COURT OF APPEALS
DECISION
DATED AND FILED

July 5, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP44 **Cir. Ct. No. 2007CF741**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CARL G. WARE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: JOHN W. MARKSON, Judge. *Affirmed.*

Before Vergeront, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Carl Ware appeals an order that denied his WIS. STAT. § 974.06 (2009-10)[1] postconviction motion. Ware contends that: (1) evidence against him should have been suppressed because it was obtained in violation of his Fourth Amendment rights; and (2) his trial counsel was ineffective by not raising the State's failure to prove every element of kidnapping, and by not raising claims of double jeopardy violations. We reject these contentions, and affirm.

Background

¶2 In April 2007, the State charged Ware with multiple criminal counts arising from a brutal beating and sexual assault of the victim. Ware moved to suppress a videotape of the crimes police obtained from him following a traffic stop, arguing that the tape was obtained in violation of his Fourth Amendment rights. The court held an evidentiary hearing on the suppression motion. The court found that the videotape was legally obtained, and denied the motion.

¶3 Ware was convicted, following a jury trial, of kidnapping, false imprisonment, second-degree recklessly endangering safety, second-degree sexual assault, delivery of cocaine, possession with intent to deliver cocaine, battery, and bail-jumping. On October 22, 2008, the court sentenced Ware to eighteen years of initial confinement and twenty years of extended supervision.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶4 On July 30, 2010, Ware filed a pro se postconviction motion. The court held a hearing and denied the motion. Ware appeals.[2] .

Standard of Review

¶5 We review a circuit court's decision on a suppression motion under a two part standard of review: we review findings of fact under the clearly erroneous standard, and we review the application of law to those facts de novo. *See* ***State v. Hughes***, 2000 WI 24, ¶15, 233 Wis. 2d 280, 607 N.W.2d 621.

¶6 We apply the same standard of review to a claim of ineffective assistance of counsel: findings of fact are upheld unless clearly erroneous, and we independently review the application of legal principles to those facts. *See* ***State v. Manuel***, 2005 WI 75, ¶26, 281 Wis. 2d 554, 697 N.W.2d 811.

Discussion

¶7 Ware contends that police lacked reasonable suspicion to stop the vehicle in which Ware was a passenger or to perform a protective frisk of Ware. *See* ***Terry v. Ohio***, 392 U.S. 1, 20-27 (providing that an investigatory stop is constitutional where police have reasonable suspicion that a crime has been committed, and a protective frisk for weapons is constitutional where police have

[2] The State argues that we should hold that Ware's appeal is untimely filed because the notice of appeal was not filed within twenty days of the court's denial of his motion, as required by WIS. STAT. RULE 809.30(2)(j). Ware filed a postconviction motion under RULE 809.30 fourteen days late, not having asked for a further extension. We therefore treated the motion, although labeled as a motion under RULE 809.30, as a motion under WIS. STAT. § 974.06. *See* § 974.06(1). Pursuant to our orders of February 4, 2011, and April 7, 2011, we concluded that Ware's notice of appeal was timely as an appeal from an order denying a § 974.06 postconviction motion, taking into account the prison mailbox rule. Accordingly, there is no merit to the State's contention that because Ware did not file his motion in the circuit court within the time limits of RULE 809.30, that the appeal from the circuit court's order is untimely.

reasonable suspicion that the safety of police or others is in danger). Ware also contends that police did not have probable cause to arrest him and that he was not under arrest at the time of the search that revealed the videotape, and thus the search was not a valid search incident to arrest. *See* ***State v. Sykes***, 2005 WI 48, ¶¶14-18, 279 Wis. 2d 742, 695 N.W.2d 277 (a search incident to arrest is valid if the arrest is supported by probable cause—that is, if the totality of the circumstances supports a reasonable belief that the defendant probably committed a crime—and the search is contemporaneous to the arrest). We conclude that police had reasonable suspicion to detain the vehicle and probable cause to arrest Ware, and that Ware was under arrest at the time of the search.[3] We therefore discern no constitutional violation on the facts of this case.

¶8 Police have reasonable suspicion necessary to support an investigatory detention if there are specific and articulable facts that support a reasonable belief that the suspect has engaged in criminal activity. *See* ***Terry***, 392 U.S. at 20-23. Additionally, when a police officer detains a suspect at the direction of another officer, we consider all of the information known to the police department in our analysis. *See* ***State v. Kolk***, 2006 WI App 261, ¶11 n.3, 298 Wis. 2d 99, 726 N.W.2d 337.

