

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 7, 2011

A. John Voelker
Acting Clerk of Court of Appeals

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Appeal No. 2010AP1746-CR

Cir. Ct. No. 2008CF4458

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CARL MILLS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 KESSLER, J. Carl Mills appeals a judgment of conviction and an order denying his postconviction motion seeking dismissal of two second-degree sexual assault charges. Mills argues that his trial counsel was ineffective for failing to object to verdict forms that did not specify the types of sexual assault

associated with each charge, thereby violating his right to verdict specificity and jury unanimity. We disagree.

BACKGROUND

¶2 On September 4, 2008, Mills was charged with four counts of second-degree sexual assault by the use or threat of force or violence, one count of kidnapping, and one count of battery. An Information issued the following week listed the exact same charges. Each sexual assault charge contained identical wording, alleging that “[o]n August 31, 2008, ... [Mills] did have sexual intercourse with Alana M., without consent, by threat of use of violence contrary to Wisconsin Statutes Section 940.225(2)(a).”¹ The probable cause portion of the complaint states that Mills held Alana M., his then-girlfriend, against her will in her apartment and forced her to perform oral sex on him, then ordered her to lie on her back and forced penis to vagina intercourse. The complaint further states that Mills took pictures while forcing Alana M. to perform oral sex again, and then forced Alana M. to lie on her stomach while he assaulted her from behind. During this final assault, the complaint states, Alana M. was able to get a hold of her cell phone and leave a voicemail for her mother in which she was crying and screaming “no.”

¶3 At trial, the State maintained that four assaults had occurred—two acts of forced oral sex and two acts of forced vaginal sex. Alana M. testified with disturbing detail as to the circumstances surrounding the assaults, how and when they occurred, and her fear of Mills.

¹ Mills raises arguments not addressed in this decision. Because we conclude that Mills was not prejudiced by his trial attorney’s lack of objections, we need not reach those arguments. See *Patrick Fur Farm, Inc. v. United Vaccines, Inc.*, 2005 WI App 190, ¶8 n.1, 286 Wis. 2d 774, 703 N.W.2d 707 (We decide cases on the narrowest possible grounds.).

¶4 Alana M. told the jury that Mills came to her apartment at 8:30 a.m. the morning of August 31, 2008. She stated that she took a nap shortly after he arrived, during which time Mills was using her computer. She stated that when she woke up, Mills confronted her about messages he had seen on her Facebook and Myspace accounts and that Mills seemed “agitated.” She further testified that she told Mills she wanted to end their relationship, prompting him to call her a “bitch” and to tell her in a “frighten[ing]” tone of voice that “he was supposed to be the one to break up with [her].” Alana M. testified that Mills was “angry,” “getting more intimidating,” and “was starting to ... call [her] names.” Specifically, Alana M. testified that Mills began to “count to five”—something he would do to indicate that “something is supposed to happen ... like ... he was gonna like hit me or something.”

¶5 Alana M. then told the jury that after counting to five, Mills called her a “bitch” and demanded that she perform oral sex. She stated that she feared for her life, “kept saying I didn’t want to,” but “then again I got threatened, so I did what he asked me to do.” Alana confirmed that this incident was the “first incident.”

¶6 After the “first incident,” Alana M. testified that Mills got on top of her, pushed her down into her bed, told her to remove her pants and underwear, and forcibly had sex with her while she was lying on her back. She stated that attempts to “push him off” were unsuccessful and Mills was able to “penetrate[] [her] vagina with his penis.” Alana M. referred to this assault as “the second one” and answered affirmatively when the prosecutor asked if the assault occurred in a “missionary position.”

¶7 Alana M. told the jury that after the second assault, she and Mills got into an argument about money and that Mills’s demeanor remained “[v]ery scary,” in part because he was “intimidating me [and] towering over me.” She testified that she felt unable to leave her apartment because the size of the apartment was so small that “[i]f I tried to run for the door, he would be right behind me.” She testified that after the argument, Mills went through her phone and began copying phone numbers from her phone into his. She further stated that she began grabbing for the phone, at which point Mills told her he would destroy it if she did not stop and demanded oral sex again. Alana M. stated that Mills took pictures of her performing oral sex with her phone and sent the pictures to his phone. A picture of Alana M. performing oral sex was shown to the jury. The complaint indicates that the photograph depicts Alana M. as “visibly distraught and crying.”

