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DISTRICT II

October 1, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP2175-CR State of Wisconsin v. Gerry L. Rogers (L.C. #2012CF570)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

In this appeal from judgments convicting him of disorderly conduct and false imprisonment (both as domestic abuse) and resisting or obstructing, Gerry Rogers argues that the circuit court erroneously instructed the jury relating to the false imprisonment charge. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2011-12).[1] We affirm because the false imprisonment instruction relating to escape was warranted by the evidence and Rogers' theory of

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

defense. The escape instruction was not erroneous and did not unconstitutionally mislead the jury.

The charges against Rogers arose out of his conduct toward his mother at their home. The victim testified that Rogers had been drinking at home, sat down near her and started complaining about other family members. Rogers then threatened to snap his mother's neck and murder school children. She was frightened and tried to leave the house. As she fled toward the door, Rogers chased after her, and they both slid on the snow-covered deck. She testified that Rogers "had his hands around my waist like trying to keep me from going out of the house" and Rogers had his hands on her once she got out to the deck. Rogers lost hold of her, and she managed to get into her vehicle and lock the door. By his conduct, Rogers delayed her entry into her vehicle. She drove to the police station. The victim was cross-examined about her recollection of the events.

In his closing argument, Rogers argued that he did not prevent his mother from leaving the house; she left. Rogers argued that because he was unsuccessful in restraining his mother, he was not guilty of false imprisonment. The State argued that Rogers grabbed his mother and interfered with her ability to leave the house. The circuit court gave the false imprisonment pattern jury instruction, WIS JI—CRIMINAL 1275, which defines false imprisonment as "committed by one who intentionally confines or restrains another without the person's consent and with knowledge that [he] has no lawful authority to do so." The court further instructed the jury that Rogers restrained or confined his mother if he "deprived [her] of freedom of movement, or compelled her to remain where she did not wish to remain…."

During deliberations, the jury presented the following question to the circuit court: "Under the meaning of confined or restrained does genuine restraint or confinement, [sic] have to be successful?" The State suggested reading the jury the portions of WIS JI—CRIMINAL 1275 that address escape, if raised by the evidence. Those portions state: "[a] person is not confined or restrained if [she] knew [she] could have avoided it by taking reasonable action" and "[a] reasonable opportunity to escape does not change confinement or restraint that has occurred." Rogers objected on the grounds that instructing the jury on escape "may mislead the jury to say that she was confined and then she escaped." The court found that the jury was inquiring about escape and that the escape instruction was appropriate. The court so instructed the jury; the jury convicted Rogers.

On appeal, Rogers argues that the escape instruction was unconstitutionally misleading and undermined his ability to present a defense.[2] Specifically, he argues that the instruction implied that confinement or restraint had already occurred when the evidence at trial did not warrant the instruction. Rogers posits that the escape instruction would have been appropriate if the victim had tried to exit from the front door, was prevented from doing so by Rogers, and then had to flee out the back door. In that scenario, Rogers argues, he would have prevented the victim from going where she wanted to go, and the escape instruction would have been appropriate.

Our independent review of the record confirms that the escape instruction was warranted by the evidence. *See* ***State v. Giminski***, 2001 WI App 211, ¶10, 247 Wis. 2d 750, 634 N.W.2d 604.

[2] Rogers concedes that WIS JI—CRIMINAL 1275 is legally accurate. He challenges its application to his case.

The victim testified that Rogers "had his hands around my waist like trying to keep me from going out of the house," Rogers had his hands on her once she got out to the deck, Rogers lost hold of her, and she managed to get into her vehicle and lock the door. Rogers argued to the jury that he did not successfully restrain or confine his mother. The jury was entitled to deem the victim's testimony credible. ***State v. Webster***, 196 Wis. 2d 308, 320, 538 N.W.2d 810 (Ct. App. 1995). From this testimony, the jury could have found that the victim was deprived of freedom of movement, WIS JI—CRIMINAL 1275, i.e., she was confined and later escaped. The court properly exercised its discretion when it gave the escape instruction. ***State v. Burris***, 2011 WI 32, ¶24, 333 Wis. 2d 87, 797 N.W.2d 430.

We turn to whether the escape instruction unconstitutionally misled the jury, ***id.***, ¶44, or effectively relieved the State of its burden of proof on the elements of false imprisonment because the instruction's language assumes that the victim was confined, ***State v. Gonzalez***, 2011 WI 63, ¶24, 335 Wis. 2d 270, 802 N.W.2d 454. Rogers bears the "burden to establish a reasonable likelihood that the jury unconstitutionally applied" the escape instruction. ***Burris***, 333 Wis. 2d 87, ¶46. We examine the challenged instruction "'in light of the proceedings as a whole.'" ***Id.***, ¶45 (citation omitted).

We agree with the State that Rogers' argument depends upon his view of the victim's testimony, which he deems insufficient to establish confinement or restraint in the first instance. We have already held that the victim's testimony was sufficient to establish that Rogers restrained or confined her during the incident and that she escaped. When the jury inquired about whether "genuine restraint or confinement, [sic] have to be successful," the jury was asking a question prompted by the evidence and anticipated by the pattern jury instruction, which

Rogers concedes is legally accurate. The escape instruction did not relieve the State of its burden of proof, it was not ambiguous, and it did not unconstitutionally mislead the jury.[3]

Upon the foregoing reasons,

IT IS ORDERED that the judgments of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

[3] In his reply brief, Rogers argues that the jury's question was as likely an inquiry about an attempt to confine or restrain rather than about escape. Because this argument was not made before the circuit court, we do not address it here. ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. Even if we were to address it, we would not conclude that it has merit.