COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2428-CR **Cir. Ct. No. 01 CF 3412**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TOMMY SMITH, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge.[1] *Affirmed.*

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

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[1] The Honorable John J. DiMotto presided over the pretrial proceedings, including the motions Smith now challenges. The Honorable Daniel L. Konkol presided over the jury trial and entered the judgment of conviction.

¶1 PER CURIAM. Tommy Smith, Jr., appeals from a judgment of conviction for child enticement and second-degree sexual assault, following a jury trial. He argues that: (1) the trial court erred in denying both counsel's request to withdraw and his request for new counsel; and (2) the evidence was insufficient to establish an element of child enticement—that he caused the victim to go to a "secluded place." Because the trial court did not err in denying either counsel's request to withdraw or Smith's request for new counsel, and because sufficient evidence established the elements of child enticement, we affirm.

I. BACKGROUND

¶2 According to the trial testimony, Smith, a driver for a transportation service, picked up Sarah G., who was seventeen years old, at her home to drive her to an appointment at Children's Hospital in Wauwatosa. Instead of taking the usual route to the hospital, Smith drove a circuitous one through various side streets, alleys, and parkways until coming to the Menomonee River Parkway where he parked in a residential area across from some trees. He then took Sarah's hand, telling her he had to show her something, and led her from the front passenger seat down the center aisle of the van to a rear seat where he exposed himself and sexually assaulted her. Smith then drove Sarah to her scheduled appointment, signed her in at the doctor's office, and left the building.

¶3 Sarah, upon entering the doctor's office, reported that she had been assaulted. She was taken to Sinai Samaritan's Women's Assessment Center, where evidence of the crime was preserved. Wauwatosa Police Officer Paula Roberson testified that Sarah showed her the route Smith had driven and the location where he parked the van. Noting the many streets and alleyways along the way, Officer Roberson indicated that Smith had taken an unusually

complicated route. Evidence also established that shortly after dropping Sarah off at the hospital, Smith returned to the transport office and changed vans. Smith failed to report to work the following day and, two days later, was arrested at his mother's residence.

¶4 Smith also testified. He admitted that he had had sexual intercourse with Sarah while parked along the parkway, but maintained that the sex was consensual. The jury convicted Smith of second-degree sexual assault and child enticement.[2] Additional background will be presented in the course of our discussion.

II. ANALYSIS

A. Requests for New Counsel

¶5 Smith first challenges the circuit court's denial of counsel's motion to withdraw and his (Smith's) motion requesting substitution of counsel. Specifically, he argues that the circuit court erroneously applied the law to counsel's and his requests. His challenge is without merit.

¶6 Smith was represented by privately retained counsel. At a scheduling conference on July 16, 2001, the trial court ordered a final pretrial date of September 13 and a trial date of September 26. On September 13, defense counsel requested an adjournment to obtain telephone records, which Smith

[2] On appeal, Smith does not challenge the conviction for second-degree sexual assault, except to the extent that his challenges to the trial court's denial of new counsel embody both convictions.

insisted would bolster his defense, and to secure funds from Smith for an investigator. The court granted the adjournment until November 19, but advised:

> [B]ut this is it. If the family doesn't come up with the coin, it's too bad. You'll still have to do the investigation. You have to be ready to go to trial on that particular date. There are no further adjournments because things aren't done or the money hasn't been paid.

¶7 On the scheduled trial date, counsel advised the court that he wished to withdraw and requested another adjournment. Counsel stated that Smith also wanted a new attorney and acknowledged that he and Smith had disagreements over trial strategy. In addition, counsel advised the court that he was not being paid. Receiving no objection from the State, the court granted the adjournment for the defense to obtain additional phone records, but denied Smith's request to discharge counsel. Instead, the court advised Smith that he could hire new counsel if he could ensure that counsel would be ready for trial on the new trial date, January 14, 2002. The court said it would not discharge counsel because no good cause existed under ***State v. Robinson***, 145 Wis. 2d 273, 278, 426 N.W.2d 606 (Ct. App. 1988). The court also denied counsel's motion to withdraw, stating that when counsel undertook the representation, he had to have known that he might not get paid.