¶8 Alana M. testified that after the third incident, she was able to “snatch[]” her phone back from Mills, however, Mills then flipped her over onto her stomach and attempted to penetrate her anally. Alana M. testified that she began “kicking and screaming,” prompting Mills to “decide[] that he was going to go into my vagina at that point.” Alana M. testified that she was still on her stomach, but that she still had possession of her phone and was able to hit a speed dial button, placing a phone call to her mother. She further testified that she kept the phone hidden under her bed—out of Mills’s sight—and cried for help into her mother’s voicemail. Alana M. confirmed that the incident was the last time she was assaulted on that day. The voicemail recording was played for the jury.

¶9 Prior to closing arguments, the trial court instructed the jury on the charges. The trial court informed the jury that: (1) count one charged unlawful penis to mouth sexual intercourse; (2) count two charged unlawful penis to vagina sexual intercourse; (3) count three charged unlawful penis to mouth sexual

intercourse; and (4) count four charged unlawful penis to vagina sexual intercourse.

¶10 At closing arguments, the State summarized the four assaults in the order, and under the circumstances, described by Alana M.: (1) the initial forced oral sex which occurred after Mills counted to five; (2) the forced vaginal sex in the missionary position; (3) the forced oral sex during which Mills took pictures; and (4) the “final” vaginal assault during which Alana M. was able to leave a voicemail to her mother crying for help.

¶11 Following closing arguments, the trial court instructed the jury that it was to “make a finding as to each count of the information,” that “[e]ach count charge[d] a separate crime,” and that “the verdict must be reached unanimously.” The verdict forms did not specify the types of sexual intercourse involved.

¶12 Mills was convicted of counts three and four and acquitted of the first two counts.² He was sentenced to a total of twenty-two years of confinement, followed by ten years of extended supervision. Mills filed a postconviction motion arguing that his trial counsel was ineffective for failing to object to: (1) the vagueness of the sexual assault charges prior to trial; (2) the absence of a specific unanimity instruction; and (3) the generic verdict forms. These errors, Mills argued, resulted in the jury’s inability to match each alleged act to each sexual assault charge. The postconviction court denied the motion, finding that the testimony “was exceptionally clear with respect to the individual acts and that

² Mills was also convicted of kidnapping; however, the kidnapping conviction is not at issue in this appeal. The complaint and Information also charged Mills with battery, however that charge was dismissed prior to the trial.

the State summed up how they essentially lined up with each count during closing argument.” This appeal follows.

DISCUSSION

¶13 On appeal, Mills argues that his trial counsel was ineffective for failing to object to the generic verdict forms used for the sexual assault charges, violating his due process right to verdict specificity and his Sixth Amendment right to a unanimous verdict. We disagree.

¶14 We are “prohibited from reviewing instructions and verdict forms absent a timely objection by the defendant.” *State v. Marcum*, 166 Wis. 2d 908, 916, 480 N.W.2d 545 (Ct. App. 1992). Because there was no timely objection made by Mills’s trial counsel, we cannot review the instructions and verdict forms in the context of whether the trial court erred. *See id.* However, “the instructions and verdict forms may be revisited under claims of ineffective assistance of counsel.” *See id.*

¶15 *Strickland v. Washington*, 466 U.S. 668 (1984), set forth a two-prong test that must be met for a party to prevail on an ineffective assistance of counsel claim. *Id.* at 687. A party must show that his counsel’s performance was deficient and that the deficient performance caused prejudice. *Id.* In determining whether defense counsel’s performance was deficient, a reviewing court must engage in a “highly deferential” review of counsel’s performance. *Id.* at 689. It “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* With respect to the prejudice component, a defendant must affirmatively show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. “A reasonable probability is a

probability sufficient to undermine confidence in the outcome.” *Id.* We need not address both components if a party makes an insufficient showing as to one. *See id.* at 697.

¶16 Mills contends that he was deprived of his right to a unanimous verdict because: (1) the four charges were worded identically; (2) the jury instructions failed to tie a particular act to a particular charge; and (3) the verdict forms lacked specificity, making it possible for the jury to have “pooled their votes” and convict Mills based on any number of speculative scenarios. Mills relies heavily on *Marcum* to support his argument that he had a due process right to understand the charges against him and that his trial counsel’s failure to object to generic verdict forms compromised his right to jury unanimity. We are not persuaded.

