COURT OF APPEALS
DECISION
DATED AND FILED

April 19, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2285-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LORNELL EVANS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed.*

Before Vergeront, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Lornell Evans appeals from a judgment convicting him, as a repeat offender, of three counts of second-degree sexual assault by use of force and one count each of kidnapping, first-degree recklessly endangering safety, and substantial battery with intent to cause bodily harm. He also appeals

from an order denying his motion for postconviction relief. Evans challenges the sexual assault convictions as multiplicitous and claims there was insufficient evidence to sustain the kidnapping verdict. For the reasons discussed below, we reject Evans's contentions and affirm.

¶2 The complaining witness left her friends at a bar and walked toward home. The next thing she knew, Evans was pulling her shorts down and raping her in an alley. She struggled and managed to get up and run a few steps away before Evans caught her, threw her back on the ground, and raped her again. About fifteen minutes later, she again attempted to run away. Evans again caught her and threw her to the ground and raped her again, choking her to quiet her screams. She broke away once more, only to be caught and thrown to the ground again. This final assault was interrupted by the arrival of the complaining witness's boyfriend.

¶3 The Fifth Amendment of the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." The Double Jeopardy Clause includes three distinct constitutional guarantees: (1) protection against a second prosecution for the same offense after an acquittal; (2) protection against a second prosecution for the same offense after a conviction; and (3) protection against multiple punishments for the same offense. ***State v. Kurzawa***, 180 Wis. 2d 502, 515, 509 N.W.2d 712 (1994). We will independently determine whether a given set of facts establishes a double jeopardy violation. ***State v. Anderson***, 219 Wis. 2d 739, 746, 580 N.W.2d 329 (1998).

¶4 Multiplicity exists when a single criminal episode or course of conduct is charged as multiple counts rather than merged into one. ***State v. Hirsch***, 140 Wis. 2d 468, 471, 410 N.W.2d 638 (Ct. App. 1987). Multiple counts

are permissible so long as the charges are not identical in law and fact and the legislature intended to allow more than one unit of prosecution. ***State v. Bergeron***, 162 Wis. 2d 521, 534, 470 N.W.2d 322 (Ct. App. 1991). Charges are different in fact if they are separated in time or place, if they require separate acts of volition within a course of conduct, or if they are otherwise of a significantly different nature. ***Anderson***, 219 Wis. 2d at 748-50.

¶5 Evans contends that the sexual assault constituted a single course of conduct. However, the assault was divided into discrete segments of time by the complaining witness's attempts to escape. Each time Evans chased the woman down and threw her to the ground required a separate volitional act. We are therefore satisfied that the three charged sexual assaults were different in fact and were not multiplicitous.

¶6 One form of kidnapping occurs when someone "[b]y 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." WIS. STAT. § 940.31(1)(b) (1997-98).[1] In reviewing the sufficiency of the evidence, we will not substitute our judgment for that of the jury "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 guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶7 Evans argues that the evidence was insufficient to support his conviction because "neither the victim nor the defendant ever moved more than a few feet from the site of the original [onslaught]." He cites a lengthy passage from ***State v. Simpson***, 118 Wis. 2d 454, 458-59, 347 N.W.2d 920 (Ct. App. 1984), in support of his position. His reliance on ***Simpson***, however, is misplaced for several reasons.

¶8 First, contrary to Evans's apparent understanding of the case cited and the law in some other jurisdictions, ***Simpson*** held that, in this state, evidence offered in support of one or more elements of kidnapping does *not* need to be wholly independent from evidence supporting another crime. ***Id.*** at 460-61. Rather, the same facts may support separate crimes as long as each of the offenses also requires proof of at least one distinct element. ***Id.*** at 461-62; *see also* WIS. STAT. § 939.71. Thus, the ***Simpson*** court determined that evidence showing that a sexual assault had occurred was also sufficient to establish the elements of kidnapping in that case. ***Simpson***, 118 Wis. 2d at 462-63.

¶9 It is not entirely clear from Evans's brief which element of kidnapping he believes the State failed to prove. The elements discussed in ***Simpson*** were asportation (carrying someone from one place to another) and intent to secretly confine. To the extent that Evans's emphasis on the location of the assault is meant to challenge the element of asportation, we note that the State did not need in this case to establish that Evans carried the complaining witness anywhere because it charged Evans under WIS. STAT. § 940.31(1)(b) rather than § 940.31(1)(a). As discussed above, the form of kidnapping with which Evans was charged occurs when someone "seizes or confines" another. The complaining witness's testimony that Evans grabbed her and threw her to the ground multiple

times when she tried to run away was more than sufficient to show that he had seized her.

¶10 Similarly, to the extent that Evans's emphasis on the location of the assault is meant to challenge the secret confinement intent element, we point to the third intent alternative under WIS. STAT. § 940.31(1)(b)—that the offender intend to hold the complaining witness to service against her will. The intent to sexually assault a person satisfies this element. ***State v. Clement***, 153 Wis. 2d 287, 294-95, 450 N.W.2d 789 (Ct. App. 1989). The evidence here easily supports the inference that Evans intended to hold the complaining witness to service against her will.

By the Court.—Judgment and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).