COURT OF APPEALS
DECISION
DATED AND RELEASED

October 17, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-1422-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LA RANCE THACKER,

Defendant-Appellant.

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

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

PER CURIAM. La Rance Thacker appeals from a judgment convicting him of eleven counts of first-degree sexual assault, as a party to a crime, contrary to §§ 940.225(1)(c), and 939.05, STATS. On appeal, he argues that the trial court: (1) erroneously exercised its discretion in excluding evidence of the victim's alleged prior sexual conduct; (2) denied him a fair trial because it made allegedly prejudicial remarks in the presence of the jury; and (3) erred by failing to dismiss two counts because the evidence was insufficient to support

those convictions.[1] Thacker waived the first two alleged errors by failing to properly preserve them at the trial court level; thus, we do not address them on appeal. Further, we reject Thacker's remaining argument and affirm.

On the night of September 13, 1991, the victim, an adult woman, was using a public telephone located on a street corner on the near north side of the City of Milwaukee. Thacker, Herbert Fobbs, and another man drove up beside her in their car. Thacker forced her into the car, which one of the men drove into a nearby alley. There the men forced the victim to engage in numerous acts of sexual intercourse and sexual contact with them. One of the men threatened to kill the victim if she did not submit. When someone shouted "police," all three men ran off. Thacker and Fobbs were tried together and the jury convicted them, as parties to a crime, of all eleven counts of first-degree sexual assault—eight of the counts were based upon nonconsensual acts of sexual intercourse, and the remaining three counts were based upon nonconsensual acts of sexual contact.

VICTIM'S PRIOR SEXUAL CONDUCT—IMPEACHMENT

In the course of cross-examination, counsel for co-defendant Fobbs asked the victim whether she had a boyfriend. She stated that she did not. The court commented: "We'll let this question be asked but nothing further, please." Fobbs's counsel suggested that he make an offer of proof. The court told him to proceed with the examination and stated: "Make your offer of proof later." Fobbs's counsel requested a side bar, which the court denied. When Fobbs's counsel persisted and asked the victim with whom she had had sexual intercourse, the State objected. The court excused the jury. Fobbs's counsel explained, in response to the court's inquiry, that he had evidence that the victim had sexual intercourse with a man the day before the alleged assaults, and that this evidence was offered to impeach the victim's denial that she had a boyfriend. The trial court castigated Fobbs's counsel for asking questions in violation of the rape-shield law, and did not allow an offer of proof to be made.

[1] The Hon. Michael D. Guolee presided over the trial and entered the original judgment of conviction on April 8, 1992. The Hon. David A. Hansher presided solely over a later resentencing and entered the final judgment of conviction on March 14, 1994.

On appeal, Thacker argues that the court's refusal to permit Fobbs's counsel to make an offer of proof prejudiced Thacker's right to impeach the victim. Thacker neither objected to the trial court's ruling, nor attempted to make an offer of proof. Accordingly, he has waived appellate review of this issue as a matter of right, *see* ***State v. Shears,*** 68 Wis.2d 217, 262, 229 N.W.2d 103, 125 (1975) (failure to object to the State's cross-examination of defendant relating to his silence or to State's closing argument comments on his silence waived appellate review of the issue); § 974.02(2), STATS., and we decline to use our power of discretionary reversal to review the issue. *See* § 752.35, STATS.

FAIR TRIAL—CONDUCT OF THE TRIAL COURT

For the first time on appeal, Thacker asserts that the trial court violated his constitutional right to a fair trial by remarks it made during his cross-examination of a witness called by Fobbs:

> Q. Now, you and [the victim] in September had known each other how long?
>
> A. Maybe about a month.
>
> Q. And was this your first date?
>
> [Prosecutor]: Objection, your Honor, relevance.
>
> THE COURT: I don't know what the relevance is here.
>
> Q. Was the first time the two of you gone out together?
>
> [Prosecutor]: Same objection.
>
> THE COURT: Sustained. I don't know the relevance of this witness period, the issues of your defenses. So, it is not relevant. It is a waste of this Court's time, this jury's time.

Thacker argues that the trial court's denial of his motion for a mistrial for commenting on the weight and sufficiency of the evidence violated his right to a fair trial. Our reading of the colloquy indicates to us that the trial court excluded the evidence on the basis of relevance. In such case, counsel should have made an offer of proof. Section 901.03(1)(b), STATS. Absent an offer of proof, this court has nothing to review. Thacker also complains that the trial court denied his motion for an instruction charging the jury not to draw inferences based on the court's comments on the evidence. The proper method for objecting to a court's refusal to charge is upon denial of a motion to instruct as prescribed by §805.13(3), STATS.—at the instruction conference. Failure to object to incompleteness of the charge at that time is a waiver of any error.

Further, at no time did Thacker raise the issue of denial of his fair trial rights by objection or motion. Accordingly, he waived the issue. ***Shears,*** 68 Wis.2d at 262, 229 N.W.2d at 125.

DENIAL OF MOTIONS TO DISMISS

After the State rested its case, Thacker moved to dismiss two of the counts that were premised upon nonconsensual sexual contact with the victim. Thacker argues that the trial court's reason for denying his dismissal motion—that a failed sexual intercourse can be a contact—is erroneous and in fact would excise from Wisconsin jurisprudence the offense of attempted sexual intercourse. He argues that the evidence supports, at best, convictions of attempted sexual assault rather than contact. In essence, we conclude that Thacker's argument is really a challenge to the sufficiency of the evidence supporting his conviction on the two counts of sexual assault based upon sexual contact.

On appeal, we will reverse a judgment of conviction for insufficient evidence only if the evidence favorable to the State is so insufficient in probative value that it can be said as a matter of law that no trier of fact could be reasonably convinced of guilt beyond a reasonable doubt. ***State v. Wilson,*** 180 Wis.2d 414, 424, 509 N.W.2d 128, 131 (Ct. App. 1993). There was overwhelming evidence to support the jury's verdict on the two challenged counts. The victim testified that Thacker tried to insert his penis into her vagina, but that he failed. This is sufficient under the statutory definition of

sexual contact. *See* § 940.225(5)(b), STATS. Thacker argues that these counts were actually failed attempts at sexual intercourse, not sexual contacts for purpose of sexual arousal or gratification. His argument is specious; if the facts were sufficient to establish intent to commit attempted sexual assault, as Thacker contends, they were sufficient to prove intent to commit sexual contact.

By the Court.—Judgment affirmed.

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