COURT OF APPEALS
DECISION
DATED AND FILED

July 16, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2660-CR **Cir. Ct. No. 99 CF 3833**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARIO V. WHITNEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN J. DiMOTTO, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Mario V. Whitney appeals from a judgment entered after a jury found him guilty of battery and one count of first-degree sexual assault while using a dangerous weapon, contrary to WIS. STAT.

§§ 940.19(1) and 940.225(1)(b) (1999-2000).[1] He also appeals from an order denying his postconviction motion. Whitney claims: (1) the evidence was insufficient to convict him of sexual assault; (2) the trial court erred by denying his motion for judgment notwithstanding the verdict on grounds of an inconsistent verdict; (3) the State's filing of additional charges against him because he withdrew his guilty plea violated his constitutional right to a jury trial; (4) the trial court erred by not removing two jurors for cause; (5) the trial court erred in its pretrial motion ruling on "other acts" evidence, thereby denying his right to present a complete defense; and (6) his thirty-five year sentence was unduly harsh and excessive. Because we resolve each issue in favor of upholding the judgment and order, we affirm.

I. BACKGROUND

¶2 On August 10, 1999, Gina G.-F. brought a complaint to the district three police station in which she claimed that on the previous night, Whitney, her boyfriend, entered her house while intoxicated, began arguing with her, hog-tied her, struck her with a wooden stick, punched her in her calf, poured beer in her nose, and threatened to kill her. Officers proceeded to Gina's residence and arrested Whitney. A search of the residence revealed a 45-caliber bolt-action rifle under a mattress in the victim's bedroom.

¶3 On August 12, 1999, the State filed a complaint charging Whitney with possession of a firearm contrary to an injunction, second-degree recklessly endangering safety, and battery. On August 18, 1999, during a re-interview, Gina

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted. Whitney is not challenging the battery portion of the judgment.

disclosed that Whitney had forced her to engage in penis-to-vagina sexual intercourse, beer bottle-to-vagina sexual intercourse, and penis-to-anus sexual intercourse, all without her consent.

¶4 On August 20, 1999, the State amended its complaint, charging Whitney with a fourth count of first-degree sexual assault while using a dangerous weapon. On October 6, 1999, in exchange for the dismissal of the illegal firearm and battery charges, Whitney pled guilty to the endangering safety charge and the first-degree sexual assault charge. On March 24, 2000, the trial court allowed Whitney to withdraw his guilty pleas. The State subsequently filed an amended information in which the sexual assault charge was expanded from a single count to three separate counts.

¶5 A jury trial commenced on September 18, 2000, but ended in a mistrial. The second jury trial commenced on October 10, 2000, after which Whitney was found not guilty of the firearm possession charge, the recklessly endangering charge, the sexual assault (bottle-to-vagina) charge, and the sexual assault (penis-to-anus) charge; however, Whitney was found guilty of the battery charge and the sexual assault (penis-to-vagina) charge. The trial court denied his postconviction motion. Whitney now appeals.

II. DISCUSSION

A. Insufficient Evidence

¶6 Whitney argues that there was insufficient evidence to convict him of sexual assault. He contends that the circuit court made two errors under this issue: (1) the trial court erred by denying his motion for dismissal at the close of the State's case; and (2) the trial court erred by denying his motion for judgment

notwithstanding the verdict on grounds of insufficient evidence of sexual assault. We cannot agree.

> [I]n reviewing the sufficiency of the evidence to support a conviction, 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. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citations omitted).

1. Denial of Motion for Dismissal

¶7 Whitney claims that the trial court applied the wrong standard when it denied his motion under WIS. STAT. § 972.10(4) to dismiss. After Whitney made his motion, the circuit court stated the following:

> Clearly the testimony of Miss G.[]-F.[], *if believed*, would support the allegations in the Information on file. This case really boils down to a question of credibility, and the jury will have to determine that. There's nothing inherently incredible in the testimony of Miss G.[]-F.[], so the motion to dismiss is denied.

