COURT OF APPEALS
DECISION
DATED AND FILED

October 12, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2088-CR **Cir. Ct. No. 2002CF1202**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GERALD R. FOGLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: MICHAEL S. FISHER, Judge. *Affirmed*.

Before Brown, Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Gerald R. Fogle appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. He argues that there was insufficient evidence to establish an element of the crime of false imprisonment, and that he received ineffective

assistance of trial counsel. Because we conclude that the evidence was sufficient and that trial counsel was not ineffective, we affirm.

¶2 Fogle was convicted after a jury trial of one count of intimidation of a witness, one count of false imprisonment, one count of battery, and one count of disorderly conduct. The underlying incident involved a violent altercation between Fogle and the mother of his child, Anissa Marlow. The two began arguing, the argument became physical, and at one point Fogle held Marlow against a wall by her throat. He also choked her at least one other time. The police eventually arrived and Marlow gave them a statement about what had happened. At Fogle's trial, Marlow recanted some of what she had said to the police at the time of the incident, although she testified that Fogle choked her twice during the incident. An expert witness, Dr. Kevin Fullin, testified that the injuries to Marlow's throat were consistent with attempted strangulation. He also testified that Marlow's injuries were inconsistent with someone "staving off" an attack by putting their hands on the attacker's neck. Further, he testified that it would be common for a person who was strangling another to have been injured by the person trying to resist strangulation.

¶3 Fogle brought a motion for postconviction relief in the circuit court alleging that his trial counsel was ineffective because she withdrew a request for a self-defense instruction at the jury instruction conference. The circuit court denied the motion, finding that there was not sufficient evidence of self-defense to have made a difference in the outcome of the trial. Fogle renews this argument on appeal, and also argues that there was insufficient evidence to support the guilty verdict for false imprisonment.

¶4 When considering a challenge to the sufficiency of the evidence, "an appellate court may not substitute its judgment for that of the trier of fact unless 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 inference may be drawn, the inference which supports the jury's verdict must be followed unless the evidence was incredible as a matter of law. ***State v. Alles***, 106 Wis. 2d 368, 377, 316 N.W.2d 378 (1982). "[I]f any possibility exists that the jury *could* have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, we will not overturn a verdict even if we believe that a jury *should* not have found guilt based on the evidence before it." ***Id.***

¶5 Fogle argues that the evidence presented at trial was not sufficient to show the confinement element of false imprisonment. False imprisonment is defined as: "Whoever intentionally confines or restrains another without the person's consent and with knowledge that he or she has no lawful authority to do so is guilty of a Class H felony." WIS. STAT. § 940.30 (2003-04).[1] Fogle argues that the evidence showed that he held Marlow either against a wall or on a couch for at most a few moments, that any evidence of confinement was simply incidental to the other crimes charged, and that the evidence presented at trial was not sufficient to establish that he confined her.

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

¶6 In support of the argument that the evidence establishing confinement or restraint was simply incidental to the other crimes charged, Fogle relies on cases from other jurisdictions. There are, however, two Wisconsin cases that address this issue. In ***Harris v. State***, 78 Wis. 2d 357, 365, 254 N.W.2d 291(1977), *criticized on other grounds by* ***Wilson v. State***, 82 Wis. 2d 657, 264 N.W.2d 234 (1978), the supreme court acknowledged that other states have a different rule, but stated that: "It is the law of this state the same criminal act may constitute different crimes with similar but not identical elements. 'In other words, if any of the elements of proof required are different in the crimes charged, then they may considered separate crimes.'" ***Id.*** (citations omitted). There appears to be no Wisconsin authority for the proposition that "evidence of conduct which is 'merely incidental' to the commission of a crime, such as sexual assault, may not be used to satisfy an element of another crime, such as kidnapping. Wisconsin authority supports the opposite conclusion." ***State v. Simpson***, 118 Wis. 2d 454, 461, 347 N.W.2d 920 (Ct. App. 1984).

