COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP107-CR **Cir. Ct. No. 2010CF778**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN D. BULLOCK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. John Bullock appeals a judgment convicting him of two counts of first-degree sexual assault, as a party to a crime, and an order denying postconviction relief. Bullock argues: (1) his trial attorney was ineffective; (2) his convictions violate double jeopardy; (3) he was denied his right

to an impartial jury; (4) the circuit court improperly admitted certain evidence; (5) insufficient evidence supports his convictions; (6) the real controversy was not fully tried; and (7) he is entitled to resentencing. We reject Bullock's arguments and affirm.

BACKGROUND

¶2 An amended information charged Bullock and his codefendant, Damonta Jones, with two counts each of first-degree sexual assault, as a party to a crime, in connection with the sexual assault of Cheri F. With respect to Bullock, the amended information used identical wording for each count, stating:

> The above-named defendant on or about Thursday, November 11, 2010, in the City of Eau Claire, Eau Claire County, Wisconsin, as a party to a crime, by use of force, did have sexual intercourse with [Cheri F.], without that person's consent, and was aided or abetted by one or more persons[.]

¶3 At trial, Cheri testified that, on November 10, 2010, she was in Turtle Lake with Mynor Adrian Andrade, whom she had met the night before. Around ten p.m., she received a call from her friend, Sophia McBain, asking Cheri for a ride to Eau Claire to visit Jones, who was McBain's boyfriend. Cheri and Andrade drove to Rice Lake to pick up McBain, and the three of them drove to Jones' house in Eau Claire.

¶4 After they arrived at Jones' residence, Cheri, Andrade, McBain, and Jones proceeded to consume vodka. Cheri and McBain began dancing provocatively with one another. After a while, one of Jones' friends, who was later identified as Bullock, arrived at the house. Shortly thereafter Andrade left to go to a bar and McBain went into the bathroom to take a shower.

¶5 Jones then offered to show Cheri his children's bedroom. When Cheri entered the darkened bedroom, she was "struck or just pushed hard," and fell down. Part of her body hit the floor, part of it fell onto a mattress, and she hit her head. Cheri testified someone pulled her pants at least partially off, and Jones held her down while Bullock penetrated her from behind. Cheri felt Bullock ejaculate inside her. Then she "heard something about a snake" and heard someone say, "Hold on, I'll go get it." Earlier that evening, she had observed that Jones kept a live snake in his living room. She felt something that was not a penis penetrate her vagina. She felt a sharp pain inside her, cried out, and then heard someone say, "[P]ull it out[.]" She was unable to see what had been inserted inside her. Cheri testified she did not consent to any sexual contact with either Bullock or Jones.

¶6 Afterwards, Bullock apparently left Jones' residence. Cheri told McBain about the assault, but McBain did not believe her. When Andrade returned from the bar, Cheri told him she had been raped. Andrade drove her to the hospital in Rice Lake, where she was examined by Marian Weiss, a sexual assault nurse examiner. During this initial examination, Cheri did not mention anything about a snake because she was too embarrassed. However, she returned to the hospital later that morning after experiencing sharp pains in her abdomen and vaginal bleeding. At that point, Cheri told a detective she believed she had been assaulted with a snake and feared she had been bitten.

¶7 Weiss testified that she examined Cheri at 3:30 a.m. on November 11, 2010. She observed bruises on Cheri's neck, arms, left breast, back, and knees. She noted that Cheri was "uncomfortable" and in "a lot of pain[.]" Weiss observed three small tears on Cheri's vaginal opening. Cheri's cervix was "very red" and abraded. Weiss testified Cheri's injuries were

consistent with a sexual assault like the one Cheri reported. Weiss also testified that she collected biological samples from Cheri's vagina, cervix, and rectum.

¶8 Linnea Schiffner, a senior DNA analyst for the state crime laboratory, testified that she analyzed the biological samples taken from Cheri, as well as samples taken from Jones' snake. Schiffner testified Bullock was a match for semen found on Cheri's vaginal and cervical swabs. Schiffner found human DNA on one of the swabs taken from the snake, but there was not enough genetic material to identify the source of the DNA. She testified the state crime laboratory does not have the capacity to test for the presence of snake DNA.

¶9 Bullock testified in his own defense. He stated that when he arrived at Jones' house on the evening of November 10, Cheri was lying on the floor wearing only her underwear, and McBain was dancing provocatively on top of her. McBain then gave Jones a lap dance, and Cheri "started giving [Bullock] a lap dance" and "put her breasts in [his] face." Cheri was intoxicated. After Andrade left to go to a bar, Cheri performed oral sex on Bullock in front of Jones and McBain. Bullock then went into a bedroom to make a phone call. Cheri followed him into the bedroom, kissed him, and again performed oral sex on him, after which they had consensual vaginal intercourse. Bullock testified that afterwards he told Cheri he needed to leave because he had to get back to his girlfriend and children.

