COURT OF APPEALS
DECISION
DATED AND RELEASED

October 17, 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.

Nos. 95-2448-CR
95-2449-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MIGUEL A. TANON,

Defendant-Appellant.

APPEAL from judgments and an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed*.

Before Eich, C.J., Dykman, P.J., and Paul C. Gartzke, Reserve Judge.

DYKMAN, P.J. Miguel A. Tanon appeals from judgments convicting him of second-degree sexual assault of a child in violation of § 948.02(2), STATS., and second-degree sexual assault in violation of § 940.225(2)(a), STATS., and an order denying his motion for postconviction relief. Tanon raises the following issues on appeal: (1) whether his conviction

for the charge of second-degree sexual assault of Laura J. is based on sufficient evidence; (2) whether he was denied effective assistance of counsel because of trial counsel's failure to object to proposed jury instructions and failure to request a lesser-included offense instruction; (3) whether the trial court should have granted a new trial on the second-degree sexual assault of a child conviction because of Judi R.'s testimony that she "was a virgin"; and (4) whether he should be granted a new trial in the interest of justice under § 752.35, STATS.

We conclude that: (1) his conviction was based on sufficient evidence; (2) he was not denied effective assistance of counsel; (3) Judy R.'s testimony was not prejudicial; and (4) he is not entitled to a new trial in the interest of justice. We therefore affirm.

BACKGROUND

On September 17, 1993, the State charged Tanon with five counts of sexual assault, with three different girls, including one count of second-degree sexual assault of a child, contrary to § 948.02(2), STATS., for his alleged sexual intercourse with Laura. At the preliminary hearing on October 13, 1993, the court bound Tanon over for trial on each of the counts, and on October 25, 1993, the State filed an information with six counts, also charging Tanon with having sexual intercourse with Laura "without her consent and by the use of force," contrary to § 940.225(2)(a), STATS.

On October 21, 1993, the State charged Tanon with four counts involving Judi R., including one count of second-degree sexual assault of a child, contrary to § 948.02(2), STATS. At the November 23, 1993 preliminary hearing, the court bound Tanon over for trial on all four charges, and the prosecutor filed an information the same day.

Tanon's trial lasted from February 21, 1994, to February 24, 1994. At trial, Laura testified that on a school day in April 1993, she and Dawn H. went to Tanon's house at about 3:00 p.m. Laura went into the living room, and Tanon and Dawn went into Tanon's bedroom. Dawn told Laura that Tanon

wanted to talk to her. Dawn came out of the bedroom and Laura went in. Tanon closed the door and put a butter knife in the door so that it could not be opened. Tanon took Laura's pants off while she was standing by the bed, and she said "no." He then pushed her on the bed, removed her underwear, and engaged in sexual intercourse. Laura's twin sister Kristine testified that Laura had told her that Tanon raped her. Kristine also testified that Laura was forced to have intercourse with Tanon.

Judi R. testified that in July 1991, she went to Tanon's bedroom so that Tanon could show her some mystery books. As Tanon and Judi were kissing, Tanon tried to unbutton her shirt. She pushed him away and said "no." She testified that she told him "I wasn't like that. My mother raised me better." Tanon said fine and they started kissing again. He again started to unbutton her shirt and she again told him no. When Tanon started to unbutton her shirt for a fourth time and she again told him to stop, he handcuffed her to what looked like a radiator, partially removed her pants and underwear, and engaged in sexual intercourse.

On redirect examination, the prosecutor asked Judi, "When you told Mr. Tanon that you were not that type of girl, did that mean you were saving yourself for marriage?" Judi answered, "Yes. I was a virgin." Tanon moved for a mistrial because this testimony was prejudicial and was not admissible under Wisconsin's rape shield law, § 972.11, STATS. The court denied Tanon's motion.

Tanon testified on his own behalf. He testified that the intercourse with Laura was consensual and that he never had any sexual contact with Judi.

The jury found Tanon guilty of having sexual intercourse with Laura before she had attained the age of sixteen years, guilty of having sexual intercourse with Laura without her consent and by the use of force, and guilty of having sexual intercourse with Judi before she had attained the age of sixteen years. The jury found Tanon not guilty on the other seven charges. Tanon brought a motion for postconviction relief, raising the same issues he raises here. The trial court denied the motion, and Tanon appeals.

SUFFICIENCY OF THE EVIDENCE

Tanon was convicted of having sexual intercourse with Laura without her consent and by the use of force, in violation of § 940.225(2)(a), STATS. Section 940.225(2)(a), second-degree sexual assault, provides that whoever "[h]as sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence" is guilty of a Class C felony. Tanon argues that his conviction for the charge of second-degree sexual assault is based on insufficient evidence. Specifically, Tanon argues that there is insufficient evidence to support the "force" element of second-degree sexual assault.

Upon a challenge to the sufficiency of the evidence, 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). It is the function of the jury to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from the facts. ***Id.*** at 506, 451 N.W.2d at 757. If more than one inference can be drawn from the evidence, we must accept and follow the inference drawn by the jury unless the evidence on which that inference is based is incredible as a matter of law. ***Id.*** at 506-07, 451 N.W.2d at 757.

After reviewing the evidence, we conclude that a jury could reasonably conclude that Tanon had sexual intercourse with Laura without her consent and by use of force. In ***State v. Baldwin***, 101 Wis.2d 441, 451, 304 N.W.2d 742, 748 (1981), the court provided that the force element of sexual assault includes the use of force "directed toward compelling the victim's submission." Laura testified that Tanon pushed her on the bed prior to engaging in nonconsensual intercourse. She told Tanon "no." Laura's sister testified that Laura told her she had been raped and that the intercourse was forced. This evidence is sufficient for the jury to conclude that Tanon used force to compel Laura to submit to sexual intercourse.