¶7 We conclude that this language is clear and unambiguous: the same conduct may constitute different criminal acts with similar but not identical elements. Fogle argues that the false imprisonment charge was merely incidental to the other crimes charged. He does not argue that the elements of the charged crimes are different. Consequently, we reject his argument that the evidence was insufficient on this basis.[2]

[2] Fogle asserts that our interpretation of the statute could lead to such absurd results as high school wrestlers being arrested for pinning an opponent, or the Green Bay Packers no longer tackling. As the State points out, however, the flaw in this argument is that the wrestlers and football players consent to the restraint. Marlow did not.

¶8 Fogle also argues that there was insufficient evidence to show that he actually confined Marlow for any length of time. The statute, however, states that whoever "confines or restrains" another without his or her consent is guilty of false imprisonment. The evidence showed that Fogle held Marlow with his hands around her neck for at least a minute. From this evidence, the jury could have reasonably concluded that Fogle restrained Marlow. We conclude that the evidence at trial was sufficient to establish the elements of the statute.

¶9 Fogle next argues that he received ineffective assistance of trial counsel. To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. If this court concludes that the defendant has failed to prove one prong, we need not address the other prong. ***Id.*** at 697. To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.*** at 687. We will not "second-guess a trial attorney's 'considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.' A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) (citations omitted).

¶10 Fogle asserts that his counsel was ineffective because she abandoned the defense of self-defense during the course of the trial. At the beginning of the trial, counsel suggested that she would be arguing that Fogle acted in self-defense in the altercation with Marlow. At the jury instruction conference, however,

counsel told the court that her client would not be requesting the self-defense instruction, and that Fogle had made that decision after conferring with her. Fogle now argues that this is a decision that counsel, not a defendant, should make, and that trial counsel abdicated her responsibility by letting him make the decision.

¶11 At the ***Machner***[3] hearing, counsel testified that both as a result of a previous revocation hearing and the evidence adduced during the trial, she became increasingly convinced that a self-defense theory would not work in this case. When questioned by Fogle's counsel she stated:

> Let me put it to you this way, [Counsel]. Things happen during a course of a trial, and you may look at it and say this is the defense; and during the course of the trial, things pop up, witnesses testify, other witnesses come in and testify; and you have to make a decision as to whether or not an instruction is totally appropriate, and that's what happened in this case, [Counsel]. During the course of the trial, things were testified to that made great doubt in my mind as to whether or not a self-defense instruction was appropriate under the circumstances, number one, the issue of who was the aggressor, whether Mr. Fogle had the opportunity to back away from this entire situation and leave the house, or back away from Miss Marlow …. The fact of the matter is that Dr. Fullin testified to … Mr. Fogle's injuries that Dr. Fullin felt were not consistent with one defending himself, … and Mr. Fogle being the instigator; so under those circumstances, and also the incident of who was provoking the matter, and that was a consideration…. [A]nd under those circumstances it appeared that the self-defense issue was not a viable issue at the time.

¶12 Counsel also testified that part of the reason she wanted to abandon the self-defense instruction was that she could then argue that this was an incident in which both parties were "mutually combative." She also testified that if she had

[3] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

pursued the defense, the jury would have had to disbelieve Dr. Fullin, who had indicated that the injuries sustained were not consistent with self-defense. By abandoning that defense, then, she would not have had to argue that Dr. Fullin's testimony was wrong.

¶13 As Fogle asserts, counsel also testified that the decision to abandon the defense was Fogle's and not hers. When she was asked if his request to abandon the defense was spontaneous or was made in the midst of the discussion of her concerns about the viability of the defense, however, she said that Fogle made the request in the midst of their discussion.

¶14 We conclude that based on the totality of this testimony, it is apparent that the decision to abandon the defense was not made by Fogle alone, but was the result of a discussion with his attorney about her doubts about the viability of the defense. Counsel considered the evidence presented and reached the conclusion that self-defense was not a viable way to proceed and discussed her concerns with her client. Her client then chose to abandon the defense, a decision with which counsel agreed. Based on counsel's testimony at the ***Machner*** hearing, as with the evidenced offered at trial, we conclude that this was a considered and reasonable decision. We conclude that Fogle did not receive ineffective assistance of counsel. For these reasons, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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