COURT OF APPEALS
DECISION
DATED AND FILED

March 26, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1390-CR **Cir. Ct. No. 2010CV779**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAMONTA D. JONES,

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., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Damonta Jones appeals a judgment convicting him of two counts of first-degree sexual assault, as party to a crime, and an order denying postconviction relief. Jones argues his trial counsel was ineffective for

failing to challenge the charges as multiplicitous, insufficient evidence supports his convictions, and the circuit court erroneously exercised its sentencing discretion. We reject Jones' arguments and affirm.

BACKGROUND

¶2 An amended information charged Jones and his codefendant, John Bullock, with two counts each of first-degree sexual assault, as party to a crime, in connection with the sexual assault of Cheri F. *See* WIS. STAT. §§ 940.225(1)(c), 939.05.[1] In regard to Jones, 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 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 Jones and Bullock had a joint trial, and therefore we take the trial facts from our opinion in ***State v. Bullock***, No. 2012AP107-CR, unpublished slip op. (WI App Oct. 10, 2012).

> 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.
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> After they arrived at Jones' residence, Cheri, Andrade, McBain, and Jones proceeded to consume vodka. Cheri

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

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.

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.

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.

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.

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.
>
> 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.

¶4 Jones did not testify. During 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 Jones guilty of both counts.[2]

¶5 The circuit court sentenced Jones to thirty-five years of initial confinement and fifteen years of extended supervision on each count, to run concurrently to each other but consecutive to any other sentence. Bullock, however, was sentenced to twenty-five years of initial confinement and ten years of extended supervision on each count. After explaining the factors it considered when rendering Jones' sentence, the court acknowledged that Jones' sentence was "different than the sentence that was provided to a codefendant. There are factors

[2] It also found Bullock guilty of both counts.

that exist here, [that] did not exist with the codefendant, primarily is that the defendant was on extended supervision for sexual offenses with a GPS monitor at the time that this offense took place."

¶6 Jones moved for postconviction relief, arguing his trial counsel was ineffective for failing to challenge the charges as multiplicitous and for failing to move to dismiss the charges at the close of trial for insufficient evidence. He also asserted the circuit court erroneously exercised its sentencing discretion. Following a hearing, the circuit court denied Jones' motion.

DISCUSSION

I. Multiplicitous charges and ineffective assistance of counsel

¶7 Jones argues his trial counsel was ineffective for failing to challenge the two sexual assault charges as multiplicitous. To prevail on an ineffective assistance of counsel claim, Jones must show both that his trial counsel's performance was deficient, and that Jones was prejudiced by counsel's deficient performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶8 Charges are multiplicitous if they are identical in law and fact.[3] ***State v. Trawitzki***, 2001 WI 77, ¶21, 244 Wis. 2d 523, 628 N.W.2d 801. Here, there is no dispute that the charges were identical in law—the amended information charged two counts of first-degree sexual assault under the same statutory section. Jones argues the two charges were identical in fact because both

[3] Charges that are not identical in law and fact may also be multiplicitous if the legislature intended only a single charge for the offenses. ***State v. Trawitzki***, 2001 WI 77, ¶21, 244 Wis. 2d 523, 628 N.W.2d 801. Jones, however, does not assert that the charges are multiplicitous because the legislature did not intend multiple charges.

charges in the amended information involved the same victim on the same date at the same location. He asserts there was no factual indication in the amended information that the two counts involved separate criminal acts.

¶9 However, the information itself does not typically include factual allegations to support the charges, *see* WIS. STAT. § 971.03, and that both sexual assault counts in the amended information involved the same victim at the same location on the same date does not automatically mean that the charges were multiplicitous. Rather, to determine whether charges are identical in fact prior to trial, we look to the probable cause section of the criminal complaint and the preliminary hearing testimony. *See* ***State v. Koller***, 2001 WI App 253, ¶47, 248 Wis. 2d 259, 635 N.W.2d 838.

¶10 Charges are not identical in fact if the "charged acts are 'separated in time or are of a significantly different nature.'" ***Id.***, ¶31 (quoting ***State v. Eisch***, 96 Wis. 2d 25, 31, 291 N.W.2d 800 (1980)). Acts of the same type will be considered different in nature "if each requires 'a new volitional departure in the defendant's course of conduct.'" ***State v. Anderson***, 219 Wis. 2d 739, 750, 580 N.W.2d 329 (1998) (quoting ***Eisch***, 96 Wis. 2d at 36). Additionally, "[t]he pertinent time question is whether the facts indicate the defendant had 'sufficient time for reflection between the assaultive acts to again commit himself.'" ***Koller***, 248 Wis. 2d 259, ¶31 (quoting ***State v. Hirsch***, 140 Wis. 2d 468, 475, 410 N.W.2d 638 (Ct. App. 1987)).

¶11 Here, the facts alleged in the criminal complaint and the testimony presented at the preliminary hearing show the charges were not identical in fact. The criminal complaint and Cheri's preliminary hearing testimony describe two separate acts—one act of insertion of a penis into the victim's vagina, and later

one act of insertion of an object into the victim's vagina. Each act required a new volitional departure in Jones' course of conduct. *See* ***Anderson***, 219 Wis. 2d at 750. The two acts were also different in nature and they were separated by a brief interval of time. *See* ***Koller***, 248 Wis. 2d 259, ¶31. Because the two charged acts were not identical in fact, any pre-trial multiplicity challenge would have failed.

