COURT OF APPEALS
DECISION
DATED AND FILED

May 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2156-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CHESTER B. WOODS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Grant County: JOHN R. WAGNER, Judge. *Affirmed.*

Before Eich, Vergeront and Roggensack, JJ.

ROGGENSACK, J. Chester Woods appeals his convictions of four counts of third-degree sexual assault, pursuant to § 940.225(3), STATS., one count of fourth-degree sexual assault, pursuant to § 940.225(3m), and the denial of his postconviction motions. Woods claims that the circuit court erred by improperly admitting hearsay testimony about statements the victim made to friends claiming

that she had been raped, that the prosecutor's improper comments during closing arguments prejudiced Woods's right to a fair trial, that the circuit court erred by instructing the jury on second-degree sexual assault because there was no evidence that the incidents involved threats of force, and that the jury was misled because the verdict forms did not include the element of lack of consent. We conclude that the circuit court's admission of the victim's out-of-court statements to her friends was harmless error; that there was evidence of forceful sexual contacts, in combination with verbal threats, that could have supported a finding of "use or threat of force or violence" necessary to second-degree sexual assault; that Woods waived any objection to the prosecutor's improper comments during closing argument by making a strategic decision not to object, but counsel's decision did not constitute ineffective assistance; and that no reasonable jury could have inferred it could convict Woods if Harms consented. Accordingly, we affirm.

BACKGROUND

On February 2, 1996, Peggy Harms celebrated her birthday at a tavern near her home. She met Woods for the first time at the bar that evening. At bar time, the party, including Woods, moved to Harms's house. The party broke-up around 7:00 a.m. on the morning of February 3, 1996.

Woods stayed at Harms's house after the other guests had gone. He went into Harms's bedroom and called to her. When Harms came into the bedroom, she found Woods standing with his pants off. He told her that he was going to bed, and he grabbed her by the wrist, pulled down the covers, and pulled her onto the bed. Harms refused to take her clothes off, and she told Woods that she did not want to have sex. Woods began to undress Harms despite her verbal and physical objections. As he undressed her, he said, "I am pretty aggressive.

Aren't you?" Then, he looked at Harms and said, "No, you are not." Harms tried to stop Woods from undressing her by grabbing his hand and saying, "Don't do that," but Woods rolled over and put his legs between her legs. Harms said, "Please, don't," and Woods said, "Just let me do what I want," in a threatening tone of voice. Because of Woods's size, actions and his tone of voice, Harms felt threatened. She began crying, but she did what he told her to do because she was afraid. Woods entered her vagina with his penis, attempted anal sex, bit her nipple, performed oral sex on her, and told her to perform oral sex on him. Harms testified the sexual acts were painful.

After Woods left, Harms did not leave the house all day, and she saw no one until two friends, Mike Pope and Ron Hardy, came to her house at approximately 6:00 p.m. Harms told Pope that Woods had raped her. The next day, Harms also told another friend, Pam Bock, that Woods had raped her.

On February 13, 1996, Harms reported the rape to officer James Cler, and she later provided the police with a written statement. Harms initially did not want to prosecute but later agreed that she would. She said her delay in reporting and deciding to prosecute was primarily due to fear. She also said "I am a business person. I am a public figure in a small community and I didn't care to be the local talk of the town." Cler later testified that she had told him "that she was afraid of her reputation if the story got around that she had had sex with a Negro, Black male" and "that nobody would believe her because it will be a black man's word against her word."

The State filed a complaint charging Woods with five counts of second-degree sexual assault under § 940.225(2)(a), STATS. At trial, Woods objected to the testimony of Harms's friends concerning out-of-court statements

she made to them following the incident, and Woods also argued that it was unfair to instruct the jury on second-degree sexual assault because of the risk of a compromised verdict. The court ruled in favor of the State on both objections. The jury convicted Woods of four counts of third-degree sexual assault, pursuant to § 940.225(3), and one count of fourth-degree sexual assault, pursuant to § 940.225(3m).

In postconviction motions, Woods sought a new trial on the grounds that the State had made impermissible comments in closing argument and that the verdict forms may have misled the jury to convict without finding all the elements of the offenses. Because Woods's attorney had not objected on these grounds at trial, Woods sought a new trial in the interests of justice and on the basis that counsel's failure to object constituted ineffective assistance. The court denied Woods's postconviction motions, and this appeal followed.

