COURT OF APPEALS DECISION DATED AND FILED

March 20, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.

Appeal No. 2006AP1679-CR

Cir. Ct. No. 2004CF792

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANGEL D. MAYAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Angel Mayan appeals his convictions of attempted sexual assault of a child under the age of sixteen and attempted incest. Mayan argues the circuit court erred by allowing certain evidence at trial and allowing the

jury to be instructed on the lesser-included offenses of which he was convicted. We disagree with Mayan's arguments and affirm the judgment.

BACKGROUND

¶2 Mayan was criminally charged with one count of sexual assault of a child under sixteen years of age and one count of incest, for allegedly sexually assaulting his daughter Valleri. Mayan was tried before a jury on both counts.

¶3 At trial, Valleri testified as to the events and circumstances surrounding the alleged assault. Valleri testified she awoke to find her pants pulled down and her father laying next to her naked expressing shock as to just having had sexual intercourse with his daughter. Valleri testified about her relationship with her father, whom she had only recently met because he had been incarcerated. Valleri testified that on the night she was assaulted Mayan had been "chewing red pills" while she was at his apartment. Valleri further testified Mayan had been drinking and was drunk on the night of the alleged assault.

¶4 At the close of its evidence, the State made a motion to include the lesser-included offense of attempted second-degree sexual assault of a child under sixteen years of age and attempted incest. Mayan objected to the lesser-included offenses, and argued that there was no way that an attempt could be committed in that he "either did it or he didn't do it." Despite the objection, the court granted the motion to include the lesser-included offenses in the jury instructions. The jury found Mayan guilty of the lesser-included offenses of attempted second-degree sexual assault and attempted incest. The court sentenced Mayan to identical consecutive twelve-year prison sentences on each count, with six years of initial confinement on each count.

DISCUSSION

¶5 Mayan makes two arguments. First, he argues the court erred by admitting certain evidence at trial. Second, he argues the court improperly instructed the jury with a lesser-included instruction. We disagree with both arguments and accordingly affirm his convictions.

¶6 Regarding Mayan's arguments relating to the admittance of evidence at trial, Wisconsin case law has repeatedly held parties waive any objection to the admissibility of evidence when they fail to object before the circuit court. ***State v. Edwards***, 2002 WI App 66, ¶9, 251 Wis. 2d 651, 642 N.W.2d 537. Mayan challenges the admissibility of evidence he consumed some red pills prior to the offense, evidence of the relationship between him and his daughter, evidence that he recently had been released from prison, and evidence Mayan was drunk. However, Mayan failed to object to any of this evidence at trial. Mayan does not claim the admission of this evidence was plain error nor does he argue his counsel was ineffective. *See* ***id.*** Therefore, Mayan has failed to preserve these issues for appeal.

¶7 Regarding the inclusion of a lesser-included instruction, Mayan challenges only the late timing of the request for the instruction. In support of his argument Mayan cites a local court rule requiring proposed jury instructions to be submitted six days before trial. He also argues that the failure to be given this advance notice of the request for a lesser-included instruction prevented his counsel from effectively representing him. However, it should be again noted that he does not make this argument as an ineffective assistance of counsel argument.

¶8 Mayan does not cite any cases to support his proposition that a violation of a local court scheduling rule or order deprives his counsel from

effectively representing him. In ***State v. Fleming***, 181 Wis. 2d 546, 556, 510 N.W.2d 837 (Ct. App. 1993), we held "[u]ntil the jury was actually instructed, the prosecutor was free to change her mind" and the trial court was required to instruct on the lesser-included offense once it concluded that the evidence could support acquittal of the greater offense and conviction of the lesser. ***Id.*** at 555-56. We reject Mayan's suggestion that our holding in ***Fleming*** is limited only to those cases where the prosecutor has been "surprised" at trial. In fact, in addressing the theory of equitable estoppel, we noted:

> It is unreasonable for a criminal defendant at the outset of trial to assume that the evidence presented at trial may not affect the state's prosecuting position. A criminal defendant must always be aware that the evidence may suggest to the state that an instruction on a lesser-included offense is appropriate. After the evidence is presented, the court may allow amendment of the complaint or information to conform to the proof where such amendment is not prejudicial to the defendant. Section 971.29(2), Stats. Variance from the complaint or information has been held immaterial where the court amended the charge against the defendant to charge a lesser-included crime. ***Moore v. State***, 55 Wis. 2d 1, 7-8, 197 N.W.2d 820, 823 (1972).

Id. at 559.

¶9 Here, Mayan has not demonstrated how he was prejudiced by the lesser-included instructions. At the post-conviction hearing, trial counsel testified that had he known in advance of the lesser-included offense he would have changed his trial strategy. However, Mayan's counsel had discussed a possible plea to the lesser-included offense with the prosecution only the day before the trial. Furthermore, he did not say how his strategy would have been different nor does he explain on appeal how it would have been different.

¶10 Finally, even assuming there had been advance notice of the lesser-included offense, it is not apparent how the trial strategy or the closing argument would have been different. Valleri did not claim to know that she was sexually assaulted. Therefore, her credibility on whether there was a completed act was not at issue. The success of the State's case hinged on the inferences to be drawn from Valleri's description of events and circumstances. If believed, Valleri's testimony could reasonably support a conviction of either the completed act or the attempt. Here, based on Valleri's testimony that she did not recall being sexually assaulted, the jury could reasonably conclude, as it did, that the evidence was insufficient to support a conviction of sexual assault. However, the jury could also reasonably conclude from this evidence of finding her father laying naked next to her on the bed and his reaction supported the lesser-included offense of attempted sexual assault. We therefore fail to see how Mayan was prejudiced by the lesser-included offense.

By the Court.—Judgment affirmed.

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