¶12 Further, any trial multiplicity challenge would have also been unsuccessful. At trial, Cheri testified that while being held down by Jones, Bullock inserted his penis into her vagina. After she felt Bullock ejaculate, she heard someone say something about a snake, and someone said, "[H]old on, I'll go get it." She then felt another penetration in her vagina that did not feel like a penis, and, when she cried out in pain, someone said to "pull it out." Her testimony describes two acts that required a volitional departure in Jones' course of conduct and were separated by a brief interval of time. The two acts were not identical in fact. *See* ***id.***

¶13 Jones nevertheless argues the charges were multiplicitous because the jury was confused about the differences in the counts and therefore he could have been convicted twice for the same act. He also asserts the circuit court's instruction to the jury 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" constituted an amendment to the information that prejudiced him.

¶14 We disagree with Jones that he was convicted twice for the same act. As Jones recognizes, the court clarified to the jury 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." Therefore, the court ameliorated any confusion the jury had with the charges. The court also instructed the jury that each count charged a

separate crime and that each count must be considered separately. "Jurors are presumed to have followed jury instructions." ***State v. LaCount***, 2008 WI 59, ¶23, 310 Wis. 2d 85, 750 N.W.2d 780. Based on these instructions, we conclude the jury did not convict Jones twice for the same act.

¶15 Further, the court's clarification of which charge corresponded to which assault did not constitute an amendment of the information, and, even if it did, Jones has not explained how he was prejudiced. *See* WIS. STAT. § 971.29(2).[4] He knew from the preliminary hearing that Cheri would be testifying that, while being held down, she was initially penetrated by a penis and later penetrated with an object. Moreover, Jones' defense was not affected by any clarification because his theory was that Cheri was lying, he was not present, and he was not involved in any way.

¶16 Because any challenge to the charges as multiplicitous would have been unsuccessful, we conclude Jones' trial counsel was not ineffective for failing to object to the charges on that basis. *See* ***State v. Swinson***, 2003 WI App 45, ¶59, 261 Wis. 2d 633, 660 N.W.2d 12 (attorney is not ineffective for failing to bring a meritless motion).

[4] WISCONSIN STAT. § 971.29(2) provides:

> At the trial, the court may allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant. After verdict the pleading shall be deemed amended to conform to the proof if no objection to the relevance of the evidence was timely raised upon the trial.

II. Insufficient evidence

¶17 Jones argues insufficient evidence supports his convictions.[5] To prevail on this claim, Jones must show that "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 (1990). If more than one reasonable inference can be drawn from the evidence, we must accept the inference that supports the jury's verdict. *See* ***id.*** at 504.

¶18 Jones was charged with two counts of first-degree sexual assault, as party to a crime. To obtain a conviction for first-degree sexual assault, the State had to prove: (1) the defendant had sexual intercourse with Cheri; (2) Cheri did not consent to the sexual intercourse; (3) the sexual intercourse was accomplished by use of threat or force or violence; and (4) the defendant was aided and abetted by one or more other persons. *See* WIS. STAT. § 940.225(1)(c); WIS JI—CRIMINAL 1205 (2005). Further, because Jones was charged as party to a crime, Jones could be found guilty for first-degree sexual assault if the State proved he intentionally aided and abetted the person who directly committed the assault. *See* WIS. STAT. § 939.05. 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).

[5] Jones actually asserts counsel was ineffective for failing to move to dismiss based on insufficient evidence. However, because an allegation of insufficient evidence can be appealed even if counsel failed to object in the trial court, *see* ***State v. Hayes***, 2004 WI 80, ¶¶49-54, 66, 273 Wis. 2d 1, 681 N.W.2d 203, we directly review Jones' challenge to the sufficiency of the evidence.

¶19 Jones argues the evidence was insufficient because Cheri "could not definitively testify as to who had been in the bedroom with her when the assault occurred or who had been holding her down or who had been assaulting her." He points to inconsistencies in Cheri's trial and preliminary hearing testimony regarding the first assault, and argues that the evidence was insufficient to establish that he had aided and abetted Bullock in the sexual assault.

¶20 The record belies Jones' assertion that Cheri "could not definitively testify" that Jones was involved in the first assault. At trial, in reference to the first assault, Cheri testified, "I looked up and I saw Damonta's face," "I believe Damonta was the one kind of holding me down forcefully," "I could tell it was Damonta," and "I've always said I felt Damonta was holding me from the front." Further, Cheri's alleged inconsistency between her preliminary hearing and trial testimony was presented to the jury,[6] and the jury, not the court, resolves

[6] On cross-examination, Jones' counsel engaged Cheri in the following questioning:

> Q: [D]id you ever see Mr. Jones hold -- doing anything to hold you down, yes or no?
>
> A: Yes.
>
> ….
>
> Q: Didn't you testify at a prior hearing that you didn't know who was holding you down?
>
> A: No. I remember seeing him from the front of me, and he was over me holding down my shoulders.
>
> ….
>
> Q: … I'm looking at page 14 now. [Referring to the preliminary hearing transcript.] The question is, so you're not sure if Mr. Jones was holding you down or he was penetrating you, and you say, answer, no, I guess I don't know which one.
>
> A: Right. There is one point when he wasn't in front of me anymore and he was behind me, and I heard two voices, and I wasn't sure until the DNA test came back of who penetrated me.

