COURT OF APPEALS
DECISION
DATED AND FILED

December 9, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2453-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LARRY BUCHANAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. MCMAHON, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Larry Buchanan appeals from the judgment of conviction, following a jury trial, for three counts of second-degree sexual assault, and one count of kidnapping. Buchanan challenges only the kidnapping conviction. He argues that the evidence adduced at trial was insufficient to support his conviction on the kidnapping charge. Alternatively, he argues that

Wisconsin's kidnapping statute is unconstitutionally vague. We reject his arguments and affirm.

Buchanan was convicted of kidnapping and sexually assaulting an eighty-five-year-old widow in her home on the north side of Milwaukee. He contends that the evidence was insufficient to convict him of kidnapping because his confinement of the victim was solely incidental to the sexual assaults. Buchanan is incorrect.

Buchanan was prosecuted for kidnapping under § 940.31(1)(b), STATS., which, in part, provides:

> **Kidnapping. (1)** Whoever does any of the following is guilty of a Class B. felony:
>
> ....
>
> (b) By force or threat of imminent force seizes or confines another without his or her consent and with intent to cause him or her to be secretly confined or imprisoned or to be carried out of this state or to be held to service against his or her will; ....

Thus, the State was required to prove that Buchanan "[b]y force or threat of imminent force … confine[d]" the victim "without … her consent and with the intent" that she "be held to service against … her will." Section 940.31(1)(b), STATS. The confinement "'need not exist for any particular length of time,'" ***State v. Wagner***, 191 Wis.2d 322, 328, 528 N.W.2d 85, 87 (Ct. App. 1995) (quoted source omitted), and evidence may be "sufficient to establish the crime of kidnapping, regardless of the incidental role of that crime to the sexual assault." ***State v. Simpson***, 118 Wis.2d 454, 455, 347 N.W.2d 920, 921 (Ct. App. 1984).

The supreme court has articulated our standard of review of a challenge to the sufficiency of evidence:

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilty beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990) (citations omitted). Here, ample evidence supported the jury's verdict for kidnapping.

The victim testified that Buchanan forced his way into her first-floor flat, grabbed her and dragged her from her kitchen to her make-shift bedroom. She also described how he kept her under his control for over five hours; how he sexually assaulted her three times; how he rested between each act; and how he remained in her home until he was arrested the following day. The victim also stated that she did not consent to anything that occurred that night. She testified that she had repeatedly ordered Buchanan to leave, but that he refused. Viewing this evidence in the light most favorable to the verdict, we conclude that the evidence was sufficient to support the jury's finding, beyond a reasonable doubt, that Buchanan committed kidnapping.

Buchanan next argues that Wisconsin's kidnapping statute is unconstitutionally vague because it is impossible to commit a sexual assault without also committing a kidnapping. In response, the State argues that Buchanan does not have standing to challenge the kidnapping statute as unconstitutionally vague. We agree with the State. As this court concluded in ***State v. Clement***, 153 Wis.2d 287, 450 N.W.2d 789 (Ct. App. 1989), "[a] party

whose conduct is clearly proscribed by the statute in question does not have standing to challenge it on the grounds of being vague as it may be applied to others." ***Clement***, 153 Wis.2d at 295-96, 450 N.W.2d at 792. Because Buchanan's conduct clearly falls within the parameters of § 940.31, STATS., he may not challenge the statute as unconstitutionally vague. *See* ***id.***, 153 Wis.2d at 296, 450 N.W.2d at 792.

Finally, Buchanan contends that the kidnapping charge was not appropriate in his case. Citing ***State v. C.V.C.***, 153 Wis.2d 145, 450 N.W.2d 463 (Ct. App. 1989), he questions how he could be charged with kidnapping as well as sexual assault, when the defendant in ***C.V.C***, who had confined his victim intermittently for two days and sexually assaulted her several times, was charged with false imprisonment rather than kidnapping. The answer to his query is simple: prosecutorial discretion. In Wisconsin, district attorneys have great discretion in determining which crimes to charge. *See* § 939.65, STATS; *see also* ***Harris v. State***, 78 Wis.2d 357, 368, 254 N.W.2d 291, 297 (1977). "It is the law of this state [that] the same criminal act may constitute different crimes with similar but not identical elements. 'In other words, if any of the elements of proof required are different in the crimes charged, then they may be considered separate crimes.'" ***Harris***, 78 Wis.2d at 365, 254 N.W.2d at 296 (quoted source omitted). Under the facts of this case, the charge and conviction for kidnapping were appropriate.

By the Court.—Judgment affirmed.

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