COURT OF APPEALS DECISION DATED AND FILED

October 10, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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.

Appeal No. 01-2768-CR

Cir. Ct. No. 98-CF-486

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DIMITRI HENLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: JACQUELINE R. ERWIN, Judge. *Affirmed*.

Before Vergeront, P.J., Dykman and Deininger, JJ.

¶1 PER CURIAM. Dimitri Henley appeals from a judgment of conviction and order denying his postconviction motion. The issues are whether his motion to dismiss during the first trial should have been granted, whether the evidence at the second trial was sufficient, whether his trial counsel was ineffective, and whether the court erroneously excluded evidence. We affirm.

¶2 Henley and two other men were charged with several counts of sexual assault for events that were alleged to have occurred with a single victim in a college dormitory room. Their first trial ended when the circuit court granted their motion for a mistrial in response to the State's amendment of the charges after the close of evidence. After the second trial, Henley was convicted for direct commission or conspiracy of five counts of second-degree sexual assault, by use or threat of force or violence, under WIS. STAT. § 940.225(2)(a) (1999-2000).[1]

¶3 Henley's first argument on appeal is that the trial court should have granted his motion to dismiss during the first trial for insufficiency of the evidence. The test of the sufficiency of the evidence on a motion to dismiss in the trial court is the same as that on appeal. ***State v. Duda***, 60 Wis. 2d 431, 439, 210 N.W.2d 763 (1973). 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).

¶4 Henley argues that the evidence at the first trial was insufficient to establish that he was in the room when the charged sexual assaults occurred. We conclude the evidence was sufficient. There was evidence that Henley's wallet was found in the room afterwards, that he was one of three defendants who were initially present in the room, that three used condoms were found in the room, and that the victim reported three acts of intercourse. Henley also argues that the evidence was insufficient to show assault by use or threat of force. However, we

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

conclude the evidence was sufficient to allow a reasonable jury to find this element. The victim testified that, during a period that she was out of the room, one of the three defendants "grabbed" her arms behind her and "kind of led" her back to the room. Later, she testified, while sitting on the floor of the room she was "pushed" onto her back, and her pants were removed by one of them even though she said she did not want her pants off.

¶5 Henley argues that the second trial was a violation of his right to be free from double jeopardy, because he should have been acquitted for insufficient evidence at the first trial. Further, he argues that his attorney at the second trial was ineffective by failing to raise the double jeopardy issue. Both of these arguments are premised on the allegation that there was, indeed, insufficient evidence at the first trial. We rejected that allegation above, and therefore reject these arguments as well.

¶6 Henley next argues that the evidence at the second trial was insufficient on the element of force. In response, the State relies on somewhat different evidence than it used when responding to Henley's similar argument about the first trial. However, we conclude the evidence at the second trial was also sufficient. There was evidence that, when the victim was out of the room, one of the defendants grabbed her by the arm and directed her back to her room. In addition, there was evidence that somebody then closed the door after she re-entered, that one of the defendants removed her pants and underwear against her physical resistance to their removal, and that she had light scratches on her chest above the neckline of her shirt and on her neck.

¶7 Henley argues that his trial counsel at the second trial was ineffective in several ways. To establish ineffective assistance of counsel, a

defendant must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We affirm the trial court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the trial court. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985).

¶8 Henley argues that his counsel was ineffective by not cross-examining the victim about her testimony at the preliminary hearing and the first trial that was inconsistent with her testimony at the second trial. He argues that trial counsel had no strategic reason for not using the inconsistent testimony. At the postconviction hearing, counsel testified that he did not have a strategic reason. However, on cross-examination, counsel agreed that there are certain general risks concerning this type of cross-examination, including jury perception of counsel as a bully, jury sympathy for the witness, jury confusion, and unwieldy use of transcripts. The following exchange then occurred:

> Q. And part of your consideration [of whether to use the inconsistent statements] was in fact the dynamic we were just discussing?
>
> A. It's always a cost/benefit type of analysis.
>
> Q. And you did that cost/benefit analysis in Mr. Henley's trials?
>
> A. In a general sense, yes.