(Emphasis added.) Whitney argues that the proper standard is whether the testimony is "believable beyond a reasonable doubt," not merely "if believed." He claims that because the trial court used an incorrect standard, the trial court erroneously exercised its discretion, requiring this court to overturn the denial of his motion. We will not reverse a ruling on a motion to dismiss unless the ruling

is clearly erroneous. ***Olfe v. Gordon***, 93 Wis. 2d 173, 186, 286 N.W.2d 573 (1980).

¶8 A witness's testimony does not have to be believable beyond a reasonable doubt. The reasonable doubt standard is reserved for the issue of the defendant's guilt, which is determined after credibility issues have been resolved. ***State v. Owens***, 148 Wis. 2d 922, 933-34, 436 N.W.2d 869 (1989).

¶9 Moreover, Whitney claims that the error of the trial court is shown by the inconsistencies in Gina's testimony. This argument fails because there is no legal authority that requires inconsistent testimony to be deemed insufficient as a matter of law. To characterize Gina's testimony as insufficient, Whitney must show that "the testimony was incredible as a matter of law," ***State v. Wilson***, 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989) (citing ***State v. Alles***, 106 Wis. 2d 368, 377, 316 N.W.2d 378 (1982)), that is it """conflict[s] with the uniform course of nature or with fully established or conceded facts,""" ***Posnanski v. City of West Allis***, 61 Wis. 2d 461, 466 n.2, 213 N.W.2d 51 (1973).

¶10 Although Whitney identifies various conflicts in Gina's testimony,[2] none of these instances conflicts with irrefutable physical evidence. *See* ***Pappas v. Jack O. A. Nelsen Agency***, 81 Wis. 2d 363, 369, 260 N.W.2d 721 (1977). Furthermore, in ***Nabbefeld v. State***, 83 Wis. 2d 515, 529, 266 N.W.2d 292 (1978), the supreme court stated that a jury may choose to believe certain parts of a witness's testimony and not others where the witness has given inconsistent

[2] There were conflicts in Gina's testimony such as whether she or Whitney unclasped her bra, whether Whitney wrapped a cord around her thigh or ankle, whether she knew about the stick, whether the sexual assault occurred, etc.

testimonies. A jury does *not* have to either totally believe or totally disbelieve a witness. ***Id***. Thus, the trial court properly denied Whitney's motion to dismiss the case at the end of the State's evidence.

2. Denial of Motion for JNOV on Evidence

¶11 Whitney contends that the State failed to provide sufficient evidence by the end of the trial to prove beyond a reasonable doubt that he committed first-degree sexual assault (penis-to-vagina). Whitney argues that because the State did not provide sufficient evidence, the trial court erred when it denied his motion for judgment notwithstanding the verdict. In the same manner as the previous subsection, Whitney once again cites various inconsistencies in Gina's testimony. And for the same reasons as in the previous section, we cannot conclude that the evidence is "incredible as a matter of law." A witness's credibility is left for the jury to resolve. Thus, Whitney's claim fails.

B. Inconsistent Verdict

¶12 Whitney argues that each of the three sexual assault counts should be treated as a single count because each of the counts contains the common element of use or threat of use of a dangerous weapon, which had to be proven beyond a reasonable doubt. Accordingly, Whitney contends that the verdicts are inconsistent because he was found not guilty on the sexual assault (bottle-to-vagina) charge and the sexual assault (penis-to-anus) charge, but guilty on the sexual assault (penis-to-vagina) charge. We cannot agree. A jury verdict will not be reversed if there is any credible evidence to support it. ***Heideman v. American Family Ins. Group***, 163 Wis. 2d 847, 863-64, 473 N.W.2d 14 (Ct. App. 1991).

¶13 Whitney's argument fails for various reasons. First, Whitney has not offered any legal authority supporting his position. An appellate court will not consider arguments that are not supported by legal authority. ***State v. Nicholson***, 148 Wis. 2d 353, 368, 435 N.W.2d 298 (Ct. App. 1988); ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980).

¶14 Second, the verdicts are actually not inconsistent. Because the jury, as the trier of fact, has the duty to determine the credibility of witnesses, it may determine which parts of the testimony establish a particular charge beyond a reasonable doubt, and which do not. In this case, the jury simply decided that Gina's testimony proved beyond a reasonable doubt that Whitney was guilty of the sexual assault (penis-to-vagina) charge, but not the other two sexual assault charges.

