COURT OF APPEALS
DECISION
DATED AND FILED

January 31, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP3017-CR **Cir. Ct. No. 2000CF5417**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PEDRO XOLOT,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Pedro Xolot appeals from a judgment, entered upon a jury's verdict, convicting him of four felonies. He contends that the evidence was insufficient to sustain his conviction for attempted second-degree sexual assault. We disagree and affirm.

I.

¶2 In 2000, Aymee B. reported that Xolot sexually assaulted her. The State filed a criminal complaint against him, and a warrant was issued for his arrest. He was apprehended in 2009. After the preliminary examination, the State filed an information charging him with one count of first-degree sexual assault while armed with a dangerous weapon, one count of armed burglary, one count of kidnapping, and one count of second-degree sexual assault of a person who he knew was unconscious. Xolot demanded a jury trial.

¶3 Aymee B. testified at trial that on the night of October 22, 2000, she was sixteen years old, and she was sleeping in her bedroom. She awoke because she felt someone lying on her. She realized that she was on her back and that an intruder was on top of her. She felt something hard stabbing at her side. She tried to escape, but the intruder restrained her and said in Spanish: "give me what I want." She testified that the intruder was "trying to touch [her] chest and [she] wouldn't let him" but "eventually he got ahold of going underneath [her] shirt." She was able to push the person to the floor only after he rubbed her breasts. She turned on the light and saw that the assailant was her mother's former boyfriend, Xolot. He was holding a screwdriver.

¶4 Xolot rested his case without presenting any evidence or calling witnesses. At the close of the evidence, Xolot said that he did not object to amending the charge of second-degree sexual assault to a charge of attempted second-degree sexual assault. The jury convicted Xolot of the four charges against him.

¶5 Xolot appeals. He challenges only the sufficiency of the evidence to support his conviction for attempted second-degree sexual assault.

II.

¶6 When we consider a challenge to the sufficiency of the evidence, our standard of review is highly deferential:

> in 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 [S]tate 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 verdict before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752, 757–758 (1990) (citation omitted). We apply the same standard whether the evidence is direct or circumstantial. ***Id.***, 153 Wis. 2d at 507, 451 N.W.2d at 758.

¶7 Pursuant to WIS. STAT. § 940.225(2)(d), a defendant commits second-degree sexual assault by having "sexual contact or sexual intercourse with a person who the defendant knows is unconscious." The elements of the offense are: (1) the defendant had sexual contact or sexual intercourse with another person; (2) the victim was unconscious at the time of the sexual contact or sexual intercourse; and (3) the defendant knew that the victim was unconscious at the time of the sexual contact or sexual intercourse. *See* ***ibid.***; *see also* WIS JI—CRIMINAL 1213. The State alleged that Xolot attempted to commit this crime.

> An attempt to commit a crime requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that the actor does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that the actor formed that intent and would commit the

> crime except for the intervention of another person or some other extraneous factor.

WIS. STAT. § 939.32(3).

¶8 The State relied on a theory that Xolot attempted to have sexual contact rather than sexual intercourse with the unconscious victim. At the time of this offense, the statutory definition of "sexual contact" included:

> [i]ntentional touching by the complainant or defendant, either directly or through clothing by the use of any body part or object, of the complainant's or defendant's intimate parts if that intentional touching is either for the purpose of sexually degrading; or for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant.

WIS. STAT. § 940.225(5)(b)1. (1999-2000).[1] Further, "'unconscious,' as used in sec. 940.225(2)(d), Stats., is a loss of awareness which may be caused by sleep." ***State v. Curtis***, 144 Wis. 2d 691, 695–696, 424 N.W.2d 719, 721 (Ct. App. 1988) (emphasis omitted).

¶9 Xolot concedes that Aymee B. "testified that he was lying on top of [her] when she woke up." He argues that the remaining evidence was insufficient to prove him guilty of attempted second-degree sexual assault beyond a reasonable doubt because:

> there was no testimony whatsoever as to which portions of Aymee B.'s body [Xolot] was at that time in contact with. Equally if not more important, however, is the fact that the record is devoid of anything that would allow the jury to conclude that this more or less incidental contact was for the purpose of sexually degrading or sexually humiliating

[1] Effective June 6, 2006, the legislature amended the statutory definition of "sexual contact." *See* 2005 Wis. Act 435; WIS. STAT. § 991.11. Xolot does not assert that the amended definition applies here.

> the complainant or sexually arousing or gratifying the defendant.

¶10 Xolot's argument lacks merit. To prevail, the State was not required to prove that Xolot had sexual contact with Aymee B. while she was unconscious. The State's burden was to prove that he attempted to do so. The jury heard evidence that Aymee B. was asleep when she felt another person on top of her, that the person was Xolot, that he told her to "give [him] what [he] want[ed]," and that he touched her breasts. The evidence amply supports the jury's conclusion that Xolot attempted to sexually assault Aymee B. while she was asleep and that he did not complete the crime because she awoke. We affirm.

By the Court.—Judgment affirmed.

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