COURT OF APPEALS
DECISION
DATED AND FILED

March 30, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP3055-CR **Cir. Ct. No. 2001CF185**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILL JAMES ROBINSON, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed.*

Before Lundsten, P.J., Deininger and Higginbotham, JJ.

¶1 PER CURIAM. Will Robinson appeals a judgment of conviction. We affirm.

¶2 Robinson was convicted of several felonies in connection with one episode involving sexual assault. His appeal challenges two of the charges. First, he challenges his kidnapping conviction under WIS. STAT. § 940.31(1)(b) (1995-96).[1] Robinson argues that the evidence was insufficient to support a conviction on this charge. In reviewing the sufficiency of the evidence, we affirm the verdict unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that no reasonable trier of fact could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶3 Robinson argues that the evidence was insufficient to prove that he confined the victim, which is an essential part of several of the elements. The jury in his case was not provided with any definition of "confined," but was simply instructed, for example, that it had to determine whether "the defendant seized or confined" the victim. Robinson argues that the evidence was insufficient because the victim voluntarily got into the car with Robinson and never told him that she did not want to be in the car, even during the assault. He argues that the only evidence that could support the confinement element was a single reference by the victim to her having tried to pull on the door handle during the assault.

¶4 We conclude the evidence was sufficient. Robinson's argument does not take into account the victim's testimony that Robinson climbed on top of her and she tried to get him off of her, and that he kept hitting her in the face while she kept trying to pull him off of her. She testified that he was "straddling" her so

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

that she could not get away. This is sufficient to meet the ordinary meaning of the word "confined."

¶5 In the alternative, Robinson argues that, even if the evidence was sufficient to meet the element of confinement, we should reverse the kidnapping charge because confinement was an integral and inseparable part of the sexual assault for which he was also convicted. To support his argument, Robinson relies on policy grounds and discussions from earlier opinions.

¶6 The legal argument Robinson is now making is one that should have been raised by motion to dismiss or by a request to modify the jury instructions. There is no indication in Robinson's briefs that he filed a motion to dismiss on this ground or requested an instruction that would have required the jury to find that the kidnapping charge was supported by facts separate from the sexual assault conduct itself. Before appealing in a criminal case, a defendant must first raise the issues by postconviction motion, unless the issue is sufficiency of the evidence or one previously raised during trial court proceedings. WIS. STAT. § 974.02(2); ***State v. Monje***, 109 Wis. 2d 138, 153-53a, 325 N.W.2d 695, 327 N.W.2d 641 (1982) (on reconsideration). Also, we lack authority to review unobjected-to jury instructions. ***State v. Schumacher***, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988). Because Robinson's issue is not sufficiency of the evidence and does not appear to have been raised earlier, we deem it waived, and reject the argument on that basis.

¶7 In addition, we reject Robinson's "integral part" argument on its merits. Robinson cites no Wisconsin authority adopting the view that a kidnapping conviction is not proper when the conduct alleged to be kidnapping is also conduct that serves as the basis for a different conviction. Robinson appears

to acknowledge that prior Wisconsin decisions take the opposite view, most particularly ***State v. Simpson***, 118 Wis. 2d 454, 347 N.W.2d 920 (Ct. App. 1984), and he attempts to distinguish them from his own case on factual grounds. However, the significance of ***Simpson*** here is not the particular facts in that case, but our statement of law: "We decline to construe the kidnapping statute to require proof of facts showing asportation or … secret confinement which are wholly independent of, and nonincidental to, the commission of the additional crime charged." ***Id.*** at 462. Applying this holding here, Robinson's conviction on both counts was proper.

¶8 Robinson next argues that the evidence was insufficient to support his conviction of first-degree recklessly endangering safety. More specifically, he contends that the evidence does not support a finding that his conduct showed utter disregard for human life. *See* WIS. STAT. § 941.30(1) (1995-96). Robinson's argument is based in part on his assertion that this element requires his conduct to have had "the potentiality of causing death." To support this assertion he relies on earlier case law and a footnote to the pattern jury instruction, WIS JI—CRIMINAL 1345. However, that case law and footnote are irrelevant in the present context. As above, this is a legal issue, not sufficiency of the evidence. It concerns the proper definition of the element, and therefore would have to be raised by motion to dismiss or by asking for the jury instructions to include the augmented definition of the term that Robinson now proposes. However, we review sufficiency of the evidence based on the instructions that were actually given, not on what the defendant now argues the instructions should have said.

¶9 In the present case, the jury was given the pattern instruction on this element:

> In determining whether the conduct showed utter disregard for human life, you should consider these factors: what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life; and, all other facts and circumstances relating to the conduct.

¶10 Robinson argues that this element was not satisfied, but he again overlooks significant parts of the victim's testimony. We conclude that the evidence of Robinson's conduct of ejecting the victim, who appeared to him to be unconscious, from his vehicle into sub-freezing cold is sufficient to support this element. After the sexual assault, the victim "played dead" by trying to appear as if she was not breathing. The defendant, at some point, stopped his vehicle in an alley and pushed the victim out of the vehicle onto the ground. The victim was intoxicated and was wearing her shirt and bra, and "might have had on a coat." While there was some uncertainty in the evidence about the coat, as we said earlier, that uncertainty must be viewed in the light most favorable to the verdict, which means the jury was entitled to conclude that the victim was not wearing a coat. And, while Robinson points out that the victim was feigning unconsciousness, he cites no evidence showing that he perceived it as ungenuine at the time of his conduct. The parties stipulated that the temperature was below freezing at the time. A physician testified that under these conditions the victim was at risk of "life and limb." In sum, we are satisfied that a jury could reasonably conclude that leaving an intoxicated, beaten, sexually assaulted, minimally clothed, unconscious person on the ground in an alley late at night in sub-freezing temperatures is conduct that shows an utter disregard for human life.

By the Court.—Judgment affirmed.

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