INEFFECTIVE ASSISTANCE OF COUNSEL

Tanon argues that he was denied effective assistance of counsel because his trial counsel failed to object to proposed jury instructions and failed to request a jury instruction on the lesser-included offense of third-degree sexual assault. To establish ineffective assistance of counsel, Tanon must satisfy a two prong test. First, he must show that his counsel's performance was deficient. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Second, he must establish that the deficient performance was prejudicial. ***Id.***

First, Tanon argues that he was denied effective assistance of counsel because he was charged in the information with having sexual intercourse with Laura by "use of force," but the trial court gave, without objection, an instruction which stated that the third element of second-degree sexual assault required that Tanon had sexual intercourse with Laura "by use or threat of force or violence." Tanon argues that his trial counsel should have objected to this instruction because the instruction should have only referred to "use of force."

We conclude that the jury instruction was not prejudicial, and therefore Tanon was not denied effective assistance of counsel. To establish prejudice, Tanon must show that but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. ***Id.*** at 694. The State only offered evidence to establish that Tanon had sexual intercourse with Laura by use of force; no evidence was produced at trial to indicate that Tanon had sexual intercourse with Laura by threat of violence or threat of force. Therefore, Tanon could not be prejudiced by the reference to violence and threat of force in the jury instruction.

Second, Tanon argues that he was denied effective assistance of counsel because his trial counsel failed to request a jury instruction on the lesser-included offense of third-degree sexual assault. Section 940.225(3), STATS., third-degree sexual assault, provides, "Whoever has sexual intercourse with a person without the consent of that person is guilty of a Class D felony." Tanon argues that this instruction was warranted because he disputed the element of force contained in second-degree sexual assault.

"The submission of a lesser-included offense instruction is proper *only* when there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense." ***State v. Wilson***, 149 Wis.2d 878, 898, 440 N.W.2d 534, 542 (1989). A special situation arises, as in this case, where the defendant presents wholly exculpatory testimony as to the charged offense but requests a lesser-included offense instruction that is directly contrary to his version of the facts. In such a situation, the defendant may request and receive a lesser-included offense instruction if "a reasonable but different view of the record, the evidence and any testimony other than that part of the defendant's testimony which is exculpatory supports acquittal on the greater charge and conviction on the lesser charge." ***State v. Sarabia***, 118 Wis.2d 655, 663, 348 N.W.2d 527, 532 (1984).

In this case, the only distinguishable element between second-degree and third-degree sexual assault is the use of force. Tanon testified that the intercourse with Laura was consensual, and therefore his testimony does not support the lesser-included offense instruction. We have already concluded that the evidence was sufficient for the jury to conclude that Tanon had intercourse with Laura by use of force. Tanon does not point to any evidence, nor do we find any evidence, to support a finding that Tanon had sexual intercourse with Laura without her consent, but that force was not used. Therefore, we conclude that there is no reasonable view of the evidence that would support an instruction on the lesser-included offense of third-degree sexual assault. Tanon's trial counsel was not ineffective by failing to request the lesser-included instruction.

JUDY R.'S TESTIMONY

Judy R. testified that she "was a virgin." The State does not dispute that this statement was not admissible under Wisconsin's rape shield law. *See* § 972.11(2), STATS. The issue, then, is whether the trial court should have granted a new trial on the second-degree sexual assault of a child conviction because of Judi R.'s testimony.

We will reverse the trial court's denial of a motion for mistrial only upon a clear showing that the trial court erroneously exercised its discretion.

State v. Pankow, 144 Wis.2d 23, 47, 422 N.W.2d 913, 921 (Ct. App. 1988). In deciding whether to grant a motion for a mistrial, the trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial. ***Id.***

We conclude that the trial court did not erroneously exercise its discretion in denying Tanon's motion for a mistrial. This case is similar to ***State v. Mitchell***, 144 Wis.2d 596, 424 N.W.2d 698 (1988), in which the defendant was charged with first-degree sexual assault, § 940.225(1)(d), STATS., 1985-86, for having "sexual contact or sexual intercourse with a person 12 years of age or younger." ***Id.*** at 601 & n.1, 424 N.W.2d at 699. The eleven-year-old complainant and her mother testified that the complainant was a virgin prior to being assaulted by the defendant. ***Id.*** at 600, 424 N.W.2d at 699. After concluding that the admission of this testimony was erroneous and after reading the record, the court concluded:

> [T]here is no reasonable possibility that the error contributed to the conviction. The complainant was eleven years old, and consent was not an issue. We are not persuaded that the jury would have given more credence to her testimony merely because she testified that she was a virgin. Thus we conclude that the inadmissible evidence did not influence the jury's verdict. The error was not prejudicial.

Id. at 620, 424 N.W.2d at 707.

Tanon was found guilty of violating § 948.02(2), STATS., which provides that "[w]hoever has sexual contact or sexual intercourse with a person who has not attained the age of 16 years old is guilty of a Class C felony." Like the sexual assault charge in ***Mitchell***, consent is not an element of this crime. Therefore, Judy R.'s testimony was not prejudicial, and the trial court properly exercised its discretion in denying Tanon's motion for a mistrial.

NEW TRIAL IN THE INTEREST OF JUSTICE

Tanon argues that he should be granted a new trial in the interest of justice under § 752.35, STATS. Because we cannot conclude either that the real controversy in this case was not tried or that justice was miscarried, we reject Tanon's request.

By the Court.—Judgments and order affirmed.

Not recommended for publication in the official reports.