¶10 During its deliberations, the jury asked the circuit court for "clarification as to what the … differences are between Counts One and Four as the wording is the same." The court told the jury that "Count[s] One and Two go

to the first alleged sexual assault. Counts Three and Four go to the second alleged sexual assault." The jury ultimately found Bullock guilty of both counts.[1] He received concurrent sentences of twenty-five years' initial confinement and ten years' extended supervision on each count.

¶11 Bullock moved for postconviction relief. Among other things, he argued he was denied his right to an impartial jury. In support of his claim, Bullock presented an affidavit of Perry Hagler. Hagler averred that on the evening of the first day of trial, juror Douglas Polzin told Hagler that "he knew 'they' were guilty when he first saw them." Hagler and Polzin were available to testify at the postconviction hearing, but the court determined their testimony would not be competent. The court subsequently denied Bullock's motion. Additional facts are set forth in the discussion section where necessary.

DISCUSSION

I. Ineffective assistance of counsel

¶12 Bullock argues that his trial attorney was ineffective in several ways. An ineffective assistance of counsel claim presents a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). We accept the circuit court's findings of fact unless they are clearly erroneous, but whether counsel's performance fell below the constitutional minimum is a question of law that we review independently. ***Id.***

[1] Jones was also found guilty of two counts of first-degree sexual assault.

¶13 To prevail on an ineffective assistance claim, a defendant must prove both that counsel performed deficiently and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, a defendant must show that his or her attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. However, "every effort is made to avoid determinations of ineffectiveness based on hindsight ... and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

¶14 To establish prejudice, a defendant must demonstrate that there is a reasonable probability that, absent counsel's errors, the result of the proceeding would have been different. ***Strickland***, 466 U.S. at 694. "A defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding." ***State v. Byrge***, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999), *aff'd*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477; *see also* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994). If a defendant fails to establish either prong of the ***Strickland*** test, we need not determine whether the other prong was satisfied. ***Strickland***, 466 U.S. at 697.

1. Failure to object to the amended information, jury instructions, and verdicts

¶15 Bullock first contends his trial attorney was ineffective by failing to object to the amended information, jury instructions, and verdicts. He argues the amended information and verdicts were ambiguous because they used identical

language with respect to Counts Two and Four—the two sexual assault charges against him. He complains that, while the court instructed the jury that it must reach a unanimous verdict, it did not specifically instruct the jury "that they needed to be unanimous about the specific act each count was based upon or even what act formed the basis of each count." He argues the jury was clearly confused about which count pertained to which allegations, as it asked the court to clarify the difference between the counts. He contends this jury confusion violated his right to a unanimous verdict.

¶16 Bullock's argument is foreclosed by ***State v. Becker***, 2009 WI App 59, 318 Wis. 2d 97, 767 N.W.2d 585. There, Becker was charged with two counts of first-degree sexual assault of a child. ***Id.***, ¶2. The complaint alleged Becker had committed two separate acts: touching the victim's vagina, and allowing or causing the victim to touch his penis. ***Id.*** However, in the information, the two counts were charged using identical language, and the court repeated the identical language from the information when instructing the jury. ***Id.***, ¶3. The verdict forms similarly failed to tie a particular act of sexual contact to each count. ***Id.***, ¶5. During deliberations, the jury asked the court, "Does count one and count two correspond to the specific events? i.e., is one the vaginal contact and two the penis contact?" ***Id.***, ¶6. With defense counsel's approval, the court responded, "No." ***Id.***, ¶7.

¶17 Becker argued the failure of the information, the instructions, and the verdicts to tie a particular act of sexual contact to each individual count created the possibility that the jury's verdicts were not unanimous. ***Id.***, ¶14. Because his trial attorney failed to object, we reviewed Becker's claim under the ineffective assistance of counsel rubric. ***Id.***, ¶18. We concluded that, because the jury convicted Becker of both sexual assault counts, he was not prejudiced by his

attorney's performance. ***Id.***, ¶23. By agreeing that Becker was guilty of both counts, the jury unanimously agreed beyond a reasonable doubt that he had committed both alleged acts of sexual assault: the act of touching the victim's vagina, and the act of allowing or causing the victim to touch his penis. ***Id.***, ¶24. How each individual juror assigned the two acts between the two counts made no difference because, in order to find Becker guilty of both counts, each juror had to conclude beyond a reasonable doubt that Becker committed both acts. ***Id.*** The two guilty verdicts therefore "eliminate[d] the risk that the jury was not unanimous[.]" ***Id.***, ¶23.

