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DISTRICT II

April 3, 2019

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

2018AP844-CR

State of Wisconsin v. Jonny C. Cruz (L.C. #2016CF576)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Jonny C. Cruz appeals from a judgment, entered upon a jury verdict, convicting him of second-degree sexual assault with use of force, false imprisonment, and possession of drug paraphernalia. Cruz argues that the evidence at trial was insufficient to convict him and that the

sentencing court erroneously exercised its discretion by giving too much weight to his refusal to admit guilt or show remorse. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ We affirm the judgment of conviction finding Cruz guilty of second-degree sexual assault with use of force, false imprisonment, and possession of drug paraphernalia.

On October 12, 2016, a Winnebago County sheriff's deputy discovered a disabled vehicle parked on the shoulder of Highway 41 in the early morning hours with one of its passenger doors open. As he exited his squad car, he heard a woman, later identified as S.M., asking for help. The deputy witnessed S.M. attempt to get out of the backseat of the vehicle, only to be "pulled ... back in" by a hand. S.M. broke free and emerged from the car "naked from the waist down and ... crying frantically that she was 'being raped.'" Cruz indicated that S.M. was his girlfriend. The deputy arrested Cruz and found "a yellow glass meth or crack pipe in [Cruz's] pocket."

At trial, S.M. testified that she met Cruz at a bar and accepted a ride home from him because she "didn't think it was safe to walk" home. Cruz drove to her home, but then drove past it, and when S.M. screamed at him to stop, Cruz kept driving. A struggle ensued, with S.M. attempting to disable or crash the vehicle. Cruz eventually pulled over, and when S.M. tried to escape, Cruz pulled her hair and smashed her head against the center console. Cruz resumed driving, but S.M. successfully broke the gear shift of the vehicle and Cruz stopped again. S.M. again tried to escape, but Cruz pulled her into the backseat of the vehicle where he started

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

bashing her head and choking her. S.M. tried to fight back by punching, clawing, and biting Cruz. S.M. testified that Cruz touched her breasts and inserted his finger into her vagina, which she did not consent to. The deputy noted that S.M. “was sobbing, she was hysterical, very shaken” and “[h]er knuckles were bruised, swollen,” “she had scratches in her breast area and the area around her neck was like all reddened like it would have been like maybe choked.”

Conversely, Cruz testified that S.M. asked him for a ride home from the bar and then to get her cocaine at another bar. He said S.M. “started becoming like upset, like going like all crazy” when it was taking too long to get to the bar. He claims when S.M. got more upset, “she started taking off her clothes ... and ... she was kicking the steering wheel.” Cruz admits that S.M. tried to exit the vehicle when they stopped, but he restrained her because he feared for her safety in traffic. Cruz claimed they started “touching each other, we started kissing,” and while “she looked afraid,” “she was accepting what we were doing.”

The jury convicted Cruz of second-degree sexual assault, false imprisonment, and possession of drug paraphernalia.² At sentencing, among its in-depth discussion, the court noted Cruz’s lack of remorse or acceptance of guilt and questioned his likelihood of rehabilitation when he did not acknowledge his culpability. Cruz received a significant prison sentence.³ Cruz appeals.

² Cruz was also charged with kidnapping, but the jury acquitted him on that charge. Cruz does not challenge his conviction for possession of drug paraphernalia on appeal.

³ Eighteen years’ initial confinement (IC), ten years extended supervision (ES) on the sexual assault; three years’ IC, three years’ ES on the false imprisonment (consecutive); and a concurrent one-month jail sentence on the drug paraphernalia conviction.

Cruz argues that the evidence was insufficient to establish that he committed these crimes and that the circuit court erroneously exercised its sentencing discretion by giving too much weight to his refusal to admit guilt or show remorse.⁴ When we review a “sufficiency” challenge, “[w]e give great deference to the determination of the trier of fact.” *State v. Hayes*, 2004 WI 80, ¶57, 273 Wis. 2d 1, 681 N.W.2d 203. We examine the record to find facts that support upholding the jury’s verdict. *Id.* To overturn the jury’s decision, we must find that the jury relied on evidence that was “inherently or patently incredible.” *State v. Tarantino*, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990).

The elements required for a finding of guilt on a charge of second-degree sexual assault with use of force under WIS. STAT. § 940.225(2)(a) are (1) Cruz had sexual contact with S.M., (2) S.M. did not consent to the sexual contact, and (3) Cruz had sexual contact with S.M. by use or threat of force. WIS JI—CRIMINAL 1208. The elements required for false imprisonment under WIS. STAT. § 940.30 are (1) and (2) Cruz confined or restrained S.M. and did so intentionally, (3) S.M. was confined or restrained without her consent, (4) Cruz had no lawful authority to confine or restrain S.M., and (5) Cruz knew that S.M. did not consent and knew that he did not have lawful authority to confine or restrain S.M. WIS JI—CRIMINAL 1275. The evidence in this case clearly satisfied all the elements.

Cruz argues the jury should have discounted S.M.’s testimony as incredible and accepted his version of events. The jury was free to reject Cruz’s testimony and accept S.M.’s testimony

⁴ Cruz also argues that he is entitled to discretionary reversal in the interest of justice. We may reverse under WIS. STAT. § 752.35 in the interest of justice when we find that justice has miscarried or when the real controversy has not been fully tried, neither of which Cruz has shown. *See Vollmer v. Luety*, 156 Wis. 2d 1, 17-20, 456 N.W.2d 797 (1990).

as the jury is charged with determining credibility. See *State v. Poellinger*, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990). We have no hesitation in concluding that the jury drew “the appropriate inferences from the evidence adduced at trial to find the requisite guilt,” and we uphold the jury’s findings of guilt. *Id.* at 507.

On the issue of the circuit court’s sentencing discretion, the State argues that Cruz forfeited this claim due to his failure to raise it before the circuit court. See *State v. Chambers*, 173 Wis. 2d 237, 261, 496 N.W.2d 191 (Ct. App. 1992). In the interest of finality, we will address the merits. We review a circuit court’s sentencing decision for an erroneous exercise of discretion. *State v. Stenzel*, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20. The sentencing court cannot solely rely on a defendant’s refusal to admit guilt, but it is a proper consideration so long as the court does not place undue weight upon it. *State v. Pico*, 2018 WI 66, ¶49, 382 Wis. 2d 273, 914 N.W.2d 95.

Here, the sentencing court did not solely rely on Cruz’s refusal to admit his guilt and show remorse. The record reflects that the circuit court considered the gravity of the crime, the protection of the public, and the rehabilitative needs of Cruz. See *State v. Gallion*, 2004 WI 42, ¶44, 270 Wis. 2d 535, 678 N.W.2d 197. The court addressed the devastating impact that the crime had on S.M. Cruz admits that the sentencing court based his sentence on multiple factors. Cruz has failed to establish that the court placed undue weight on his failure to admit guilt or show remorse.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals