COURT OF APPEALS
DECISION
DATED AND RELEASED

June 19, 1996

No. 95-0630-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH C. FREY,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Winnebago County: BRUCE SCHMIDT, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Joseph C. Frey appeals from a judgment convicting him of four counts of first-degree sexual assault by use or threat of use of a dangerous weapon, one count of armed burglary and one count of false imprisonment, and from an order denying his motion for postconviction relief. We affirm.

Frey was charged with the aforementioned crimes as a result of an attack upon Maren L. on February 9, 1991, in the city of Oshkosh. Frey raises a

number of challenges to his conviction: (1) the failure of the State to preserve potentially exculpatory evidence from destruction; (2) the admission of other acts evidence; (3) the sufficiency of the evidence of false imprisonment; (4) an erroneous jury instruction and/or ineffective assistance of counsel relating to the armed burglary charge; and (5) the severity of his sentence.

DESTROYED EVIDENCE

Before trial, Frey moved to dismiss the charges against him on the grounds that the State had destroyed potentially exculpatory evidence, i.e., pubic hair taken during a combing from the victim after the assault. A defendant's motion to dismiss the charges against him or her on the ground of lost evidence is subject to the tests set forth in ***State v. Greenwold,*** 189 Wis.2d 59, 525 N.W.2d 294 (Ct. App. 1994). A defendant's due process rights are violated if the police: (1) failed to preserve evidence that is apparently exculpatory; or (2) acted in bad faith by failing to preserve evidence which is potentially exculpatory. ***Id.*** at 67, 525 N.W.2d at 297. To show bad faith, a defendant must demonstrate that the police acted with "official animus or made a conscious effort to suppress exculpatory evidence." ***Id.*** at 69, 525 N.W.2d at 298. We independently review whether the trial court erred in applying the constitutional standard to the facts it found. ***Id.*** at 66, 525 N.W.2d at 296-97.

At the hearing on the motion, Detective Quant testified that he received three hairs from a combing of Maren's pubic hair and that the hairs were submitted to the state crime laboratory for comparison with standards of her pubic hair. The hairs were returned to Quant in August 1991 without comparison because the victim's standards were inadequate for testing. Quant gave the hairs to Detective Charley, the officer in charge of the Oshkosh police department evidence room. In December 1993, Quant asked Charley for the combings so they could be sent for further crime lab analysis and discovered that they had been destroyed in October 1992 along with Maren's bed linens, clothing and the sexual assault evidence kit consisting of blood, saliva and hair standards. Quant did not authorize the destruction.

The state crime laboratory analyst involved in the case, Marie Varriale, testified that she received the three hairs in 1991 but did not analyze them because the laboratory's procedure was to first test unknown hairs against

the standards from the individual from whom they were taken. Because Maren's hair standards were inadequate for testing, the three hairs went unanalyzed. Because the three hairs were ultimately destroyed, Varriale did not have an opportunity to compare them with standards from Frey to determine the likelihood that they came from him. She testified that various swabs from Maren tested negative for the presence of sperm or semen.

Charley acknowledged that his initials appeared on the department's records showing the evidence was destroyed in October 1992, although he did not recall the incident. Charley guessed that he had received some instruction which he interpreted to mean that the Frey case was closed.[1] However, the department's central record file did not contain any evidence showing that Charley had been instructed to destroy the evidence in this case.

The court found that the hairs had some exculpatory value because Varriale testified that if they had been compared with Frey's hairs, it would have been possible to eliminate him as the donor of the hairs. Nevertheless, the court was not convinced that the three hairs possessed apparent exculpatory value because their exculpatory value was not apparent to police. The court found no evidence of bad faith on the part of the State and deemed destruction of the evidence inadvertent. Therefore, under ***Greenwold,*** Frey's due process rights were not violated by destruction of the evidence.

The trial court's findings that the hairs were potentially, rather than apparently, exculpatory and that their destruction was inadvertent are not clearly erroneous. Section 805.17(2), STATS.[2] Numerous federal cases have held that where negligence is the cause of destruction of evidence, such cannot support a showing of bad faith. ***Greenwold***, 189 Wis.2d at 69, 525 N.W.2d at 297-98. Because Frey did not establish that the hairs were either (1) apparently exculpatory or (2) potentially exculpatory and destroyed as a result of the State's bad faith, the trial court did not err in denying his motion to dismiss.

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[1] Charley was not involved in the investigation of the assault of Maren.

[2] Frey has not claimed that the hairs would have exonerated him. Therefore, their exculpatory value was only potential, necessitating proof of bad faith on the part of the police in destroying the evidence.

OTHER ACTS EVIDENCE

Frey challenges the trial court's decision to admit evidence of sexual assaults involving Cynthia F. and Judith W. He argues that the evidence was not necessary to prove identity and that it was insufficiently near in time, place and circumstance to constitute an imprint under ***State v. Kuntz,*** 160 Wis.2d 722, 746, 467 N.W.2d 531, 540 (1991). Frey also argues that the other acts evidence was not reliable because his conviction for assaulting Cynthia was reversed.

We will affirm the trial court's decision to admit evidence if the court properly exercised its discretion. ***State v. Webster,*** 156 Wis.2d 510, 514, 458 N.W.2d 373, 374-75 (Ct. App. 1990). In exercising its discretion, the trial court must apply accepted legal standards to the facts of record and use a rational process to reach a reasonable conclusion. *See* ***id.*** at 515, 458 N.W.2d at 375. We conclude the trial court did so.

Although § 904.04(2), STATS., specifically excludes evidence of other acts when such evidence is offered "to prove the character of a person in order to show that he [or she] acted in conformity therewith," ***State v. Shillcutt,*** 116 Wis.2d 227, 236, 341 N.W.2d 716, 720 (Ct. App. 1983), *aff'd*, 119 Wis.2d 788, 350 N.W.2d 686 (1984), it does not bar evidence which is "offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Section 904.04(2).

When the trial court must decide whether to admit other acts evidence, it is required to use a two-pronged analysis. First, the trial court must consider whether the proposed evidence fits within one of the exceptions stated in § 904.04(2), STATS. Second, the trial court must exercise its discretion to resolve whether the prejudice resulting from the other acts evidence outweighs its probative value. ***State v. Fishnick,*** 127 Wis.2d 247, 254, 378 N.W.2d 272, 276 (1985). The relevancy of the other acts evidence is a threshold question that is implicit in the two-pronged analysis. The trial court must decide if there is a logical or rational connection between the other acts evidence and any fact that is of consequence to the determination of the action being tried. *See* ***State v. Alsteen,*** 108 Wis.2d 723, 729-30, 324 N.W.2d 426, 429 (1982).

"To be admissible for purposes of identity, the other-acts evidence should have such a concurrence of common features and so many points of similarity with the crime charged that it "can reasonably be said that the other acts and the present act constitute the imprint of the defendant." ***Kuntz***, 160 Wis.2d at 746, 467 N.W.2d at 540. The threshold measure for similarity is nearness in time, place and circumstance to the charged crime. ***Id.*** at 746-47, 467 N.W.2d at 540. Whether there is a concurrence of common features is generally within the trial court's discretion. ***Id.*** at 747, 467 N.W.2d at 540.

Cynthia was assaulted in her Green Bay home on January 31, 1991. Frey forced his way into the home, woke Cynthia and sexually assaulted her by first having oral and then vaginal sex with her. During the assault, Frey was conversational, preoccupied with time and threatened Cynthia with further harm if she reported the assault to the police. On February 19, 1991, approximately ten days after the attack on Maren, Frey forcibly entered the home of Judith W., woke and sexually assaulted her by first having oral and then vaginal sex with her. Frey threatened further harm if she reported the attack to the police. During the assault, Frey was conversational with Judith.

The court found that while the crimes were not identical, there were similarities which far outweighed the dissimilarities. All three assaults (Maren, Cynthia and Judith) resulted from forcible entry into the victims' residences in the early morning hours while the victims were sleeping. The attacker first had oral and then vaginal sex with the victim and threatened the victim with further harm if she reported the assault to the police. The court found that all three of the attacks occurred within a twenty-day time period in areas that Frey frequented, notwithstanding that Green Bay and Oshkosh are separated by some miles. The court found that the other acts evidence was relevant to identity[3] and that its probative value exceeded the danger of unfair prejudice.

[3] The court made this finding notwithstanding Frey's earlier argument that identity would not be an issue because Maren identified him in a lineup. The fact that Frey would not stipulate to identity and that a notice of alibi had been filed indicated to the trial court that identity would be an issue at trial.

We agree with the trial court that there were sufficient similarities to admit the attacks on Judith and Cynthia as other acts evidence relevant to the identity of Maren's attacker. There was a concurrence of common features and sufficient points of similarity with the charged crime such that Frey's imprint was revealed. The incidents occurred near in time, reasonably near in place and under circumstances that made them relevant to the identity of Maren's attacker and the charged crime. That the Cynthia F. conviction was reversed does not preclude its use as other acts evidence. *Cf.* ***Day v. State***, 92 Wis.2d 392, 403, 284 N.W.2d 666, 672 (1979) (conviction not necessary to be admissible as other acts evidence).