DISCUSSION

Standard of Review.

This case presents several questions reviewed under various standards. The admission of evidence lies within the sound discretion of the circuit court. ***State v. Pepin***, 110 Wis.2d 431, 435, 328 N.W.2d 898, 900 (Ct. App. 1982). When we review a discretionary decision, we examine the record to determine 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 88, 892-93 (Ct. App. 1997). In considering whether the proper legal standard was applied, however, no deference is due. This court's function is to correct legal errors. ***Id.*** Therefore, we review *de novo* whether the evidence before the circuit

court was legally sufficient to support its rulings. ***Id.*** Furthermore, if evidence has been erroneously admitted or excluded, we will independently determine whether that error was harmless or prejudicial. ***State v. Patricia A.M.***, 176 Wis.2d 542, 556-57, 500 N.W.2d 289, 295 (1993).

The determination of whether a jury instruction is sufficiently supported by the evidence is a question of law which we review *de novo*. ***State v. Holt***, 128 Wis.2d 110, 126-27, 382 N.W.2d 679, 687-88 (Ct. App. 1985). In contrast, the form of a special verdict is within the circuit court's discretion and we will not interfere if the material issues of fact are encompassed within the question asked and the instructions given. ***Ford Motor Co. v. Lyons***, 137 Wis.2d 397, 467-68, 405 N.W.2d 354, 382 (Ct. App. 1987).

Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State ex rel. Flores v. State***, 183 Wis.2d 587, 609, 516 N.W.2d 362, 368-69 (1994) (citing ***Strickland v. Washington***, 466 U.S. 668, 698 (1984)). The circuit court's findings of fact will not be reversed, unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714-15 (1985); § 805.17(2), STATS. However, ultimately whether counsel's conduct violated Woods's right to effective assistance of counsel is a legal determination, which this court decides without deference to the circuit court. ***State v. (Oliver) Johnson***, 133 Wis.2d 207, 216, 395 N.W.2d 176, 181 (1986). In contrast, a circuit court's decision to grant or deny a new trial is discretionary. ***Markey v. Hauck***, 73 Wis.2d 165, 171-72, 242 N.W.2d 914, 917 (1976).

Prior Consistent Statements.

Woods contends that the circuit court erroneously exercised its discretion in permitting Harms, Pope and Bock to testify to Harms's out-of-court statements that Woods had raped her. The State contends that Harms's statements to her friends in the days following the sexual assault were admissible under the § 908.01(4)(a)2., STATS., exception to the hearsay rules. Section 908.01(4)(a)2., states in relevant part:

> A statement is not hearsay if … [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is … [c]onsistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

Under § 908.01(4)(a)2., STATS., a prior consistent statement of a witness is not hearsay and may be offered for substantive purposes if: (1) the declarant testifies at trial and is subject to cross-examination concerning the statement; (2) the statement is consistent with the declarant's testimony; and (3) the statement is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. ***State v. Ansani***, 223 Wis.2d 39, 52, 588 N.W.2d 321, 327 (Ct. App. 1998)

The declarant, Harms, testified at trial; she was subject to cross-examination concerning the statement; and her earlier statements were consistent with her trial testimony. Therefore, the only remaining issue is whether testimony regarding Harms's out-of-court statements to her friends were offered to rebut an express or implied charge against Harms of recent fabrication or improper influence or motive.

To use prior consistent statements, the proponent of the statements must show that they predated an alleged recent fabrication and that there was an express or implied charge of fabrication at trial. ***State v. Peters***, 166 Wis.2d 168, 177, 479 N.W.2d 198, 201 (Ct. App. 1991); ***State v. Mares***, 149 Wis.2d 519, 527, 439 N.W.2d 146, 149 (Ct. App. 1989). If the prior consistent statements predate the alleged recent fabrication, then the statements have probative value and are admissible. ***Peters***, 166 Wis.2d at 177, 479 N.W.2d at 201. In addition, a suggestion of recent fabrication must be made at trial.