¶18 As in ***Becker***, the jury in this case was presented with allegations of two separate acts of sexual assault: penetration of Cheri's vagina by Bullock's penis, and penetration of Cheri's vagina by an object. Based on these acts, Bullock was charged with two counts of first-degree sexual assault, and the jury found him guilty of both counts. Bullock's convictions on both counts "eliminate[] the risk that the jury was not unanimous" because, even if the jurors did not agree about which act applied to which count, they all concluded beyond a reasonable doubt that Bullock committed both acts. *See* ***id.***, ¶¶23-24. Moreover, even if the jury was initially confused about the difference between the two counts, the court clarified that Count Two referred to the first sexual assault and Count Four referred to the second sexual assault. Accordingly, Bullock was not prejudiced by his counsel's failure to object to the amended information, jury instructions, and verdicts.

2. Failure to properly cross-examine witnesses

¶19 Bullock next argues his trial attorney was ineffective by failing to properly cross-examine certain witnesses. We conclude Bullock has not established he was prejudiced by his attorney's performance.

¶20 First, Bullock argues his attorney should have questioned Andrade about a statement he made to police that, on the evening in question, he was only absent from Jones' residence for about thirty minutes. However, at trial, Andrade similarly testified that he was only gone for about half an hour. Bullock does not specify what additional questions his attorney should have asked about the length of Andrade's absence, or how Andrade's answers would have changed the result of the trial. He does not, for instance, suggest that the assaults Cheri described could not have taken place during Andrade's thirty-minute absence.

¶21 Second, Bullock argues his trial attorney should have questioned Andrade about his statement to police that, when he returned to Jones' residence, Cheri said "I think I got raped." Again, Andrade's testimony at trial was consistent with his earlier statement. Andrade testified that, when he returned to Jones' residence, Cheri was lying on the couch "bawling her eyes out." When he asked Cheri what was wrong, she did not say anything at first. When asked again, she responded, "I think I got raped." When Andrade asked Cheri what she meant, she clarified that she had been raped. Similarly, Cheri testified she was initially hesitant to tell Andrade she had been raped, prompting him to ask whether she thought she was raped or was actually raped. Bullock does not identify any additional questions his attorney should have asked about Cheri's statement to Andrade, and he does not explain how the answers would have affected the result of his trial.

¶22 Third, Bullock argues his attorney should have asked Cheri about a statement she allegedly made to Weiss that she was not sure whether she had been penetrated by a foreign object. A form Weiss filled out while examining Cheri asked whether Cheri had been penetrated by a foreign object, and Weiss circled "unsure." However, directly beneath that, Weiss wrote that Cheri stated "they stuck something in there." Thus, the form actually indicated that Cheri believed she had been penetrated by a foreign object, but she was unsure what that object was. At trial, Weiss confirmed that Cheri said she had been penetrated by an object but did not know what it was. Cheri similarly testified she had been penetrated by an object but could not see what it was. Bullock does not specify what additional questions his attorney should have asked about Cheri's alleged statement to Weiss that she did not know whether she was penetrated by an object. Bullock does not explain how Cheri's answers would have changed the result of his trial.

¶23 Fourth, Bullock faults his attorney for failing to ask Schiffner about the fact that no snake DNA was found in Cheri, and the fact that no semen was found on the snake. However, Schiffner had already testified on direct examination that the state crime laboratory does not have the capacity to test for the presence of snake DNA. She also testified that, while she found human DNA on the snake, there was not enough genetic material to perform any further analysis. Thus, the jury was aware that Schiffner did not find snake DNA on the samples taken from Cheri and that she could not identify any semen on the samples taken from the snake. Bullock does not specify what additional questions his attorney should have asked Schiffner, or how the answers would have changed the outcome of his trial.

3. Failure to object to leading questions

¶24 Bullock also contends his attorney was ineffective by failing to object to leading questions during Cheri's testimony. Bullock cites the following exchange:

> Q: Okay. What else did you tell them when you went back [to the hospital] the second time [on November 11]?
>
> A: That I was experiencing a lot of, you know, pain inside of my—it was like more of an abdominal pain than my vagina, you know, it was more abdominal, and there was some like bleeding that I didn't notice was there the night before so much.
>
> Q: Okay. Well, did you tell them your concern about what had caused this injury?
>
> A: Not initially.
>
> Q: Well, did you tell them the second time that you were at the hospital what you were concerned about?
>
> A: I told them I was concerned about those two points, but I think at the time that she—a nurse was with me or a physician or whatever, the detective had came in at that time also, 'cuz it's actually the detective that I talked to and told my frustrations to more. I think I felt more comfortable with him for some reason, the way he presented himself maybe or—
>
> Q: Okay. Well, what did you tell him that you hadn't told the SANE nurse?
>
> A: That I think I had been assaulted with a snake.
>
> Q: Okay. And why did you tell him that?
>
> A: I didn't want to tell the hospital staff, I guess.
>
> Q: Okay.
>
> A: I don't know.