¶15 Third, Whitney's argument here cannot provide him any relief because logical consistency amongst verdicts is not required:

> It has been universally held that logical consistency in the verdict as between the several counts in a criminal information is not required. The verdict will be upheld despite the fact that the counts of which the defendant was convicted cannot be logically reconciled with the counts of which the defendant was acquitted.

State v. Mills, 62 Wis. 2d 186, 191, 214 N.W.2d 456 (1974) (footnote omitted).

¶16 Finally, Whitney's claim cannot succeed on an argument of multiplicity of convictions. For Whitney to succeed on this argument, he would have to satisfy a two-prong test: (1) the sexual assault charges are identical in law and fact; and (2) if the charges are not identical in law and fact, the legislative intent of the statute is to treat multiple offenses as a single count. ***State v. Anderson***, 219 Wis. 2d 739, 746, 580 N.W.2d 329 (1998).

¶17 Although the sexual assault charges may be based on the same statute, the facts as per Gina's testimony show that each of the assaults are distinct in nature. And even if the sexual assault charges do violate the rule against multiplicitous charges, Whitney still cannot be afforded any relief. The purpose of the rule against multiplicitous convictions is to shield a defendant from double-jeopardy. *See* ***id.*** Because Whitney was exonerated on two of the three sexual assault charges, his constitutional right against being punished for the same offense twice was not violated. Therefore, this argument fails.

C. Filing of Additional Charges

¶18 Whitney claims that his right to a jury trial was violated when the State charged him with three additional counts after he withdrew his guilty plea (one of the additional charges was later dismissed). Whitney argues that he was punished for exercising this right. We cannot agree. The issue of prosecutorial vindictiveness presents a question of law, which we review *de novo*. ***State v. Johnson***, 2000 WI 12, ¶18, 232 Wis. 2d 679, 605 N.W.2d 846.

¶19 According to ***Johnson***, during pretrial proceedings, a prosecutor's decision to increase charges against the defendant does not automatically trigger a presumption of vindictiveness. ***Id.*** at ¶¶24-32, 38-42. For there to be a presumption of vindictiveness, the defendant must establish a likelihood of vindictiveness. ***Id.*** at ¶17. Consequently, Whitney has failed to provide any evidence showing a likelihood of vindictiveness other than the mere fact that the State increased his charges after he changed his pleas, which is insufficient. *See* ***id.*** at ¶30. Where a presumption of vindictiveness is not established, as is the case here, a defendant has the burden of proving actual vindictiveness. ***Id.*** at ¶47.

¶20 To prove actual vindictiveness, the defendant must provide objective evidence that the prosecutor acted to punish the defendant for exercising his or her legal right. ***Id.*** at ¶47. Even explicitly coercive conduct by a prosecutor at the pretrial stage will not yield a conclusion of actual vindictiveness. *See* ***Bordenkircher v. Hayes***, 434 U.S. 357, 358, 365 (1978). Because Whitney has failed to provide any objective evidence whatsoever showing the State's actual vindictiveness, we are not persuaded by his argument. In addition, the United States Supreme Court has also recognized that "a prosecutor may file additional charges if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded." ***United States v. Goodwin***, 457 U.S. 368, 380 (1982) (footnote omitted). Thus, Whitney's contention is without merit.

D. Juror Removal

¶21 Whitney argues that the trial court erroneously exercised its discretion when it denied his motion to strike two potential jurors for cause. Whitney further argues that because his motion was denied, he was forced to use two of his peremptory strikes to have the potential jurors removed. He contends that the denial of his motion impaired his right to exercise peremptory challenges, thereby creating reversible error. We cannot agree.

¶22 For Whitney to succeed on this argument, he must show that: (1) he did, in fact, use his peremptory challenges to remove those jurors; (2) the trial court erroneously exercised its discretion when it denied his motion to strike the two jurors, *see* ***State v. Gesch***, 167 Wis. 2d 660, 666, 482 N.W.2d 99 (1992); and (3) his use of his peremptory challenges adversely affected his substantial rights, ***State v. Lindell***, 2001 WI 108, ¶111, 245 Wis. 2d 689, 629 N.W.2d 223.