For example, in ***Mares***, a sexual assault victim was asked questions by defense counsel which suggested that she had been coached by the prosecutor about explaining the differences between her preliminary hearing testimony and her trial testimony. ***Mares***, 149 Wis.2d at 527, 439 N.W.2d at 149. We concluded that this line of questioning raised the spectre of improper prosecutorial coaching and suggested that the victim was fabricating her testimony at trial. ***Id.*** at 528-29, 439 N.W.2d at 149.

During opening statements, counsel for Woods alleged that Harms had fabricated the assault. When cross-examining Harms, counsel also asked why she waited to report the assault and whether she was embarrassed by the fact that Woods was black. Woods's attorney also asked officer Cler if Harms was reluctant to prosecute because she was afraid of her reputation if the story got around that she had had sex with a black man. By asking these questions, defense counsel suggested that Harms had lied about the rape because she did not want people to know that she had sex with a black man.

Although the State met its burden of proving that Woods charged Harms with fabricating the assault, the State failed to show that the hearsay

statements predated the fabrication. Woods contends that Harms's motive to fabricate the assault arose immediately following the sexual contact. The State, in contrast, argues that because the alleged motive to lie is based on Harms's subjective concern, not some objective event, any attempt to determine when the motive arose is pure speculation; therefore, we should look for some objective manifestation or expression of motive to lie to determine when it arose. The State suggests that Harms's conversation with Cler is an expression of her motive; however, the State did not present any evidence which proves that the charged motive to lie arose at that time rather than at the earlier time alleged by Woods. Therefore, because the State failed to prove that the alleged motive to fabricate predated Harms's statements to her friends, the circuit court erred in admitting the testimony as prior consistent statements under § 908.01(4)(a)2., STATS.

However, our analysis does not end there. Evidentiary errors are subject to a harmless error analysis. An error is harmless if there is no reasonable possibility that it contributed to the conviction. ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985). A "reasonable possibility" is one which is sufficient to undermine confidence in the outcome of the proceeding. ***Patricia A.M.***, 176 Wis.2d at 556, 500 N.W.2d at 295. The burden of proof is on the beneficiary of the error to establish that the error was not prejudicial. ***Dyess***, 124 Wis.2d at 544 n.11, 370 N.W.2d at 232 n.11.

The State met its burden on this issue. During closing arguments, the prosecutor noted that the testimony of Pope and Bock corroborated Harms's testimony, but the prosecutor did not suggest that Harms's statements to her friends proved that she had not fabricated the assault. Instead, the State argued that Woods's contention that Harms fabricated the assault was illogical, noting that if Harms were ashamed of having sex with a black man, it would have made

more sense to deny that the incident happened at all. Because the State did not address the specific hearsay statements Harms made to her friends, it is evident that the verdict did not rest on the truth of those statements. Furthermore, the record is replete with evidence of Woods's guilt. For example, Harms testified, in detail, about the circumstances of the assault, including that she repeatedly told Woods that she did not want to have sex with him, and Harms's demeanor at trial and as described by others, demonstrated that she was upset by the sexual contact. In addition, Woods initially lied to police about knowing Harms, which undermined his position. Furthermore, Woods apologized to Harms a few days after the assault. Based on the abundant evidence against him and the way the State used Harms's earlier statements, there is no reasonable possibility that the erroneously admitted testimony contributed to the conviction. Therefore, we conclude that the admission of the testimony was harmless error.[1]

Jury Instruction.

A person commits second-degree sexual assault under § 940.225(2)(a), STATS., if he or she "[h]as sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence." The offense can be broken down into three essential elements: (1) sexual contact or sexual intercourse with the victim, (2) lack of the victim's consent, and (3) use or threat of force or violence. ***State v. Baldwin***, 101 Wis.2d 441, 449, 304 N.W.2d 742, 747 (1981). "Stated in simpler terms the offense has a

[1] Because we conclude that the admission of the hearsay statements was harmless error, we do not address whether the statements could have been admitted as excited utterances under § 908.03(2), STATS. Furthermore, the State does not adequately address the excited utterance hearsay exception. ***Truttschel v. Martin***, 208 Wis.2d 361, 369, 560 N.W.2d 315, 319 (Ct. App. 1997) ("[W]e do not decide issues that are not adequately developed by the parties in their briefs.").

sexual activity component, a consent component, and a force component." ***Id.*** Woods argues that the evidence adduced at trial was insufficient to support the third component,[2] and therefore, the circuit court erred by instructing the jury on second-degree sexual assault.