Frey also argues that the other acts evidence was prejudicial. However, nearly all evidence operates to the prejudice of the party against whom it is offered. ***State v. Johnson,*** 184 Wis.2d 324, 340, 516 N.W.2d 463, 468 (Ct. App. 1994). The test is whether the prejudice of relevant evidence is fair or unfair. ***Id.*** The trial court determined that the evidence, while prejudicial, was probative on the question of identity. Additionally, the trial court's use of a cautionary instruction ameliorated the prejudicial effect of the other acts evidence. ***Shillcutt,*** 116 Wis.2d at 238, 341 N.W.2d at 721. We assume the jury heeded the curative instruction. *See* ***In re D.S.P.,*** 157 Wis.2d 106, 117, 458 N.W.2d 823, 828 (Ct. App. 1990), *aff'd,* 166 Wis.2d 464, 480 N.W.2d 234 (1992). Such instructions go far "to cure any adverse effect attendant with the admission of the [other acts] evidence." ***Fishnick,*** 127 Wis.2d at 262, 378 N.W.2d at 280.

Our independent review of the record supports the trial court's discretionary decision to admit the evidence. In light of the multiple points of congruence between the charged crime and the other acts, the trial court had a rational basis for concluding that the other acts evidence was relevant to the issue of identity. ***Kuntz,*** 160 Wis.2d at 747, 467 N.W.2d at 540.

FALSE IMPRISONMENT

Frey challenges the sufficiency of the evidence that he falsely imprisoned Maren contrary to § 940.30, STATS. Upon a challenge to the sufficiency of the evidence to support a jury's verdict, we may not substitute our judgment for that of the jury "unless the evidence, viewed most favorably to the

state and the conviction, is so lacking in probative value and force" that no reasonable jury "could have found guilt beyond a reasonable doubt." ***State v. Poellinger,*** 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990). We will uphold the verdict if any possibility exists that the jury could have drawn the inference of guilt from the evidence. *See* ***id.*** at 507, 451 N.W.2d at 758. It is the jury's province to fairly resolve conflicts in the testimony, weigh the evidence and draw reasonable inferences from the facts. *See* ***id.*** at 506, 451 N.W.2d at 757. We must accept the reasonable inferences drawn from the evidence by the jury. ***Id.*** at 507, 451 N.W.2d at 757. If more than one reasonable inference can be drawn from the evidence, the reviewing court must adopt the inference which supports the conviction. ***State v. Hamilton***, 120 Wis.2d 532, 541, 356 N.W.2d 169, 173-74 (1984).

A defendant confines or restrains another when the defendant deprives that person of freedom of movement or compels that person to remain where that person does not wish to remain. WIS J I—CRIMINAL 1275 (1990). A person is not confined or restrained if the person knew imprisonment could have been avoided by taking reasonable action. ***Id.*** The confinement or restraint must be intentional on the part of the defendant and without the authority of the victim. ***Id.***

Frey argues that Maren was restrained for the short period of time during which she was sexually assaulted. Maren testified that Frey entered her bedroom, pushed her down and forced her to perform various sex acts. During that time, the defendant either straddled her, exhibited superior physical strength or made threats while armed. We conclude that the evidence in this case is sufficient to satisfy the elements of false imprisonment. When viewed in combination, the circumstances of this case indicate that Frey confined or restrained Maren, deprived her of freedom of movement and that she was unable to take reasonable action to avoid the restraint.

CHALLENGE TO ARMED BURGLARY

Frey seeks reversal of his conviction for armed burglary because the jury instruction did not require the jury to find beyond a reasonable doubt that Frey was armed prior to or during the burglary and did not define "armed." Frey is correct that the jury was instructed on unarmed burglary. At the

postconviction motion hearing, the court noted that it had held two preliminary jury instruction conferences and a formal conference on the record and that Frey did not object to the unarmed burglary instruction the court gave. Frey concedes as much on appeal.

Failure to object at the jury instruction conference waives any error in the proposed instruction. *See* § 805.13(3), STATS. We do not "have the power to find that unobjected-to errors go to the integrity of the fact-finding process ...." ***State v. Schumacher,*** 144 Wis.2d 388, 409, 424 N.W.2d 672, 680 (1988). Although we are precluded from addressing Frey's claim that the unarmed burglary instruction was error, we do have broad discretionary power of reversal under § 752.35, STATS., if we are satisfied that the real controversy was not fully tried or there was a miscarriage of justice. ***State v. Smith,*** 170 Wis.2d 701, 714 n.5, 490 N.W.2d 40, 46 (Ct. App. 1992), *cert. denied*, 507 U.S. 1035 (1993). We may also review an alleged error in jury instructions under an ineffective assistance of counsel claim. ***Id.***

Under § 752.35, STATS., we may reverse and order a new trial if the real controversy has not been fully tried or if it is probable that justice has for any reason miscarried. ***Vollmer v. Luety,*** 156 Wis.2d 1, 16, 456 N.W.2d 797, 804 (1990). When the real controversy has not been fully tried, we may exercise our power of discretionary reversal without finding that it is probable that a different result would occur on retrial. ***Id.*** In contrast, in order to reverse on the grounds that justice has miscarried, we must first find a substantial probability of a different result on retrial. ***Id.***

We decline to exercise our authority under § 752.35, STATS., because we conclude that the real controversy, i.e., whether Frey was armed during the burglary, was tried. Furthermore, it is substantially improbable that a different result would occur on retrial (i.e., acquittal) if a second jury was instructed regarding the armed element of burglary. Therefore, justice did not miscarry.