> Q: Well, what was your concern about having been bitten possibly by a snake?
>
> A: If it was poisonous or not maybe, and, you know, everything runs through a woman's head like, you know, if I can ever have children again or if I was still bleeding from it, you know, if it would cause any more harm. It was a very, like, embarrassing thing to talk about. Still is.
>
> Q: Okay. So you were seeking treatment because of the possibility that it—you were bitten by the snake?
>
> A: Right.

Bullock does not identify the specific questions in this exchange that he believes are leading. He does not explain how his attorney's failure to object to these questions prejudiced him. We need not consider undeveloped arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶25 Furthermore, the State points out that, although leading questions should be avoided on direct examination, they are not completely prohibited. *See* ***Jordan v. State***, 93 Wis. 2d 449, 471, 287 N.W.2d 509 (1980). Instead, they may be used for several purposes, including eliciting introductory or undisputed matter, *see* ***State v. Barnes***, 203 Wis. 2d 132, 138-39, 552 N.W.2d 857 (Ct. App. 1996), and developing a witness's testimony where necessary, *see* ***Jordan***, 93 Wis. 2d at 471.

¶26 The State argues that only three of the questions in the exchange cited above were even arguably leading. The State contends that two of these questions were not objectionable because they were simply introductory questions used to develop Cheri's testimony. It asserts the third question was permissible because it merely suggested an answer that had already been given in response to previous, nonleading questions. Bullock fails to respond to the State's argument.

Unrefuted arguments are deemed conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶27 The State also argues Bullock was not prejudiced by his attorney's failure to object to any leading questions because, even if his attorney had successfully objected, the prosecutor would simply have rephrased the offending questions and elicited the same answers. Consequently, even if Bullock's attorney had objected, the State contends the result of the trial would have been the same. Again, Bullock fails to respond to the State's argument. We agree with the State that Bullock was not prejudiced by his attorney's failure to object to any leading questions.

4. Failure to file a motion in limine to exclude evidence that Cheri was penetrated by a snake

¶28 Bullock next argues that his trial counsel should have filed a motion in limine to exclude evidence that a snake was used in the sexual assault. He claims any evidence related to the snake was irrelevant and unfairly prejudicial. We disagree.

¶29 Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01.[2] The State alleged that Bullock committed two acts of sexual assault and that the second act was accomplished using an object. The complaint specified that object was a snake. At trial, Cheri testified that she was penetrated by an object and, while she

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

could not see the object, she believed it was a snake. She heard one of her assailants say that he was going to get the snake, and afterwards she felt herself being penetrated by something that was not a penis. She then felt a sharp pain inside her, which she believed was a snake bite. Evidence that Cheri was penetrated using a snake made it more probable that she was sexually assaulted using an object than it would have been without the evidence. The evidence was therefore relevant.

¶30 Furthermore, the evidence's probative value was not substantially outweighed by the danger of unfair prejudice. *See* WIS. STAT. § 904.03. Unfair prejudice results when evidence has the capacity to "lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." ***Old Chief v. United States***, 519 U.S. 172, 180 (1997). Here, evidence that Bullock used a snake to penetrate Cheri was proof specific to the offense charged—it tended to show that Bullock sexually assaulted Cheri using an object.

¶31 Additionally, in determining whether evidence's probative value is outweighed by the danger of unfair prejudice, we may consider whether other evidence was available to prove an essential element of the crime. *See* ***State v. Grande***, 169 Wis. 2d 422, 434, 485 N.W.2d 282 (Ct. App. 1992). "[A] defendant has no right to claim that … evidence is unfair and excludable under [WIS. STAT. §] 904.03 where it is admissible and the only evidence of an element of the charged offense." ***Id.*** at 434-35. Here, evidence that Cheri was penetrated by a snake was the only evidence of an essential element of the crime—that is, penetration by an object. There was no evidence available that Cheri was penetrated by any object other than a snake.

¶32 Because evidence related to the snake was relevant and its probative value was not outweighed by the danger of unfair prejudice, a motion in limine to exclude the evidence would have properly been denied. Consequently, Bullock was not prejudiced by his attorney's failure to file such a motion.

5. Failure to request a change of venue

¶33 Bullock also argues his trial counsel was ineffective for failing to request a change of venue. He contends a change of venue was necessary because of "the extensive and pervasive coverage of [the] case" in the local media.