¶8 On December 19, 2001, Smith indicated that he was dissatisfied with counsel's representation. When the court asked him how many times he would seek new counsel if the Public Defender's office appointed new counsel, Smith replied, "I can't say." The court then asked the State for its position, and the prosecutor advised the court that the victim needed the case to proceed. Given this information, and the fact that no newly appointed attorney could come into the

case and be prepared by the January 14 trial, the court denied the motions to withdraw and to discharge counsel.

¶9 Smith first challenges the trial court's denial of counsel's motion to withdraw. His challenge is without merit.

¶10 An attorney who undertakes representation in a criminal case cannot unilaterally terminate the representation. ***State v. Batista***, 171 Wis. 2d 690, 699, 492 N.W.2d 354 (Ct. App. 1992), *overruled on other grounds by* ***State v. Cummings***, 199 Wis. 2d 721, 546 N.W.2d 406 (1996). Only the trial court can relieve the attorney from the representation, and only if the court is satisfied that good cause exists to permit counsel's withdrawal. ***Id.*** Whether an attorney's withdrawal should be permitted is a matter of trial court discretion. ***Cummings***, 199 Wis. 2d at 749-50 (appointed counsel); ***State ex rel. Dressler v. Racine County Circuit Ct.***, 163 Wis. 2d 622, 632, 472 N.W.2d 532 (Ct. App. 1991) (retained counsel). Relevant factors to be considered include: the amount of preparation that has been completed, the cost to the public, and the need to avoid delay and dilatory tactics. ***Batista***, 171 Wis. 2d at 699. Moreover, mere disagreement over trial strategy does not constitute "good cause" allowing an appointed attorney to withdraw. ***Robinson***, 145 Wis. 2d at 278.

¶11 The trial court considered the proper factors, noting that mere disagreement over trial strategy was insufficient to merit withdrawal. *See* ***id.*** The court also denied his request to withdraw based on Smith's failure to pay legal fees, commenting that sometimes lawyers do not get paid. Finally, the court noted that other continuances had been granted, and that further delay would be detrimental to the victim. Clearly, the court considered the appropriate factors and exercised discretion in denying counsel's request to withdraw.

¶12 Smith next challenges the trial court's denial of his request for substitution of counsel. This too is without merit. Although different rules govern the determination of a defendant's request for substitution of counsel, *see* ***State v. Lomax***, 146 Wis. 2d 356, 359, 432 N.W.2d 89 (1988), this request also is addressed to the sound discretion of the trial court, *see* ***id.*** Again, we will not reverse a trial court's discretionary determination if the trial court examined the facts, applied the proper legal standard, and reached a reasonable determination. ***Schultz v. Darlington Mut. Ins. Co.***, 181 Wis. 2d 646, 656, 511 N.W.2d 879 (1994).

¶13 In evaluating a trial court's denial of a request for new counsel, we consider: (1) the adequacy of the trial court's inquiry into the defendant's complaint;[3] (2) the timeliness of the defendant's request; and (3) whether the alleged conflict between the defendant and counsel was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case. ***Lomax***, 146 Wis. 2d at 359.

¶14 The record establishes that the trial court referred to the proper standards and reviewed the required criteria. Specifically, the court balanced Smith's interest in having counsel of his choice with the public's interest in the efficient administration of justice. In doing so, the court noted that it did not believe Smith's reason for wanting new counsel was valid because it involved a

[3] When a criminal defendant requests an adjournment to seek substitution of counsel, circuit courts are encouraged, but not required, to inquire into: (1) the length of delay requested; (2) whether competent counsel is presently available to try the case; (3) whether other continuances have been requested; (4) whether the request will inconvenience other parties, witnesses, and the court; (5) whether the delay is for legitimate or dilatory reasons; and (6) other relevant factors. ***State v. Lomax***, 146 Wis. 2d 356, 360, 432 N.W.2d 89 (1988).

disagreement over trial tactics. In addition, the court noted its concern about delaying the trial, particularly because it was a sexual assault case involving a child victim. Finally, the court noted that Smith's counsel was competent and advised Smith to allow counsel to determine trial tactics. We conclude that the trial court properly exercised discretion in denying counsel's motion to withdraw and Smith's request for substitution of counsel.

