COURT OF APPEALS
DECISION
DATED AND FILED

December 8, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.

No. 98-0874-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN K. RUNDLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dunn County: DONNA J. MUZA, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Brian Rundle appeals a judgment convicting him of second-degree sexual assault and two counts of obstructing an officer. He argues that: (1) the trial court compromised his right to confrontation and compulsory process when it precluded him from asking a police witness about other accusations the victim had made against Rundle and Rundle's complaints

about the victim and her family; (2) the trial court should not have allowed the police chief to testify to the victim's reputation for truthfulness; (3) the State presented insufficient evidence to support the convictions for obstructing an officer; and (4) the trial court failed to properly instruct the jury that it should separately consider each of the crimes.[1] We reject these arguments and affirm the judgment of conviction.

The victim testified that Rundle came to her mobile home in the middle of the night and knocked on her door. They discussed an upcoming trial in which the victim was the defendant in a case involving a drug transaction. She believed that Rundle was the informant in her drug case. She told Rundle that she did not trust the Elk Mound police chief or Rundle's probation officer because they let him get away with illegal things. She told him that maybe she should "take matters into [her] own hands." She then testified that Rundle told her he loved her and offered her money in exchange for sex. She asked him to leave. He removed his clothes, held her upper arms with his hands and pushed her against a sink, lifting her so that her feet were nearly off the floor. After a struggle, they both landed on the floor. He was only able to pull her jeans part way down and inserted his finger in her vagina. He then put on his clothes and left.

[1] In his statement of the issues and in his conclusion, Rundle also argues that his trial counsel was ineffective for failing to present a medical witness regarding limitations placed on Rundle as a result of back injuries and surgery. While this issue is raised, it is not argued and is therefore deemed abandoned. *See* ***Reiman Assoc. V. R/A Adver.***, 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981). In addition, the issue was not raised by postconviction motion. Ineffective assistance of counsel cannot be considered for the first time on appeal. *See* ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908-09 (Ct. App. 1979).

Her testimony was partially corroborated by two of her children, one of whom heard pounding on the door and another who recognized Rundle's voice in the kitchen. Photographs of her arms also showed bruises consistent with her description of the way he held her arms during the assault. On cross-examination, the victim indicated that she had made four or five additional complaints about Rundle to the police including "flipping her daughter off," his jumping in front of her son's car, his making a phone call to her friend, and whistling at her in a store.

A sheriff's deputy testified that when she interviewed the victim, the victim told her that she hated Rundle's guts. The victim asked the deputy about working undercover to "set up" Rundle on a drug charge. When the deputy interviewed Rundle, he told her that he had numerous medical problems with his back, that he was on medication that affected his ability to have sexual relations, and that he was unable to push, pull or drag anything because of his back problems. He told her that he was unable to lift anything that weighs more than a gallon of milk.

Another sheriff's department detective testified that Rundle denied that he had been at the victim's home on the night of the assault. That statement and the statement that he could not lift anything heavier than a gallon of milk constitute the basis for the two obstruction charges. The police chief testified that Rundle had helped him carry a television set from outside the town hall to the chief's vehicle, showing that he exaggerated his lifting limitations. The police chief also testified that he knew the victim professionally and had formed an opinion that she had been truthful with him in his investigations.

Rundle testified on his own behalf that at one time he had testified against the victim in a criminal trial. He again denied having been at her residence

on the night of the incident. He described his back condition and surgeries and the medication he took for pain. He testified that his treating physician advised him to limit lifting to no more than forty pounds. His doctors have, from time to time, changed the limits on the amount of weight he could safely lift. He recalled the range being from five to forty pounds. He explained that when talking to the sheriff's deputy, he was only speaking generally when he spoke of lifting a gallon of milk. He also explained that he should not have lifted the television set and that he suffered additional pain after he did.

The trial court properly limited cross-examination of the police chief regarding the details of the victim's other accusations against Rundle.[2] The stated purpose for asking about these details was to establish a pattern of harassment, indicating the victim's bias and motive for a false accusation. The prosecutor indicated that he was prepared to defend against these accusations by showing that many of the complaints were meritorious. The precise number of other allegations and the details of them are not highly probative and were properly excluded to avoid confusion of the issues and undue delay. *See* § 904.03, STATS. The victim's admission that she made four or five complaints against him, her offer to "set up" Rundle on a drug charge, her testimony that they discussed ways in which she could get him in trouble and her statement to the sheriff's deputy that she hated his guts adequately informed the jury of her bias. Her belief that Rundle acted as an informant in her drug case adequately shows her motive for making a false accusation.

