

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 13, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 99-3111-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARKHAM O. MAYNE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: WILLIAM E. CRANE, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Markham O. Mayne pled guilty to being a felon in possession of a firearm and was then convicted by a jury of kidnapping, eight counts of sexual assault with a weapon, and endangering safety. He appeals from the judgment of conviction and from an order denying his postconviction motion

without an evidentiary hearing. Mayne raises numerous issues on appeal. Only one issue is adequately briefed for our consideration: whether the circuit court erred when it rejected Mayne's proposed stipulation under *State v. Wallerman*, 203 Wis. 2d 158, 552 N.W.2d 128 (Ct. App. 1996), by which Mayne sought to prevent the State from introducing evidence of other kidnappings/sexual assaults. Because we conclude that the circuit court did not err, we affirm.

¶2 Mayne was charged under WIS. STAT. § 940.31(1)(b) (1995-96)¹ with kidnapping Brenda A. on July 17, 1995, for the purpose of sexually assaulting her. Mayne allegedly assaulted Brenda A. repeatedly from the evening of July 17 until dawn on July 18. The State sought to admit evidence of other kidnappings/sexual assaults Mayne committed against three other women over the preceding fifteen years. The State contended that the evidence was relevant to Mayne's motive and intent to kidnap and hold women to service against their will. The circuit court ruled that the evidence was relevant to the kidnapping charge and that its probative value was not substantially outweighed by the danger of unfair prejudice.

¶3 After the circuit court admitted the other-acts evidence, Mayne offered a *Wallerman*-type stipulation to motive and intent in order to remove the need for other-acts evidence. In *Wallerman*, 203 Wis. 2d at 167-68, this court held that to preclude the admission of other-acts evidence proffered by the State, a

¹ All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise noted. WISCONSIN STAT. § 940.31(1)(b) provides:

By force or threat of imminent force seizes or confines another without his or her consent and with intent to cause him or her to be secretly confined or imprisoned or to be carried out of this state or to be held to service against his or her will.

defendant may offer to stipulate to the elements of the offense for which the other-acts evidence is being offered. Whether to allow such a stipulation is within the circuit court's discretion. *See id.* at 168 n.4. This court later established the following guidelines for the circuit court to determine whether to accept a *Wallerman* stipulation:

After having considered whether there is sufficient evidence to prove the elements to which the stipulation applies, the court should: (1) determine exactly what the defendant is conceding; (2) assess whether the other acts evidence would still be necessary despite the concession; (3) personally voir dire the lawyers and the defendant to ensure they understand the effects of the concession

State v. DeKeyser, 221 Wis. 2d 435, 444, 585 N.W.2d 668 (Ct. App.), *review denied*, 221 Wis. 2d 656, 588 N.W.2d 633 (Wis. Oct. 14, 1998) (No. 98-0174-CR).

¶4 Mayne made several offers to stipulate to the fourth element of kidnapping: the defendant seized or confined the victim with intent that the victim be held to service against her will. *See* WIS JI—CRIMINAL 1281.² In November 1998,³ Mayne moved to exclude the other-acts evidence and to stipulate that the only possible motive and intent for kidnapping Brenda A. was to commit a sexual assault. In conjunction with the motion, Mayne submitted a proposed jury instruction stating that a sexual assault was the same as holding someone to service against her will and that a sexual assault, as alleged, would satisfy the

² The other elements of kidnapping are set forth in WIS JI—CRIMINAL 1281: (1) the defendant must have seized or confined the victim; (2) the defendant seized or confined the victim without her consent; and (3) the defendant seized or confined the victim forcibly.

³ Mayne's September 1998 proposed *Wallerman* stipulation stated that if Mayne had sexual contact with Brenda A. as alleged, his motive and intent were sexual gratification. Mayne apparently abandoned a stipulation relating to sexual gratification because all subsequent proposed stipulations related to the fourth element of the kidnapping charge.

fourth element of kidnapping. At the hearing on Mayne's motion regarding the other-acts evidence, the State clarified that it would present only the two most recent prior instances of kidnapping/sexual assault and that this other-acts evidence was offered to prove motive and intent with regard to the "service against will" element of kidnapping. The court accepted the State's clarification of the use of the other-acts evidence and reiterated its admissibility for these purposes.