¶9 Here, the victim arrived at the Cottage Grove Police Department with injuries to his face and body and reported to a police officer that he had been

[3] The State contends that Ware did not challenge the denial of his suppression motion in his postconviction motion, and therefore may not raise that issue on appeal. Ware replies that the issue was preserved for appeal by the suppression motion, citing WIS. STAT. § 974.02(2) ("An appellant is not required to file a postconviction motion in the trial court prior to an appeal if the grounds are sufficiency of the evidence or issues previously raised."). Because we reject Ware's suppression argument on the merits, we need not resolve this dispute.

beaten and stabbed. The victim told the officer that he had been staying with three people at a yellow house near a pawn shop on County Trunk Highway BB or Cottage Grove Road, and that those people had stripped him, tied him, beaten him, and sexually assaulted him. He stated that the assailants had used weapons and threatened to kill him. He identified the three people involved as "black males" he knew as "Domino," "Erilla," and Ware. He stated that Ware and the other two had videotaped the assault. It appeared to the officer that the victim had just escaped from the residence.

¶10 The information the victim reported to the officer at the station was then relayed to a detective with the Dane County Sheriff's Department, who coordinated the Sheriff's Department's response. Additionally, the police were able to obtain the exact address of the home based on its unique identifying features, and the address was conveyed to the detective as well. The coordinating detective dispatched other detectives to watch the residence pending a search warrant.

¶11 One of the officers surveilling the house observed two African-American males exit the house and walk to the back of the house, and then observed a vehicle exit the driveway. The officer radioed the coordinating detective that two male individuals fitting the profile given by the victim were in a vehicle leaving the residence. At the direction of the coordinating detective, the surveilling officer followed the vehicle. The officer observed that the passenger was slouched in his seat. Again at the direction of the coordinating detective, the surveilling officer initiated a traffic stop of the vehicle to identify the occupants. The officer observed that, after he activated the lights on the police car to make the stop, the suspects were restless and turning around, particularly the passenger.

¶12 Ware contends that, on these facts, police lacked reasonable suspicion to conduct the traffic stop. He contends that the victim's identification of his assailants as "three African American males," with no further identifying information, did not provide police with reasonable suspicion to stop a vehicle leaving the residence with African-American male occupants. Ware also contends the police lacked reasonable suspicion because the driveway to the residence was shared with a business with a large garage. He points out that the officers did not see the occupants of the vehicle commit any criminal activity or traffic violations. Ware also points out that almost five hours had passed between the time the victim arrived at the police station and the traffic stop, and contends that police would have no way to know that Ware was in the vehicle.

¶13 We conclude that the police had reasonable suspicion to detain the occupants of the vehicle. The police knew that the residence being watched was likely the site of a violent assault earlier in the day. They also knew that the suspects in the assault were African-American males. Police then observed two African-American males exit the residence and proceed to the back of the residence, and then a vehicle exited the shared driveway for the residence and a next-door business. These are specific and articulable facts that warrant a reasonable suspicion that the occupants of the vehicle had been engaged in criminal activity, supporting at least a brief detention to identify the occupants and investigate their possible involvement in the crime. *See* ***State v. Young***, 2006 WI 98, ¶¶20-21, 294 Wis. 2d 1, 717 N.W.2d 729 ("[S]uspicious conduct by its very nature is ambiguous, and the [principal] function of the investigative stop is to quickly resolve that ambiguity. Therefore, if any reasonable inference of wrongful conduct can be objectively discerned, … the officers have the right to temporarily detain the individual for the purpose of inquiry." (citation omitted)).

¶14 Next, we turn to the question of whether police validly searched Ware incident to an arrest. Ware contends that police lacked probable cause to arrest him and that he was not actually under arrest when the search occurred. We conclude that the police had probable cause to arrest Ware and that Ware was under arrest when he was searched, and thus the search was a valid search incident to arrest.[4]

¶15 A search is a valid search incident to arrest if police have probable cause to arrest the suspect and the suspect is arrested contemporaneously with the search. *See* ***Sykes***, 279 Wis. 2d 742, ¶¶14-18.

¶16 We first examine whether police had probable cause to arrest Ware. Probable cause exists where the totality of circumstances would lead a reasonable officer to believe that the defendant probably committed a crime. ***Id.***, ¶18. We consider the totality of the information available to the police department. *See* ***Kolk***, 298 Wis. 2d 99, ¶11 n.3.

¶17 Here, the two officers conducting the traffic stop made contact with the driver and passenger of the vehicle, and the passenger identified himself as Ware. The victim had identified one of his assailants as Ware. Based on the facts set forth above, plus Ware's self-identification, a reasonable police officer would believe Ware had probably committed a crime. *See* ***Sykes***, 279 Wis. 2d 742, ¶18.