[2] Contrary to the argument Rundle makes on appeal, his counsel did not attempt to more fully cross-examine the victim about these matters. The restriction on cross-examination occurred when counsel attempted to elicit details about the previous complaints from the police chief.

The trial court also sustained an objection when defense counsel asked the police chief about complaints Rundle made against the victim or her children. In his argument and offer of proof in the trial court and in his brief on appeal, Rundle has not established the relevancy of his accusations against the victim or her children made after the sexual assault was reported.

The trial court properly allowed the police chief to testify that the victim had been truthful with him in his investigations. Rundle argues that this evidence was not admissible under § 906.08(1), STATS., because her character for truthfulness had not been attacked. Section 906.08(1)(b), allows evidence of truthful character after the character of the witness for truthfulness has been attacked by opinion or reputation evidence "or otherwise." During his opening statement, defense counsel referred to the numerous reports the victim had made against Rundle and her statement that she was going to pay him back for getting her in trouble. On cross-examination of the victim, defense counsel further suggested that the victim continually lied to law enforcement authorities in an effort to get Rundle in trouble. The victim's character for truthfulness was impugned by this evidence and was therefore subject to rehabilitation by the chief's testimony.

Rundle also characterizes the chief's testimony as an opinion that the victim's accusations were true. The chief did not express his beliefs on the truthfulness of the victim's testimony in this case. Rather, he properly referred to her truthfulness in investigations that he had conducted during his seven years as police chief. This testimony does not violate the rule that no witness is permitted to give an opinion that another mentally competent witness is telling the truth. *See* ***State v. Haseltine***, 120 Wis.2d 92, 96, 352 N.W.2d 673, 676 (Ct. App. 1984).

The State presented sufficient evidence to support the obstructing convictions. Rundle argues that an obstructing charge cannot be based on his denial that he committed the underlying offense. Rundle's actions are not comparable to the defendant's refusal to identify himself in ***State v. Hamilton***, 120 Wis.2d 532, 536, 356 N.W.2d 169, 171 (1984). Rundle did more than deny the underlying offense. He gave false information to police officers on two occasions. Knowingly giving false information with intent to mislead constitutes obstructing an officer. *See* ***State v. Caldwell***, 154 Wis.2d 683, 686, 454 N.W.2d 13, 14-15 (Ct. App. 1990).

Rundle also argues that the trial court should have granted the defense request to instruct the jury that simply entering a denial to an allegation of a criminal offense does not constitute obstructing. The trial court properly refused to read that instruction because it does not fit the facts of this case. The State's case does not turn on a simple denial of the alleged sexual assault, but rather on the specific lies Rundle told the police.

Rundle argues that his "feelings or opinions" on his lifting capacity or exaggerations or hyperbole are not encompassed in the element that he knowingly gave false information to the officers. Whether Rundle's statements were expressions of his opinions or statements of false facts and whether his exaggerations were intended to deceive the police are questions for the jury to resolve. The jury could reasonably find that Rundle gave specific, detailed, false information to the officers with intent to impede their investigation.

The court properly exercised its discretion when it gave the standard cautionary instruction that the verdict for one crime charged must not affect the verdict on the other charges. Rundle relies on ***Peters v. State***, 70 Wis.2d 22, 233

N.W.2d 420 (1975) in which the court held that a cautionary instruction should be given. In ***Peters***, the court held that charges of burglary, theft and obstructing were properly joined because the obstruction took place during a John Doe investigation of the other two crimes. The defendant put forward a false alibi. The court held, however, that the State could not rely on the false alibi in lieu of evidence placing ***Peters*** at the scene of the crime. ***Id.*** at 30-31, 233 N.W.2d at 425. The court concluded that the jury should be instructed to separately consider the evidence of each offense to avoid the prospect of the jury regarding the evidence on obstruction as sufficient **in itself** to find the defendant guilty of burglary. ***Id.*** In response to ***Peters***, a pattern jury instruction was created to alert the jury that the verdict for one crime must not affect its verdict on the other. The trial court gave that cautionary instruction which presumptively cured any prejudice that may have resulted from joinder of the obstruction charges to the sexual assault. *See* ***State v. Hoffman***, 106 Wis.2d 185, 212, 316 N.W.2d 143, 158-59 (Ct. App. 1982).

By the Court.—Judgment affirmed.

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