B. Sufficiency of Evidence

¶15 Smith also argues that the evidence was insufficient to convict him of child enticement because, he contends, the State failed to prove that he caused Sarah to go into a "secluded place." We reject his argument.

¶16 When reviewing the sufficiency of the evidence, we will reverse a conviction only if "the evidence, viewed most favorably to the [S]tate and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The jury, not a reviewing court, determines the credibility of witnesses and the weight of their testimony, ***Whitaker v. State***, 83 Wis. 2d 368, 377, 265 N.W.2d 575 (1978), and resolves any conflicts in the evidence, ***State v. Daniels***, 117 Wis. 2d 9, 18, 343 N.W.2d 411 (Ct. App. 1983). If a jury could reasonably have drawn more than one inference from the evidence, a reviewing court must accept the jury's choice. ***State v. Alles***, 106 Wis. 2d 368, 377, 316 N.W.2d 378 (1982). Thus, a defendant "attacking a jury verdict has a heavy burden, for the rules governing our review strongly favor the verdict." ***State v. Allbaugh***, 148 Wis. 2d 807, 808-09, 436 N.W.2d 898 (Ct. App. 1989).

¶17 WISCONSIN STAT. § 948.07(3) (1999-2000) provides: "Whoever, with intent to [expose a sex organ to a child], causes or attempts to cause any child … to go into any vehicle, building, room or secluded place is guilty of a Class BC felony."[4] Smith contends that "the curbside parking area of a neighborhood street, next to a park, as a matter of law, did not constitute a secluded [place]." We disagree.

¶18 Construction of a statute presents a question of law, which we consider *de novo.* ***State v. Dean***, 163 Wis. 2d 503, 510, 471 N.W.2d 310 (Ct. App. 1991). "The primary source for the construction of a statute is the language of the statute itself." ***Id.*** When the statutory language is clear and unambiguous, we arrive at the intention of the legislature by giving the language its ordinary and accepted meaning. ***Id.*** Non-technical words are given their common and accepted meaning, which may be determined from the definition contained in any recognized dictionary. ***State v. Sorenson***, 2000 WI 43, ¶23, 234 Wis. 2d 648, 663, 611 N.W.2d 240 (2000).

¶19 "Secluded" is not defined in the statutes. Accordingly, we give it its common and accepting meaning, which includes: "screened or hidden from view; sequestered." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2050 (1993). These definitions, coupled with the apparent purpose of WIS. STAT. § 948.07—to protect children from abduction and molestation—allow for the reasonable inference that Smith, by driving a circuitous route, parking the van along a parkway, and leading Sarah from the front seat to a rear seat, "cause[d] [Sarah] to go into … [a] secluded place." *See* WIS. STAT. § 948.07; *see also* ***State v.***

[4] All other references to the Wisconsin Statutes are to the 2001-02 version.

DeRango, 229 Wis. 2d 1, 16, 599 N.W.2d 27 (Ct. App. 1999) (stating that the aim of the statute is "to address the social evil of removing children from the protection of the general public"), *aff'd*, 2000 WI 89, 236 Wis. 2d 721, 613 N.W.2d 833.

¶20 Smith contends that no jury reasonably could have found the area in question to be a secluded place. He points to his own testimony, wherein he claimed that the parkway was bustling with activity at the time he parked the van. He maintains, therefore, that no jury reasonably could have found him guilty of child enticement. We disagree.

¶21 Trying to contradict the State's evidence establishing that he took Sarah to a secluded place, Smith claimed that a number of people were in the parkway area. He also claimed, however, that his sex with Sarah was consensual. Rather obviously, therefore, Smith's premise is absurd. If, in fact, he was taking Sarah to a location for consensual sex, he would have sought a secluded place. Hence, the evidence—and even Smith's own account—was sufficient to prove that Smith took Sarah to a secluded place with intent to expose himself and sexually assault her.

By the Court.—Judgment affirmed.

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