her symptoms is sufficient to support the second theory.

By the Court.—Order affirmed.

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