¶17 In *Marcum*, the defendant was charged with six counts of sexual assault of a child. *Id.*, 166 Wis. 2d at 913. Three of the counts in the Information were phrased identically: “[The defendant did] ... have sexual contact with a person who has not attained the age of 13 years.” *Id.* (brackets in *Marcum*). The victim testified at a preliminary hearing, however at trial the victim’s testimony did not match that given at the preliminary hearing. *Id.* The jurors heard confused and conflicting versions of the assaults pertaining to how many assaults occurred, when exactly they occurred and which assault was the “last time.” *Id.* at 913-914. The jury instructions for each count were the same and the verdict forms contained identical language for each count. *Id.* at 915. The trial court gave the standard instruction on unanimity and the defendant’s trial counsel did not object. *Id.* The jury convicted Marcum on one of the three counts, but found him not guilty on the other two. *Id.*

¶18 We concluded that Marcum’s rights to verdict specificity and a unanimous verdict were violated, explaining:

From the state of the record, we do not know which of the several alleged acts led to his conviction on count six. Nor do we know which acts the jury acquitted him of in counts four and five....

[I]n the instant case, there was nothing to focus the jury on a specific act or alternative forms of a specific act. Nor does the unanimity instruction tell the jurors that they have to agree on which act forms the basis for their verdict. From this instruction, the jury would have known only that they had to be unanimous about Marcum’s guilt or innocence of any criminal conduct in September. They would not have known that they had to be unanimous on the specific act for which he was guilty.

Id. at 919.

¶19 In contrast to the situation in *Marcum*, Mills fails to show that he was prejudiced by his trial counsel’s failure to object to the lack of verdict specificity. First, the jury did not lack the ability to match each alleged act to each sexual assault charge. Both Alana M.’s testimony and the State’s closing arguments were clear as to the order and circumstances surrounding the four distinct sexual assaults. Alana M. specifically testified to remembering the order of events and testified about each assault in graphic detail. The State reiterated the order of the assaults, along with the specific circumstances surrounding each assault, in its closing arguments. Specifically, the State argued: (1) the first assault involved oral sex and occurred after Mills “count[ed] to five,” something Alana M. testified he did when he became exceptionally angry; (2) the second assault was a vaginal assault during which Mills was pushing Alana M. into the bed and “getting on top of her missionary style”; (3) the third assault also involved oral sex and Mills took a picture of the act; and (4) the final assault was an

attempted anal assault, which became a vaginal assault, during which Alana M. was able to call her mother for help. The jury convicted Mills on counts three and four—the two counts in which the jury was presented with physical evidence. Unlike *Marcum*, the record in this case shows there was always a clear distinction between the acts underlying each count.

¶20 Second, the trial court also specified which act correlated with which count when it instructed the jury on the charges before closing arguments. Specifically, the trial court informed the jury that: (1) count one of the Information charged penis to mouth sexual intercourse without consent by threat of use of force or violence; (2) count two charged penis to vagina sexual intercourse without consent by threat of use of force or violence; (3) count three charged penis to mouth sexual intercourse without consent by threat of use of force or violence; and (4) count four charged penis to vagina sexual intercourse without consent by threat of use of force or violence. Following closing arguments, the trial court informed the jury that it was to form a unanimous verdict as to each offense charged:

It is for you to determine whether the defendant is guilty or not guilty of each of the offenses charged. You must make a finding as to each count of the information. Each count charges a separate crime and ... you must consider each one separately.

Your verdict for the crime charged in one count must not affect your verdict on any other count.

....

This is a criminal not civil case, therefore, before the jury may return a verdict which may legally be received, the verdict must be reached unanimously.

¶21 In *Marcum*, we acknowledged “that any unanimity problem could [be] avoided by an instruction telling the jurors that they must be unanimous about

the specific act that formed the basis for each count.” *Id.* at 918. “And, if the conduct involves separate transactions and separate crimes, the court must then instruct the jury that unanimity is required as to each.” *Id.* The trial court took the proper steps to avoid a unanimity problem. The instructions are clear that the jury was to consider each count separately and was to reach a unanimous verdict as to each count. We presume that the jury followed these instructions. *See State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989) (jury is presumed to follow instructions). Even if Mills’s trial counsel should have objected to the wording in the Information, instructions and verdict forms, Mills was not prejudiced by this failure.

CONCLUSION

¶22 For the foregoing reasons, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