¶23 The State argues that Whitney has waived this issue by failing to provide information showing that he did, in fact, use his peremptory challenges to dismiss the two prospective jurors; however, since the filing of the State's brief, this court has allowed Whitney to supplement the record with the jury panel roster in response to the State's contention that he failed to present evidence on the removal of the two potential jurors. Accordingly, we address the merits of this issue.

¶24 Although both potential jurors initially expressed concern over whether they would be able to remain unbiased throughout the trial,[3] additional questioning by the court showed that both reassessed their position. Both potential jurors had agreed that during the trial they would be able to set aside any conflicting attitudes that would impede their objectivity. Furthermore, Whitney does not cite any authority that the trial court erred in conducting its inquiry to determine whether the two prospective jurors could get past their initial feelings of uncertainty or bias.

¶25 In addition, the record shows that the trial court carefully considered Whitney's request to remove the prospective jurors, evaluated their responses to the questioning (including body language), examined the pertinent legal precedents, and applied the legal precedents to the facts to reach a reasonable conclusion. A trial court has discretion in determining whether a potential juror is biased and should be removed from a panel. *See* ***State v. Ferron***, 219 Wis. 2d

[3] Prospective juror Nickodem expressed fear that her sympathy for women could interfere with her being objective to the evidence; prospective juror Hall claimed that he would believe a police officer's testimony before he would believe anyone else.

481, 491-92, 579 N.W.2d 654 (1998), *overruled on other grounds by* ***Lindell***. We cannot say that the trial court improperly exercised its discretion here.

¶26 In support of his argument, Whitney cites ***State v. Ramos***, 211 Wis. 2d 12, 18, 564 N.W.2d 328 (1997) claiming that when a trial court fails to remove a prospective juror causing a party to use his or her peremptory challenges, the court's action is "reversible error without a showing of prejudice." This finding was overruled in ***Lindell***, 2001 WI 108 at ¶111. In ***Lindell***, the supreme court stated that when a trial court erroneously fails to strike a biased juror, and a defendant uses a peremptory challenge, an appellate court determines "whether the error has affected the substantial rights of the [defendant]." ***Id.***

¶27 We further conclude that even if the trial court erred in denying Whitney's request to remove the prospective jurors, the error was harmless. Whitney had to show that the court's action adversely affected his substantial rights. ***Id.*** Because Whitney's use of his two peremptory strikes did not exhaust his entire allotment (he had three remaining), we cannot say that his substantial rights were affected. Whitney still had peremptory strikes remaining to remove any potential jurors who could be biased. Furthermore, Whitney does not argue that the jury panel that sat for the case showed any bias against him or acted improperly, nor does he argue that had he not used his peremptory challenges on the two potential jurors, he would have used them elsewhere resulting in a jury that would acquit him. He has failed to show us anything that would prove he was deprived of a fair and impartial trial as a result of the trial court's decision on this issue.

¶28 Consequently, although Whitney has shown that he did use his peremptory challenges to remove jurors after the circuit court denied his motion to

remove them for cause, we believe that the trial court did not erroneously exercise its discretion in denying his motion. And, even if it did, we conclude that Whitney's use of his peremptory challenges did not adversely affect his substantial rights. *See* ***id.***

E. Motion to Introduce Character Evidence Relating to the Victim

¶29 Whitney argues that the trial court erred when it disallowed the admission of "other acts" evidence relating to the character of the victim. Whitney intended to present evidence at the trial that on two occasions Gina asked individuals to lie for her for her own personal gain by deceiving the legal system. We cannot agree that the trial court erred in not allowing the other acts testimony. To determine whether the trial court properly denied the admission of "other acts" evidence, we must decide whether the court exercised appropriate discretion. *See* ***State v. Boykins***, 119 Wis. 2d 272, 277, 350 N.W.2d 710 (Ct. App. 1984). We will not overturn a trial court's discretionary rulings absent an erroneous exercise of discretion. ***State v. Givens***, 217 Wis. 2d 180, 194, 580 N.W.2d 340 (Ct. App. 1998).