¶9 In denying the postconviction motion, the trial court wrote: "Experienced trial counsel's assessment of [the victim as a witness] led to the reasonable decision not to appear to 'bully' this witness by impeachment with prior inconsistent statements." This appears to be a finding of fact that counsel had a strategic reason. Henley's argument is, essentially, that this finding is

erroneous because counsel testified that he did not have a strategic reason. However, in light of counsel's cross-examination testimony, we cannot say the finding is clearly erroneous.

¶10 Henley next argues that his counsel was ineffective by failing to call a witness who was present in the dormitory and would have testified contrary to the victim's testimony on certain points. Henley again argues, and trial counsel again testified, that there was no strategic reason not to call this witness. However, counsel also testified that his professional judgment in this case was that on the question of whether to call defense witnesses, it would be a more effective defense strategy to call no witnesses. Counsel conceded that the decision not to call this particular witness fell within this general strategy. The circuit court found that counsel's overarching decision was to make "no defense" a statement to the jury. This finding was sufficiently supported by counsel's testimony.

¶11 Henley argues that his trial counsel was ineffective by failing to call emergency-room personnel to testify that the victim had no lacerations or abrasions in her vagina following the incident. Counsel testified that he did not call the doctor because it would have given him an opportunity to testify as to certain things the victim said to him that would have been damaging to Henley's case. Henley argues that this choice was unreasonable because the doctor also would have conveyed things the victim said that were inconsistent with her trial testimony. We conclude that counsel's choice was not unreasonable.

¶12 Henley argues that his trial counsel was ineffective by failing to object to the wording of the jury instruction on conspiracy. The trial court modified the pattern jury instruction with additional language. Henley argues that some of the language did not correctly state the law of conspiracy. In particular,

he argues that counsel should have objected to the instruction that stated: "One who tacitly consents to the object of a conspiracy and goes along with the other conspirators is guilty even though he intends to take no active part in the crime but stands by while they put the conspiracy into effect." Henley argues that the given instruction allowed the jury to believe that a co-conspirator need take no affirmative action, by speech or action, to participate in a conspiracy, and therefore may have found him guilty simply for being present while an assault occurred.

¶13 We are satisfied that the jury instruction adequately stated applicable law. Criminal liability for conspiracy is based on the agreement between the parties, as discussed in ***Bautista v. State***, 53 Wis. 2d 218, 224-25, 191 N.W.2d 725 (1971). We conclude that the jury instruction in this case informed the jury that the essential act of a conspiracy is an agreement between multiple parties to direct their conduct toward realization of an intended criminal objective. Accordingly, counsel was not ineffective by failing to object.

¶14 Henley next argues that the circuit court erred by excluding evidence that the victim and the defendants may have gone to her room to smoke marijuana. At the first trial, the victim's roommate testified that she and the victim were present when the defendants talked about going up to the victim's room to smoke marijuana. Before the second trial, the State moved to exclude this evidence. The defendants sought to have the evidence admitted to show a friendly association and invitation between the victim and the defendants, in order to rebut the State's expected evidence that the victim did not invite the defendants to her room. The circuit court analyzed this as other-acts evidence under WIS. STAT. § 904.04(2), and appears to have concluded that the fact of the possible invitation up to the room would be allowed, but not references to marijuana. At the second trial, the

roommate testified that she and the victim invited the defendants up to their room, but without reference to marijuana.

¶15 On appeal, Henley first argues that the marijuana evidence was not other-acts evidence, because it was not offered to prove the character of a person in order to show that the person acted in conformity therewith. The State does not respond to this argument. We assume, without deciding, that this is not other-acts evidence. However, within the court's analysis as other-acts evidence, the court concluded that the evidence was not relevant, that it had "relatively low" probative value, and that its probative value was outweighed by unfair prejudice to the State. These concepts apply to all evidence, not just to other-acts evidence. *See* WIS. STAT. §§ 904.02 and 904.03. We conclude that it was not an erroneous exercise of discretion to decide that the possible use of marijuana was not evidence of a friendly relationship, and that a reference to marijuana would cause unfair prejudice to the State.

¶16 Finally, Henley argues that we should reverse using our discretionary authority under WIS. STAT. § 752.35 because the real controversy was not fully tried or justice has miscarried. The grounds for this argument are the same grounds that we have already rejected above on their own merits, and we also reject them in this context.

By the Court.—Judgment and order affirmed.

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