(continued)

inconsistencies in testimony. *See* ***Poellinger***, 153 Wis. 2d at 503 ("The function of the jury is to decide which evidence is credible and which is not and how conflicts in the evidence are to be resolved."). That there are alleged conflicts in the testimony does not mean the evidence supporting the first assault was insufficient.

¶21 In any event, sufficient evidence supports Jones' conviction for the first count of first-degree sexual assault, as party to a crime. Cheri testified she was knocked to the ground and that Jones held her down while Bullock penetrated her vagina with his penis from behind. Cheri's testimony was corroborated by Schiffner, who testified that Bullock was the source of the semen recovered from the vaginal swab taken from Cheri during a sexual assault examination. Cheri's testimony was further corroborated by Weiss, who opined that Cheri's injuries—bruises and a torn vaginal opening—were consistent with a sexual assault.

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

¶23 Although Jones argues that the evidence was insufficient because Cheri never "testif[ed] that she had seen or heard the defendant be a part of the

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> Q: So on December 7th … you weren't sure he was holding you down and today you are?
>
> A: I recall that he was being in front of me.

second assault against her" and "it was only conjecture that a snake had been involved in the assault," a jury could reasonably infer that Jones was still present in the room during the second assault, and that he either directly inserted an object into her vagina or he continued to hold her down while Bullock did so. *See* ***Poellinger***, 153 Wis. 2d at 504. Further, the State was not required to prove the actual object used in the second assault. *See* WIS JI—CRIMINAL 1200B.

III. Sentencing

¶24 Jones argues the circuit court erroneously exercised its sentencing discretion because Bullock received a thirty-five-year bifurcated sentence and he received a fifty-year bifurcated sentence. 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. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. We will sustain a circuit court's exercise of discretion "if the conclusion reached by the trial court was one a reasonable judge could reach, even if this court or another judge might have reached a different conclusion." ***Id.***, ¶8.

¶25 Although "equality of treatment under the [F]ourteenth [A]mendment requires substantially the same sentence for substantially the same case histories, it does not preclude different sentences for persons convicted of the same crime based upon their individual culpability and need for rehabilitation." ***Ocanas v. State***, 70 Wis. 2d 179, 186, 233 N.W.2d 457 (1975). "[M]ere disparity in sentencing does not constitute a denial of equal protection of the law." ***Id.*** To constitute a denial of equal protection, the disparity in sentencing must either be arbitrary or based upon considerations not pertinent to proper sentencing discretion. ***Id.*** at 187.

¶26 In this case, the main difference between Jones and Bullock was that Jones had sexual assault convictions and was on extended supervision for those convictions when he committed the current offenses. When fashioning Jones' sentence, the court highlighted these differences, reasoning, in part,[7] it considered that Jones "was on extended supervision for sexual offenses at the time that this offense occurred to be an aggravating factor." The court also noted Jones' behavior was sexually deviant and that his behavior, combined with his prior sexual offenses and lack of impulse control, indicated he needed "close rehabilitative control" in an institutional setting. The court further stated Jones' "history of criminal sexual behavior" contributed to "a high degree of need to protect the public, because there is an elevated likelihood of re-offense." Finally, the court explained that Jones was receiving a disparate sentence from Bullock because there were factors in Jones' case that did not exist in Bullock's—"primarily … that the defendant was on extended supervision for sexual offenses with a GPS monitor at the time that this offense took place."

¶27 The record reflects that Jones received a disparate sentence from that of Bullock because Jones had a history of sexual assault convictions and because he was on extended supervision for those convictions when he committed these offenses against Cheri. Although Jones argues these reasons are insufficient to impose a longer sentence, the circuit court's discretionary decision was based upon relevant factors with no improper considerations. *See* ***Ocanas***, 70 Wis. 2d at

[7] Jones does not argue that the court failed to consider the proper sentencing factors. Indeed, the record reflects that the court considered the seriousness of the offense, the need to protect the public, and the character of the defendant, including his rehabilitative needs.

189. Therefore, we conclude the circuit court did not erroneously exercise its discretion by imposing a longer sentence on Jones.

¶28 Finally, incorporated within his disparate sentence argument, Jones states his sentence is unduly harsh. A sentence is unduly harsh and thus constitutes an erroneous exercise of discretion if the sentence was "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." ***Id.*** at 185. Jones does not elaborate why he believes his sentence is unduly harsh, and we presume it is because of the disparate treatment he received. However, because we conclude the circuit court properly exercised its discretion by sentencing Jones to a longer term of imprisonment, we reject Jones' contention that his sentence is unduly harsh.

By the Court.—Judgment and order affirmed.

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