¶5 At a subsequent hearing, the court addressed Mayne's proposed stipulation. The State argued that Mayne's proposed stipulation did not actually concede the fourth element of kidnapping. By stipulating only to "possible" motive and intent, the State argued that Mayne's stipulation was conditional and did not admit to the fourth element of kidnapping. The circuit court agreed and rejected Mayne's stipulation as insufficient due to the "possible" provision.

¶6 In January 1999, Mayne filed yet another motion to stipulate along with a proposed jury instruction regarding the elements of kidnapping. The stipulation stated:

As to the motive and intent elements of kidnapping, as defined by WIS JI—CRIMINAL 1281, the defendant concedes that the motive and intent for seizure or confinement of Brenda A[.] as alleged by the State will not be contested. Therefore, the defendant concedes that if he seized or confined Brenda A[.] by use of force and without her consent, and if he sexually assaulted her thereafter, then the sexual assault was the motive and intent of the seizure and confinement.

¶7 The State argued that Mayne was only conceding that if he seized and sexually assaulted Brenda A., then his motive and intent were to assault Brenda A. But, the State argued, it need only prove that at the time of the seizure,

Mayne had the intent to assault, not that assault actually occurred. The State urged that Mayne had to concede intent at the moment he seized Brenda A. in order to eliminate the State's obligation to prove the fourth element of kidnapping and bar the other-acts evidence relating to that element.

¶8 The court agreed with the State and rejected Mayne's final stipulation. The court found that the fourth element of kidnapping requires that the defendant have confined the victim with intent to hold the victim to service against her will. The court restated that the other-acts evidence was relevant to Mayne's intent at the time he seized Brenda A.

¶9 On appeal, Mayne challenges the circuit court's *Wallerman* ruling. Mayne contends that he stipulated to the intent element of the kidnapping charge, and the court should have accepted his stipulation. We affirm the circuit court's discretionary decision to reject the stipulation because the stipulation did not relieve the State of proving the "service against will" element of kidnapping for which the circuit court deemed the other-acts evidence relevant.⁴

¶10 Because Mayne's stipulation was conditioned upon whether he seized Brenda A. and sexually assaulted her, the State was still required to prove the fourth element of kidnapping: intent to hold the victim to service against her will. This element has been held to include sexual acts performed at the command of another. See *State v. Clement*, 153 Wis. 2d 287, 293, 450 N.W.2d 789 (Ct. App. 1989). Therefore, Mayne's stipulation did not eliminate all of the matters which the State had to prove to satisfy the fourth element of kidnapping. Mayne

⁴ We may affirm based on reasoning other than that used by the circuit court if the court reached the proper result. See *State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985).

did not satisfy the *Wallerman* requirement that a defendant actually stipulate to an element of the crime to which the other-acts evidence would be relevant. The circuit court properly exercised its discretion in rejecting Mayne's proposed stipulation.

¶11 Furthermore, even if Mayne had offered a valid *Wallerman* stipulation, evidence of the previous kidnappings/sexual assaults would have been relevant to his "system of activity," another basis for admitting other-acts evidence. See *Whitty v. State*, 34 Wis. 2d 278, 293, 149 N.W.2d 557 (1967); see also *State v. Shillcutt*, 116 Wis. 2d 227, 236, 341 N.W.2d 716 (Ct. App. 1983), *aff'd*, 119 Wis. 2d 788, 350 N.W.2d 686 (1984) (purposes of other-acts evidence enumerated in WIS. STAT. § 904.04(2) is not exhaustive). There were substantial similarities between the seizure and sexual assault of Brenda A. and the seizure and sexual assault of the other women.

¶12 Mayne raises numerous other issues on appeal relating to ineffective assistance of trial counsel and the circuit court's failure to grant him an evidentiary hearing on his postconviction motion. These claims of error are supported by only conclusory allegations of prejudice. These issues are inadequately briefed, and we will not independently develop Mayne's arguments for him. See *Vesely v. Sec. First Nat'l Bank*, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593 (Ct. App. 1985). A brief which raises all possible claims of error and does not "winnow[...] the potential claims so that the court may focus on those with the best prospects," is not effective appellate advocacy. *Page v. United States*, 884 F.2d 300, 302 (7th Cir. 1989).

By the Court.—Judgment and order affirmed.

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