¶18 Next, we turn to whether Ware was placed under arrest contemporaneously with the search. *See* ***id.***, ¶¶14-15. "The standard used to

[4] Because we conclude that the search was valid as a search incident to arrest, we need not address whether it was valid as a protective frisk.

determine the moment of arrest is whether a reasonable person in the defendant's position would have considered himself or herself to be 'in custody,' given the degree of restraint under the circumstances." ***State v. Kiekhefer***, 212 Wis. 2d 460, 485, 569 N.W.2d 316 (Ct. App. 1997).

¶19 Here, after Ware identified himself, police informed Ware that he was being detained with respect to an investigation, and that he was not free to leave. An officer asked Ware if he was willing to go to the police station to talk with officers, and Ware stated he would go but might not say anything. Police did not advise Ware that he was under arrest.

¶20 Another officer then arrived on the scene to transport Ware to the police station. That officer handcuffed Ware and searched him prior to placing him in the police squad car, and located the videotape.

¶21 We conclude that, at the time of the search, Ware was under arrest. He had been told he was being detained and that he was not free to leave, and he was placed in handcuffs. He was being transported to the police station in a police car rather than being allowed to drive himself. A reasonable person in those circumstances would believe himself to be in police custody. *See* ***id.*** Additionally, contrary to Ware's assertion, the officers' subjective intentions are not relevant to our inquiry. *See* ***State v. Swanson***, 164 Wis. 2d 437, 447, 475 N.W.2d 148 (1991) (police officers' "unarticulated plan is irrelevant in determining the question of custody"), *overruled on other grounds by* ***State v. Sykes***, 2005 WI 48, ¶27, 279 Wis. 2d 742, 695 N.W.2d 277. Because Ware was under arrest and the arrest was supported by probable cause, the search was a valid search incident to arrest.

¶22 Next, Ware contends that his trial counsel was ineffective by failing to raise the State's failure to prove every element of the kidnapping charge. We disagree.

¶23 Ware's claim of ineffective assistance of counsel is premised on his assertion that the evidence was insufficient to support the kidnapping conviction. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501-02, 451 N.W.2d 752 (1990) (criminal conviction must be supported by proof of every element of crime). Specifically, Ware contends that the State did not prove the "secret confinement" element of kidnapping, because there was evidence at trial that Ware spoke with the victim's girlfriend and told her that the victim would be held at Ware's house until she came to get him. *See* WIS JI—CRIMINAL 1281 (establishing that elements of kidnapping are: (1) the defendant confined the victim; (2) without the victim's consent; (3) the confinement was done forcibly; and (4) the defendant confined the victim with the intent that the victim be secretly confined).

¶24 When we review the sufficiency of the evidence to sustain a conviction, we view the evidence in the light most favorable to the State and the conviction. *See* ***Poellinger***, 153 Wis. 2d at 507. We will sustain a conviction unless the evidence "is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***Id.***

¶25 Here, Ware does not dispute that he forcibly confined the victim without the victim's consent. He contends, however, that the evidence was insufficient to prove that he intended to secretly confine the victim. Ware points to the following: (1) the victim testified that his girlfriend called his cell phone from Arizona, that Ware answered the phone, and that Ware informed her that the victim was being held until she came to get him; and (2) a friend of Ware's

girlfriend testified that the victim phoned Ware's girlfriend several times over the course of the night, asking for drugs. Ware contends that this evidence established that Ware did not intend to *secretly* confine the victim. We disagree.

¶26 Viewing the evidence in the light most favorable to the conviction, as we must, we conclude that a reasonable trier of fact could have found beyond a reasonable doubt that Ware intended to secretly confine the victim. The victim testified that Ware and two others attacked him at Ware's house, brutally beat him for hours, and would not allow him to leave. He also testified that when his girlfriend called, Ware answered the phone and the victim was not allowed to speak to her. He stated that Ware said only that the victim was being held at Ware's house until the victim's girlfriend-who was in Arizona-came to get him. He testified that Ware and the other two assailants took his phone away at that point and he made no phone calls during the time he was held. Ware points to no evidence that the victim's girlfriend knew the location of Ware's house.

¶27 The jury was entitled to infer that Ware intended to secretly confine the victim when he told the victim's girlfriend only that the victim was being held at Ware's house. Moreover, the jury was free to assess the credibility of the witnesses and believe or disbelieve their testimony. In sum, from the evidence presented at trial, a reasonable trier of fact could find that Ware intended to secretly confine the victim. Accordingly, because a challenge to the sufficiency of the evidence to support the kidnapping conviction lacks merit, we reject Ware's claim that his trial counsel was ineffective for failing to pursue it.

