

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 16, 1996

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.

NOTICE

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

No. 95-1134-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SCOTT J. KONZE,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Monroe County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed and cause remanded with directions.*

Before Eich, C.J., Dykman and Sundby, JJ.

PER CURIAM. Scott J. Konze appeals from a judgment convicting him on two counts of sexual assault. The State charged Konze with first-degree sexual assault, second-degree sexual assault, second-degree sexual assault as a party to the crime, and misdemeanor battery. The jury convicted Konze on the first and third charges and acquitted him on the other two. He

contends that the trial court should have set aside the verdict on the first-degree sexual assault charge because it is inconsistent with an acquittal on the battery charge, as the foundation for both was the same act of violence. He also contends that the trial court erred when it allowed the State to amend the first charge from second-degree to first-degree sexual assault. We reject his arguments and affirm.¹

Inconsistency in a verdict is not *per se* grounds for reversal of a conviction. *State v. Johnson*, 184 Wis.2d 324, 347-48, 516 N.W.2d 463, 471 (Ct. App. 1994). As long as sufficient evidence supports the guilty verdict, we will affirm. *Id.* at 348, 516 N.W.2d at 471. Here, the jury heard testimony that the victim was pummeled into a dazed state of submission by the violent and forceful acts of Konze and his accomplice. If believed, that evidence reasonably allowed the jury to find guilt beyond a reasonable doubt. Whether to believe it was the jury's prerogative. *State v. Poellinger*, 153 Wis.2d 493, 503, 451 N.W.2d 752, 756 (1990).

The trial court properly allowed the State to amend the information. Konze argues that the evidence presented at the preliminary hearing did not support the first-degree sexual assault charge. We disagree. The charge that he violated, § 940.225(1)(c), STATS., required evidence that he had nonconsensual sexual contact or intercourse with another person by using force or violence or threatening force or violence while aided or abetted by another person. The victim testified at the preliminary hearing that Konze had sexual intercourse with her without her consent, after he and his co-defendant pummeled her into a dazed, submissive state. That evidence established probable cause to charge Konze with first-degree sexual assault. It is therefore unnecessary to determine the issue raised by the State as to whether the charge need only be not wholly unrelated to the preliminary hearing evidence.

By the Court.—Judgment affirmed and cause remanded with directions.

¹ Although no question exists that Konze was tried and convicted of first-degree sexual assault, the judgment reports a conviction for second-degree sexual assault. Although we affirm, we remand for entry of an amended judgment that conforms to the proceedings.

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