¶34 At the postconviction hearing, Bullock's trial attorney testified he did not request a change of venue because he was concerned the trial would be held in a county with "less diversity" that would be "even more adverse to a minority defendant" than Eau Claire County. He stated he felt that "the media coverage was less of a concern than a potentially less diverse [jury.]" He discussed his concerns with Bullock, and Bullock agreed that a venue change would not be beneficial. Counsel's decision not to request a venue change was a reasonable strategic choice, and reasonable trial strategy does not constitute ineffective assistance of counsel. *See* ***State v. Maloney***, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620.

¶35 Additionally, Bullock has not established that he was prejudiced by counsel's failure to request a venue change. He simply speculates that many members of the jury pool may have been familiar with media accounts of the case and may have formed opinions about his guilt. However, he does not argue that any members of the jury were unable to put aside this outside information and decide the case based on the evidence. He has not established that the result of his trial would have been any different had he been tried in another venue.

6. Failure to object to the number of convictions used to impeach defense witnesses

¶36 At trial, Bullock testified that he had five prior convictions. McBain, who testified for the defense, stated she had seven prior convictions. Bullock argues his attorney should have objected to the use of these convictions for impeachment purposes. We conclude Bullock was not prejudiced by his attorney's failure to object because the circuit court properly admitted the convictions.

¶37 Wisconsin law presumes that criminals as a class are less truthful than persons who have not been convicted of a crime. ***State v. Gary M.B.***, 2004 WI 33, ¶21, 270 Wis. 2d 62, 676 N.W.2d 475. Thus, under WIS. STAT. § 906.09, any prior conviction is relevant to a witness's character for truthfulness. ***Id.*** There is no need to link the nature of the offense to a trait for untruthfulness; the link is provided by the fact of the conviction. ***Gary M.B.***, 270 Wis. 2d 62, ¶23.

¶38 However, evidence of a prior conviction may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. WIS. STAT. § 906.09(2). To determine whether a prior conviction should be excluded, the court should consider the lapse of time since the conviction, the rehabilitation or pardon of the person convicted, the gravity of the crime, and the involvement of dishonesty or false statement in the crime. ***Gary M.B.***, 270 Wis. 2d 62, ¶21. When there are multiple convictions, the court should also consider the frequency of the convictions because "the more often one has been convicted, the less truthful he is presumed to be[.]" ***Id.*** (quoting ***Nicholas v. State***, 49 Wis. 2d 683, 688, 183 N.W.2d 11 (1971)).

¶39 Bullock contends that all of his convictions should have been excluded because only two were felonies and none involved dishonesty. However, he does not address the fact that all of the convictions were relatively recent, with the oldest occurring six years before trial. *See* ***id.*** He also fails to address "the rehabilitation or pardon of the person convicted[.]" *See* ***id.*** Additionally, he does not discuss the weight that should be ascribed to the frequency of the convictions. *See* ***id.*** Consequently, he has not established that the convictions' probative value was substantially outweighed by the danger of unfair prejudice. *See* WIS. STAT. § 906.09(2).

¶40 With respect to McBain, Bullock argues all seven of her prior convictions should have been excluded because four were misdemeanors and only one involved dishonesty. Again, Bullock fails to address the lapse of time since the convictions, McBain's rehabilitation or pardon, and the frequency of the convictions. ***Gary M.B.***, 270 Wis. 2d 62, ¶21. He does not discuss whether these factors weigh in favor of or against exclusion. As a result, he has failed to demonstrate that the convictions' probative value was substantially outweighed by the danger of unfair prejudice. *See* WIS. STAT. § 906.09(2).

7. Cumulative prejudice

¶41 Finally, Bullock argues that, even if his attorney's errors were not individually prejudicial, the combined effect of the errors prejudiced the defense. *See* ***State v. Thiel***, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 305. We have determined that all of Bullock's ineffective assistance claims are without merit. "[A] convicted defendant may not simply present a laundry list of mistakes by counsel and expect to be awarded a new trial." ***Id.***, ¶61. As the State aptly

points out, "[z]ero plus zero equals zero." ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976).

II. Double jeopardy

¶42 Bullock contends that the wording of the amended information, jury instructions, and verdicts violated his right to be free from double jeopardy. The state and federal double jeopardy clauses protect a person against three types of action: (1) subsequent prosecution for the same offense after acquittal; (2) subsequent prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. ***State v. Rachel***, 2002 WI 81, ¶20, 254 Wis. 2d 215, 647 N.W.2d 762. Bullock argues he received multiple punishments for the same offense because the amended information, jury instructions, and verdicts did not distinguish between the two sexual assault charges. He argues the jury "could very well have believed that the two counts involved the same act."

¶43 Because Bullock's attorney failed to object to the amended information, jury instructions, and verdicts, we review his double jeopardy claim under the ineffective assistance of counsel rubric. *See* ***State v. Haywood***, 2009 WI App 178, ¶15, 322 Wis. 2d 691, 777 N.W.2d 921. We conclude Bullock did not receive ineffective assistance because he was not prejudiced by his attorney's failure to object.

