COURT OF APPEALS
DECISION
DATED AND RELEASED

MARCH 12, 1996

NOTICE

No. 95-2336-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES J. BAETEN,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Brown County: PETER J. NAZE, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. James Baeten appeals a judgment convicting him of second-degree sexual assault and an order denying his postconviction motion. He argues that his trial counsel was ineffective because he failed to request a jury instruction on third-degree sexual assault. We conclude that Baeten has not established that he was prejudiced by his counsel's failure to request that instruction because the evidence does not support submission of that offense to the jury.

A lesser included offense should be submitted to the jury if, viewing the evidence in the light most favorable to the defendant, the jury could have a reasonable doubt as to some element of the greater offense but still convict on the lesser offense. *See* ***State v. Muenter***, 138 Wis.2d 374, 385, 406 N.W.2d 415, 420 (1987). Second-degree sexual assault differs from third-degree only in that second-degree requires proof that the defendant had nonconsensual sexual intercourse "by use or threat of force or violence." Therefore, it would only be appropriate to instruct the jury on third-degree sexual assault if the jury could reasonably have believed that Baeten had nonconsensual intercourse with the victim but reasonably doubted that he did so by use or threat of force or violence.

The victim testified that she and Baeten went to her home after they concluded work and had breakfast together. She testified that Baeten made three sexual advances to her, each time backing off after she protested. Then, after a lengthy conversation Baeten asked her to show him around her house. As they passed the door of her bedroom, Baeten grabbed her from behind, threw her on the bed, forcibly removed her clothes and had intercourse with her despite her struggles, tears and demands that he stop. Her testimony was corroborated by excited utterances to friends and investigating officers, statements she made to medical personnel later that day, fresh bruises at the base of her neck and on her back as well as abrasions around her shoulder blades, and her demeanor on the day following the attack.

Baeten testified that he made repeated sexual advances that were not unequivocally discouraged. During a tour of the victim's home, he followed her into her bedroom and she closed the door. He testified that she initiated sexual intercourse through passionate kissing, removal of his clothing and an attempt to perform oral sex with him. He denied any threats or violence and insisted that the victim consented to the intercourse. His testimony was supported by character witnesses who testified that he had a reputation for honesty and nonviolence.

No reasonable view of this evidence would support acquittal on second-degree sexual assault but conviction on third-degree. There is no basis for the jury to believe that an adult, alert woman submitted to nonconsensual intercourse without any use or threat of force or violence. The only possible basis for acquittal on the charge of second-degree sexual assault would be if the

jury believed Baeten's testimony that the victim consented to the intercourse. On the evidence presented in this case, it would be unreasonable for the jury to doubt the use or threat of force or violence but still find nonconsent.

Because instruction on third-degree sexual assault would not have been proper under the evidence presented in this case, trial counsel's failure to request a jury instruction on that charge did not prejudice the defense. Therefore, this court need not review whether counsel's performance was deficient. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984).

By the Court.—Judgment and order affirmed.

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