The force element of second-degree sexual assault involves an element of compulsion, the utter subjugation of the victim's free will, ***id.*** at 450, 304 N.W.2d at 748, and the message conveyed by the threat is determined in part by the context in which it occurs. ***State v. Jaworski***, 135 Wis.2d 235, 239, 400 N.W.2d 29, 30-31 (Ct. App. 1986). For example, in addition to verbal threats, the place in which the assault took place, the age and size of the defendant in comparison to the victim, and the victim's level of fear are all important in determining whether the sexual assault was achieved by threat of force. ***Id.*** at 239-40, 400 N.W.2d at 31. In ***Jaworski***, the threat occurred in a county jail, where the victim and the perpetrator were confined to the same cell block. ***Id.*** at 239, 400 N.W.2d at 31. Jaworski, an older and larger inmate, grabbed the victim by the throat and said, "If you want me to get violent, I'll get violent with you." ***Id.*** Although Jaworski did not repeat the threat each time, the victim submitted to Jaworski out of fear on several subsequent occasions. ***Id.*** The court was particularly concerned with the victim's level of fear, and it concluded that the

[2] Woods contends that only the "threat of force" is at issue because the State, in the criminal complaint and information, charged Woods with only a "threat of force," not with a "use of force"; however, the State clearly charged Woods with second-degree sexual assault which does not require delineation between "use of force" or "threat of force," it requires only a force component. ***State v. Baldwin***, 101 Wis.2d 441, 446-52, 304 N.W.2d 742, 746-49 (1981) (Second-degree sexual assault "maintains the proscription against force or compulsion not as separate and distinct forms of conduct, but as a more generalized concept of conduct, including force threatened and force applied, directed toward compelling the victim's submission.").

original threat of violence continued to weigh upon the victim and caused him to cooperate out of fear that he would be injured. ***Id.*** at 239-40, 400 N.W.2d at 31.

Many of the factors which contributed to the threatening atmosphere in ***Jaworski*** exist in the present case. Woods was much larger than Harms, and Harms specifically noted Woods's size in comparison to hers in explaining why she felt threatened. Although not as unambiguously threatening as Jaworski's verbal threat to his victim, Woods saying, "I am pretty aggressive" and "Just let me do what I want," in combination with his ignoring Harms's objections to his sexual overtures, grabbing Harms's wrist, pulling her onto the bed, removing her clothes when she asked him not to, and continuing the assault even though she was crying, all conveyed a willingness to use force and to compel Harms's submission.

Furthermore, there was evidence of use of physical force in this case as well. The phrase "use of force" in § 940.225(2)(a), STATS., includes "forcible contact or the force used as the means of making contact." ***State v. Bonds***, 165 Wis.2d 27, 32, 477 N.W.2d 265, 267 (1991). For example, in ***Bonds***, the supreme court concluded that twisting the victim's nipple constituted both sexual contact and use of force necessary for a second-degree sexual assault conviction because force used at the time of contact can compel submission as effectively as force or threats occurring before contact. ***Id.***

Like the defendant in ***Bonds***, Woods used force at the time of contact. When Woods bit Harms's nipple and attempted anal sex, he caused Harms a great deal of pain thereby compelling her further submission. Evidence of these forceful sexual contacts, in combination with Woods's verbal threats and the size disparity between the two parties, could have supported a finding of "use

or threat of force or violence" by the jury. Therefore, the circuit court did not err in giving the second-degree sexual assault instruction to the jury.

Closing Arguments.

Woods contends that during closing argument, the prosecutor improperly commented on Woods's exercise of his right not to testify and urged the jury to convict for reasons other than guilt and that such comments prejudiced Woods's right to a fair trial. However, Woods waived any objection to the allegedly improper comments because he failed to object, *see* ***State v. Coulthard***, 171 Wis.2d 573, 590, 492 N.W.2d 329, 337 (Ct. App. 1992), or move for a mistrial, *see* ***Haskins v. State***, 97 Wis.2d 408, 424, 294 N.W.2d 25, 36 (1980), at the time the comments were made.