The jury was advised at the outset that Frey was charged with having sexual intercourse with Maren without her consent by use or threat of use of a dangerous weapon, i.e., a knife. The jury was also informed that Frey was charged with burglary "while armed with a dangerous weapon" arising out

of the same incident. Maren testified that her assailant brandished a knife and threatened her with it. The jury was instructed that the burglary occurred with the intent to commit a felony on the premises. The underlying felony was a sexual assault with the use or threat of use of a knife. The jury was also instructed on the armed element of the sexual assault charge.

In order to find Frey guilty of first-degree sexual assault contrary to § 940.225(1)(b), STATS., the jury had to find that he used or threatened to use a dangerous weapon. In their closing arguments, the prosecutor and defense counsel referred to evidence that Maren's assailant possessed a knife. The armed burglary verdict stated that the defendant had to have been armed. Under all of these circumstances, we conclude that the real controversy—whether Frey was armed during the burglary—was before the jury. We also conclude that justice has not miscarried because we are unable to conclude that a different result would occur on retrial, i.e., acquittal of armed burglary.

The foregoing reasoning also precludes a conclusion that trial counsel was ineffective for not having sought an armed burglary instruction or objecting to the unarmed burglary instruction. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984). We need not address whether counsel's performance was deficient if we can conclude that counsel's performance did not prejudice the defendant. ***State v. Moats,*** 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990). Whether counsel's performance prejudiced the defendant is a question of law which we review de novo. ***Id.*** A defendant is prejudiced if he or she can show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. ***State v. Johnson,*** 153 Wis.2d 121, 129, 449 N.W.2d 845, 848 (1990). A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Id.*** In applying this principle, reviewing courts are instructed to consider the totality of the evidence before the trier of fact. ***Id.*** at 129-30, 449 N.W.2d at 848-49.

We have already concluded that had the jury been instructed on armed burglary, it is not reasonably probable that Frey would have been acquitted on the charge. For this reason, there was no prejudice to Frey as a

result of trial counsel's failure to assure a proper jury instruction on armed burglary.

SENTENCING

Finally, Frey challenges the severity of his sentence. The trial court sentenced Frey to the maximum consecutive sentences on each offense. In particular, he complains that the court did not articulate a rationale for giving consecutive sentences on the four counts of first-degree sexual assault for which he was convicted.

We review whether the trial court misused its sentencing discretion. ***State v. J.E.B.,*** 161 Wis.2d 655, 661, 469 N.W.2d 192, 195 (Ct. App. 1991), *cert. denied,* 503 U.S. 940 (1992). We presume that the trial court acted reasonably, and the defendant must show that the trial court relied upon an unreasonable or unjustifiable basis for its sentence. ***Id.*** The weight given to each of the sentencing factors is within the sentencing judge's discretion. ***Id.*** at 662, 469 N.W.2d at 195. Public policy strongly disfavors appellate courts interfering with the sentencing discretion of the trial court. ***State v. Teynor,*** 141 Wis.2d 187, 219, 414 N.W.2d 76, 88 (Ct. App. 1987). We conclude that the trial court properly exercised its discretion in sentencing Frey and that its sentence does not shock public sentiment. *See* ***id.***

The primary factors to be considered by the trial court in imposing a sentence are the gravity of the offense, the offender's character and the need to protect the public. ***State v. Borrell,*** 167 Wis.2d 749, 773, 482 N.W.2d 883, 892 (1992). Frey concedes that the court properly considered the seriousness of the offenses and his prior criminal record. The court also considered Frey's history of criminal activity, drug and alcohol abuse, and the fact that he showed no remorse. The court found that the public required protection from Frey. The court expressed serious concern that Frey would continue to commit violent crimes if not incarcerated for a substantial period of time. The trial court considered the appropriate factors and weighed them in its discretion.

As with the length of the sentence, whether sentences shall be served consecutively or concurrently is entrusted to the trial court's discretion.

See ***State v. Hamm,*** 146 Wis.2d 130, 156, 430 N.W.2d 584, 596 (Ct. App. 1988). "[T]he factors that apply to the length of sentence also apply to whether sentences will run consecutively." ***State v. Anderson,*** 163 Wis.2d 342, 350-51, 471 N.W.2d 279, 282 (Ct. App. 1991). The trial court's rationale for imposing the maximum penalties also supports its decision that the sentences be served consecutively. We do not see any misuse of discretion.

By the Court.—Judgment and order affirmed.

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