¶44 We reject Bullock's contention that the jury "could very well have believed" that the two sexual assault counts involved the same act. At trial, Cheri testified about two different assaults—one that involved penetration by Bullock's penis, and another that involved penetration by an object. She testified that the penetration by Bullock's penis occurred first, and the penetration by the object occurred second. In its closing argument, the State referred to the penetration by

Bullock's penis as "the first sexual assault" and the penetration by an object as "the second assault." Although the jury may initially have been confused about the difference between the charged offenses, the court clarified that "Count[s] One and Two go to the first alleged sexual assault" and "Counts Three and Four go to the second alleged sexual assault." The court also instructed the jury that each count charges a separate crime and that each count must be considered separately. Given these instructions, it is implausible that the jury could have believed it could convict Bullock of both counts premised on the same act. "The jury is presumed to follow all instructions given." *See* ***Grande***, 169 Wis. 2d at 436.

III. Impartial jury

¶45 Bullock next contends he was deprived of his right to an impartial jury because: (1) juror Douglas Polzin incorrectly or incompletely responded to a material question on voir dire; and (2) it is more probable than not that, under the facts and circumstances of the case, Polzin was biased against Bullock. *See* ***State v. Oswald***, 2000 WI App 2, ¶45, 232 Wis. 2d 62, 606 N.W.2d 207. We agree with the State that Bullock has failed to demonstrate that Polzin gave an incorrect or incomplete response during voir dire.

¶46 In his affidavit, Perry Hagler averred that, on the evening of the first day of trial, "Polzin stated that he knew 'they' were guilty when he first saw them." Assuming Polzin actually made that statement, it could not be literally true. Polzin could not have "known" that Bullock was guilty simply by looking at him. Instead, what Polzin most likely meant was that he formed an opinion that Bullock looked like the kind of person who would commit the charged offenses.

¶47 Polzin was asked on voir dire whether he had formed an opinion about the defendants' guilt as a result of what acquaintances had told him about

media accounts of the case. He indicated he had not formed an opinion on that basis. He was not asked whether he had formed an opinion about the defendants' guilt for any other reason. Accordingly, he did not incorrectly or incompletely respond to any question by failing to volunteer that he had formed an opinion based on Bullock's appearance.

¶48 During voir dire, Polzin also stated that he would not be embarrassed by finding Bullock not guilty, that he would listen to the facts and give an honest opinion, and that he would be fair and not prejudge the case. He indicated that he would be able to apply the presumption of innocence and that he understood the State needed to prove every element of the charged offenses beyond a reasonable doubt. He also indicated that he would not base his decision on racial prejudice and that there was no other reason he could not be a fair and impartial juror. These responses are not inconsistent with having initially formed an opinion of Bullock's guilt based on his appearance.

¶49 Moreover, a person who has formed an opinion about a defendant's guilt before trial may still qualify as an impartial juror if he can put that opinion aside and render a verdict based on the evidence. *See* ***State v. Sarinske***, 91 Wis. 2d 14, 33, 280 N.W.2d 725 (1979). Polzin's remarks during voir dire were essentially assurances that he could put aside his opinion about Bullock's guilt and decide the case solely on the evidence. The record indicates that Polzin answered the questions he was asked during voir dire correctly and completely and that, if he initially had any bias or prejudice against Bullock, he was able to put it aside.

¶50 Additionally, Polzin's alleged remark to Hagler was made on the evening of the first day of trial. To the extent the timing of the remark implies that Polzin resurrected his opinion about Bullock's guilt during the first day of trial, the

remark is not competent evidence of bias because it is evidence of Polzin's thought processes during the trial. Once the jury is impaneled, any subsequent expression of bias during the deliberative process may not be inquired into to show that a particular juror should have been disqualified. *See* ***Anderson v. Burnett Cnty.***, 207 Wis. 2d 587, 594-96, 558 N.W.2d 636 (Ct. App. 1996).

IV. Admissibility of evidence

¶51 Bullock also argues that the circuit court erred by improperly admitting Cheri's ripped bra into evidence during the State's rebuttal. He contends that the ripped bra goes to Cheri's lack of consent to a sexual encounter. Because the State must prove lack of consent during its case-in-chief, Bullock argues the State could not properly introduce the bra on rebuttal.

¶52 However, the State is not prevented from presenting evidence on rebuttal simply because the evidence could have been presented in its case-in-chief. *See* ***State v. Konkol***, 2002 WI App 174, ¶18, 256 Wis. 2d 725, 649 N.W.2d 300. Instead, the operative question is whether the evidence became necessary and appropriate after the defendant presented his or her case. ***Id.*** We will uphold a circuit court's discretionary decision to admit or exclude evidence if it has a reasonable basis and was made in accordance with accepted legal standards and the facts of record. ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992). Moreover, a circuit court has "considerable discretion" in controlling the admission of rebuttal evidence. ***Konkol***, 256 Wis. 2d 725, ¶18.