Woods argues that because the error is fundamental and affects his substantial rights, we should nevertheless grant a new trial in the interests of justice. Even though comment on a defendant's silence is sufficiently prejudicial to warrant examination in the interests of justice despite a waiver, direct constitutional error is waived by a strategic decision not to object. ***State v. Hoffman***, 106 Wis.2d 185, 223, 316 N.W.2d 143, 163 (Ct. App. 1982); ***Murray v. State***, 83 Wis.2d 621, 628-30, 266 N.W.2d 288, 291-92 (Ct. App. 1978). At the postconviction hearing, defense counsel stated that he made a strategic decision not to object to the comments in question because he thought the risk of objecting and alienating the jury or emphasizing the comments was greater than the risk to the defendant because the comments were not plainly improper or effective with the jury. Therefore, because defense counsel's failure to object was strategically motivated, we will not disregard the waiver and grant a new trial in the interests of justice.

Woods also contends that he is entitled to a new trial because defense counsel's failure to object constituted ineffective assistance of counsel. The right to effective assistance of counsel stems from the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution, which guarantee a criminal defendant a fair trial. *See* ***Strickland***, 466 U.S. at 684-86; ***State v. Sanchez***, 201 Wis.2d 219, 227-28, 548 N.W.2d 69, 72-73 (1996). The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. ***Strickland***, 466 U.S. at 687. A defendant has the burden of proof on both components of the test. ***Id.*** at 688.

To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***State v. (Edward) Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990) (citing ***Strickland***, 466 U.S. at 687). A defendant must also overcome a strong presumption that his or her counsel acted reasonably within professional norms. ***Id.*** To satisfy the prejudice prong, a defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. ***Strickland***, 466 U.S. at 687.

Woods argues that defense counsel was ineffective in failing to object to comments concerning Woods's exercise of his right not to testify. However, the prosecutor's comments were not plainly improper because he did not make direct reference to Woods's silence; rather, he merely reviewed the testimony presented at trial, omitting Woods from the list of witnesses. *See* ***Griffin v. California***, 380 U.S. 609, 611 (1965). While the prosecutor's remarks might have prompted the jury to recall and reflect upon Woods's failure to testify,

the comments did not highlight Woods's silence. *See* ***State v. (Michael) Johnson***, 121 Wis.2d 237, 248, 358 N.W.2d 824, 829 (Ct. App. 1984). Therefore, defense counsel's failure to object was a reasonable, strategic decision and did not constitute deficient performance.

Woods also argues that his attorney was ineffective in not objecting to the prosecutor's comments urging the jury to convict for reasons other than guilt; specifically, suggesting that the jury should convict Woods to protect community values or to "send a message." These remarks were not clearly inappropriate because the prosecutor urged the jury to "send a message" to Woods, not to the community, that such conduct is unacceptable. Additionally, defense counsel offered reasonable grounds for deciding not to object to those comments.

Verdict Forms.

Woods's last argument is that he was deprived of a fair trial because the verdict forms were misleading. The verdict forms specified the sexual act to which each verdict related, but each form did not require a specific finding on lack of consent. Therefore, Woods contends that the jury could have believed that it could convict Woods if it found he performed the sexual acts, even if Harms consented.

While verdict forms do not always set forth the elements of the offenses, the verdict forms in this case did specify the sexual acts because the parties and the circuit court wanted to distinguish between the various counts in the information. Although the consent element was not included in the verdict forms, the court instructed the jury on consent and consent was the central focus of the trial. Therefore, no reasonable jury could have inferred that the absence of the

consent element on the verdict forms meant that it could convict, even if Harms had consented.

CONCLUSION

We conclude that the circuit court's admission of Harms's out-of-court statements to her friends was harmless error; that evidence of forceful sexual contacts, in combination with verbal threats and the size disparity between the two parties, could have supported a finding of "use or threat of force or violence" necessary to give a second-degree sexual assault instruction to the jury; that Woods waived any objection to the allegedly improper comments during closing argument by making a strategic decision not to object but that such a decision did not constitute ineffective assistance; and that no reasonable jury could have inferred that the absence of the consent element on the verdict forms meant that it could convict without that element. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.