¶30 For a trial court to allow the introduction of character evidence of the victim, the evidence must satisfy the exception in WIS. STAT. § 904.04(1): "Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except … (b) … evidence of a pertinent trait of character of the victim of the crime offered by an accused …." Whitney argues that in deciding whether the character evidence falls within the exception, the trial court erroneously exercised its discretion by failing "to delineate the factors that

influenced its decision." This argument is without merit because the trial court did, in fact, explain its reason for denying Whitney's motion:

> Now with respect to the defense motion to introduce character evidence, when I look at the two aspects potentially of James Carter testifying, both of them have to do with allegations of deceit on the part of Miss G.[]-F.[] to try and hit the jackpot, so to speak, by getting money for a slip and fall, by potentially getting money by filing a sexual harassment charge. The evidence proffered by James Carter in that vein is really an attempt to put in evidence of a trait of character. However, that evidence does not meet the dictates of 904.04(1)(b). Mr. Carter will not be allowed to testify about those two incidents.
>
> There is a case that I think is fairly directly on point, a reported case that would indicate that this type of evidence is just not admissible, and that is *State v. Medrano*, 84 Wis. 2d page 11, a 1978 Wisconsin Supreme Court decision.
>
> That was a sexual assault case. What the defense wanted to do during trial is they wanted to put in evidence that the victim fraudulently tried to obtain money from a former boyfriend five months prior to the rape.
>
> That's not unlike what the defense wants to do here, use Mr. Carter to show that the alleged victim, Miss G.[]-F.[], was trying to fraudulently get money vis-[à]-vis a slip and fall and a sexual harassment complaint.
>
> They said in *Medrano* that type of evidence is not a pertinent trait of character. It's not admissible under 904.04(1)(b). It's improper character evidence, and it won't be allowed in.

In ***State v. Medrano***, 84 Wis. 2d 11, 26, 267 N.W.2d 586 (1978), the supreme court stated that evidence of this nature is not of pertinent character within the meaning of WIS. STAT. § 904.04(1)(b). Because the trial court's ruling was consistent with ***Medrano***, we cannot say that it committed an erroneous exercise of discretion. Although we recognize that Whitney has a constitutional right to

present a defense, he does not have a right to present evidence that violates a statute.

F. Unduly Harsh and Excessive Sentence

¶31 Whitney argues that his thirty-five-year prison sentence with credit for time served is harsh and unconscionable. We cannot agree. The standard on which we review the court's sentencing decision is whether it committed an erroneous exercise of discretion: "Sentencing is within the sound discretion of the trial court and we will not reverse absent an abuse of that discretion. The sentencing court is presumed to have acted reasonably and the defendant has the burden of showing an unreasonable or unjustifiable basis in the record for the sentence." ***State v. Tarantino***, 157 Wis. 2d 199, 221, 458 N.W.2d 582 (Ct. App. 1990) (citations omitted). There is a presumption that the trial court acted reasonably. ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W. 2d 633 (1984).

¶32 The trial court must take into consideration three factors when imposing a sentence: the gravity of the offense, the character of the offender, and the need for public protection. ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). The court may also take into account other factors such as the "defendant's criminal record; history of undesirable behavior patterns; personality, character and social traits; results of a presentence investigation; vicious or aggravated nature of the crime; degree of culpability; demeanor at trial; age, educational background and employment record; remorse, repentance and cooperativeness; need for close rehabilitative control; rights of the public; and length of pretrial detention." ***Id.*** at 426-27.

¶33 The record shows that the circuit court applied the necessary and additional sentencing factors to come to its conclusion. Whitney has an extensive

juvenile and adult record. His adult record consists of three battery convictions and a domestic abuse injunction violation. Three out of the four offenses were against women. Moreover, the assault in the instant case occurred during his probation for two other battery convictions.

¶34 Whitney received a thirty-five-year prison sentence out of a possible forty years for his crimes. We cannot conclude that his sentence is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances[,]" ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Accordingly, we see no reason to modify his sentence.

By the Court.—Judgment and order affirmed.

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