¶53 The circuit court properly exercised its discretion by admitting the ripped bra. During the defense's case, Bullock admitted that he had sex with Cheri, but he claimed the sex was consensual. As evidence that Cheri consented to sex, Bullock asserted that Cheri was dancing topless when he arrived at Jones'

residence and that she later rubbed her bare breasts in his face while giving him a lap dance. McBain also testified that Cheri took off her bra while dancing.

¶54 In rebuttal, Cheri testified that she never took her bra off on the night in question and that it was ripped during the sexual assault. This testimony was necessary and appropriate to rebut Bullock's claim that Cheri invited sexual intercourse by baring her breasts and dancing topless. The ripped bra itself was properly admitted as physical evidence to corroborate Cheri's testimony.

V. Sufficiency of the evidence

¶55 Bullock next contends that insufficient evidence supports his convictions. To prevail on this claim, Bullock must show that "the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law 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 (1990). If more than one reasonable inference can be drawn from the evidence, we must accept the inference that supports the jury's verdict. ***Id.*** at 504.

¶56 Bullock was charged with two counts of first-degree sexual assault, pursuant to WIS. STAT. § 940.225(1)(c). To obtain a conviction on each count, the State had to prove: (1) Bullock had sexual intercourse with Cheri; (2) Cheri did not consent to the sexual intercourse; (3) the sexual intercourse was accomplished by use or threat of force or violence; and (4) Bullock was aided and abetted by one or more other persons. *See* WIS. STAT. § 940.225(1)(c); WIS JI—CRIMINAL 1205 (2005). Sexual intercourse is defined as "any intrusion, however slight, by any part of a person's body or of any object, into the genital or anal opening of another." WIS JI—CRIMINAL 1200B (2010).

¶57 Sufficient evidence supports Bullock's conviction for the first count of first-degree sexual assault. Bullock concedes that he had sexual intercourse with Cheri, which satisfies the first element of the crime. With respect to the remaining elements, Cheri testified that she was struck or pushed to the ground, after which Jones held her down while Bullock used his penis to penetrate her from behind. Weiss testified that Cheri had bruises on various parts of her body, that her vaginal opening was torn, and that her cervix was red and abraded. In Weiss's opinion, these injuries were consistent with a sexual assault. Based on this evidence, a reasonable jury could find beyond a reasonable doubt that Cheri did not consent to intercourse with Bullock, that the intercourse was accomplished by use or threat of force or violence, and that Bullock was aided and abetted by Jones. *See* WIS JI—CRIMINAL 1205 (2005). Although Bullock presented contrary evidence, it is the function of the jury, not this court, to "resolve any conflicts or inconsistencies in the evidence and to judge the credibility of the evidence." ***State v. Perkins***, 2004 WI App 213, ¶15, 277 Wis. 2d 243, 689 N.W.2d 684.

¶58 Sufficient evidence also supports Bullock's conviction for the second count of first-degree sexual assault. Cheri testified that after Bullock ejaculated inside her, while she was still being held down, she heard someone say something about getting a snake. Then, she felt someone struggling to get something inside her. She felt her vagina being penetrated by something other than a penis, and she subsequently felt a sharp pain. When she cried out in pain, someone said to "pull it out[.]"

¶59 Although Cheri could not see who inserted the snake or other object into her vagina, a jury could reasonably infer that Bullock did so while Jones continued to hold her down. Thus, a reasonable jury could find beyond a reasonable doubt that Bullock had sexual intercourse with Cheri by inserting an

object into her vagina, that the intercourse was not consensual, that it was accomplished by use or threat of force or violence, and that Bullock was aided and abetted by Jones. Again, although Jones presented evidence to the contrary, the jury was entitled to decide which evidence to believe. *See* ***id.*** The evidence of the second sexual assault is not so "inherently or patently incredible" that we will substitute our judgment for that of the jury. *See* ***State v. Saunders***, 196 Wis. 2d 45, 54, 538 N.W.2d 546 (Ct. App. 1995).

VI. Discretionary reversal

¶60 Bullock next asks us to exercise our power of discretionary reversal, pursuant to WIS. STAT. § 752.35. He argues the real controversy was not fully tried because of the "numerous errors" in his trial. Our discretionary reversal power is formidable, and we exercise it sparingly and with great caution. ***State v. Williams***, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719. We have already considered and rejected Bullock's arguments regarding the alleged trial errors. "Larding a final catch-all plea for reversal with arguments that have already been rejected adds nothing." ***State v. Echols***, 152 Wis. 2d 725, 745, 449 N.W.2d 320 (Ct. App. 1989). Again, "[z]ero plus zero equals zero." ***Mentek***, 71 Wis. 2d at 809.