¶28 Next, Ware contends that his trial counsel was ineffective by failing to object on double jeopardy grounds to the entry of two convictions for false imprisonment because, Ware asserts, both convictions arise from one continuous

event. *See* ***State v. Davison***, 2003 WI 89, ¶19, 263 Wis. 2d 145, 666 N.W.2d 1 (explaining that the Double Jeopardy Clause protects against multiple punishments for the same offense). In support, Ware cites ***Baldwin v. State***, 62 Wis. 2d 521, 215 N.W.2d 541 (1974), which held "that false imprisonment is a crime of a continuous nature and exists so long as the confinement of the person without his consent continues uninterrupted." ***Id.*** at 526

¶29 Baldwin had participated as a party to the crime of false imprisonment while he drove his own car and his co-actor drove a car in which the victim was confined; the victim then jumped out of the car and attempted to reach safety, and Baldwin forced her into his car. ***Id.*** at 524. The supreme court held that Baldwin had committed two acts of false imprisonment: first as a party to a crime when the victim was in a separate vehicle and then, after her attempted escape, as a principal when he confined her in his car. ***Id.*** at 525. The court explained that Baldwin's "participation changed, the cars changed, and the restraint changed." ***Id.*** The court further explained that "in false imprisonment, it is not each act of control which constitutes the crime but the effect of many acts which confines or restrains a person against his will." ***Id.*** at 526. The court held that the crime of false imprisonment continues so long as the confinement continues uninterrupted; thus, Baldwin was properly convicted of two separate counts of false imprisonment. ***Id.***

¶30 Ware contends that here, unlike in ***Baldwin***, the record shows that the entire confinement of the victim continued uninterrupted. Ware disputes the State's rationale that two separate acts of false imprisonment occurred by two separate instances of Ware's tying the victim's hands and feet during the total time that the victim was confined in Ware's house. Rather, Ware contends that, according to the record, the victim was confined from the moment he was attacked

until he left the house, with no interruption in the confinement. Thus, Ware contends, the evidence supports only one conviction for false imprisonment.

¶31 The problem with Ware's argument is that the two charges of false imprisonment were based on allegations that Ware committed two separate acts of *restraining* the victim, rather than allegations that Ware committed two separate acts of *confining* the victim. *See* WIS. STAT. § 940.30 (defining false imprisonment as "intentionally confin[ing] *or* restrain[ing] another without the person's consent and with knowledge that [the defendant] has no lawful authority to do so" (emphasis added)). Both counts of false imprisonment specifically alleged that Ware *restrained* the victim by tying his hands and feet. The victim testified at trial that his assailants tied his hands and feet at the initiation of the attack; that he was later untied; and that he was tied again later during the time he was held at the house. Because the separate acts of restraining the victim constituted separate acts of false imprisonment, the double jeopardy claim lacks merit. Accordingly, counsel was not ineffective by failing to assert it.

¶32 Finally, Ware contends that his trial counsel was ineffective by failing to raise a double jeopardy argument based on Ware's convictions for both kidnapping and false imprisonment because, Ware contends, false imprisonment is subsumed in the elements of kidnapping. *See* ***Blockburger v. United States***, 284 U.S. 299, 304 (1932) ("[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."). We disagree.

¶33 The supreme court has held that false imprisonment is not an included crime of kidnapping. *See* ***Geitner v. State***, 59 Wis. 2d 128, 132-33, 207

N.W.2d 837 (1973). Ware acknowledges that ***Geitner*** held that false imprisonment requires proof that the defendant knew he lacked authority to restrain the victim and that kidnapping does not. *See* ***id.*** Ware argues that his argument is distinguishable from the argument rejected in ***Geitner***. Ware contends that the ***Geitner*** court relied on the absence of a "lack [of] authority" element in the kidnapping statute, while Ware contends that false imprisonment's "lack [of] authority" element is subsumed in kidnapping's elements of forcibly confining the victim without the victim's consent, with intent to secretly confine. That is, Ware contends, once the State proves the elements of kidnapping, it has proven that the defendant knew he lacked authority to confine the victim.

¶34 Ware's attempts to distinguish his current double jeopardy argument from the argument raised in ***Geitner*** are without merit. Ware's double jeopardy claim is directly contrary to the supreme court's holding in ***Geitner***, which we are bound to follow. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Because Ware's final argument is contrary to established precedent, it lacks merit, and counsel was not ineffective by failing to raise it. Accordingly, we affirm.

By the Court.—Order affirmed.

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