VII. Sentencing

1. Inaccurate information

¶61 Bullock also argues he is entitled to resentencing because the circuit court sentenced him based on inaccurate information. "A defendant has a constitutionally protected due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d

1. Whether this due process right has been denied is a constitutional issue that we review independently. ***Id.*** A defendant who requests resentencing based on the sentencing court's use of inaccurate information must show both that the information was inaccurate and that the court actually relied on the information. ***State v. Lechner***, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998).

¶62 Bullock first argues that the presentence investigation (PSI) was inaccurate because it stated that "the victim [was] brutalized by one of the defendants forcing a python into her vagina." He contends this statement is inaccurate because "there is no evidence that a snake was in fact used[.]" However, Cheri's trial testimony was sufficient to establish that a snake was used during the assault. Consequently, the PSI was not inaccurate in this respect.

¶63 Bullock also contends the PSI was inaccurate when it stated that "[the] snake originally belonged to [Bullock], but was given to Jones shortly after he was released from prison." The circuit court cited this information during the sentencing hearing, stating, "[I]t was Mr. Bullock who originally owned the snake and gave the snake to the defendant Jones when the defendant Jones was released from prison." According to the PSI, both Bullock's mother and records from the Department of Corrections confirmed that Bullock was the snake's original owner. Bullock denies ever owning the snake, and he therefore argues the court relied on inaccurate information.

¶64 At the postconviction hearing, the circuit court noted that, while it was aware at the time of sentencing that Bullock denied owning the snake, other sources of information contradicted Bullock's claim. Thus, the court reasoned there was a "conflict" in the information, not an inaccuracy. The court implicitly

resolved this conflict by accepting the information in the PSI and making a finding of fact that Bullock was the snake's original owner.

¶65 There is no "formal burden of proof requirement for factual findings which impact on a sentencing." *See* ***State v. Hubert***, 181 Wis. 2d 333, 345, 510 N.W.2d 799 (Ct. App. 1993). In general, a circuit court's findings of fact are sustained on appeal unless they are clearly erroneous. ***State v. Ramel***, 2007 WI App 271, ¶9, 306 Wis. 2d 654, 743 N.W.2d 502. Bullock has not established that the circuit court's finding that Bullock originally owned the snake was clearly erroneous. Merely stating there was a conflict in the evidence does not establish that the circuit court erroneously resolved the conflict. Accordingly, Bullock has not established that he was sentenced based on inaccurate information.

2. Unduly harsh sentences

¶66 Bullock also argues that his sentences are unduly harsh. Sentencing is left to the discretion of the circuit court, and our review is limited to determining whether the court erroneously exercised its discretion. ***State v. Patino***, 177 Wis. 2d 348, 384, 502 N.W.2d 601 (Ct. App. 1993). A sentencing court erroneously exercises its discretion when a sentence is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). A sentence well within the statutory maximum is presumed not to be unduly harsh. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507.

¶67 Bullock was convicted of two counts of first-degree sexual assault, which is a Class B felony. *See* WIS. STAT. § 940.225(1)(c). The court could have

sentenced him to sixty years' imprisonment on each count. *See* WIS. STAT. § 939.50(3)(b). Instead, he received concurrent thirty-five-year sentences, each consisting of twenty-five years' initial confinement and ten years' extended supervision. Bullock's sentences are well within the statutory maximum, and therefore presumptively not unduly harsh.

¶68 Bullock nevertheless argues his sentences are unduly harsh "[g]iven the mitigating factors in this case[.]" He states that he had "an incredibly difficult childhood," during which his mother was incarcerated, he was exposed to drugs at an early age, and he was verbally, physically, and sexually abused. He also argues he does not have an extensive adult criminal record.

¶69 The sentencing court considered these mitigating factors. However, it determined they were outweighed by other considerations. It noted that Bullock had committed a "very serious" and "brutal" offense. He had an "extensive criminal history," beginning when he was thirteen years old, that included three violent offenses and one sexual incident. Given this history, the court reasoned there was an "elevated likelihood" that Bullock would reoffend in a violent manner. Furthermore, his long history of behavioral problems and his lack of impulse control suggested "a need for close rehabilitative control best provided in an institutional setting." The court also considered the "lifelong impact" Bullock's actions would have on Cheri. In light of these factors, concurrent thirty-five-year sentences are not shocking to public sentiment. *See* ***Ocanas***, 70 Wis. 2d at 185. Bullock's sentences are not unduly harsh.

By the Court.—Judgment and order affirmed.

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