COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3085-CR **Cir. Ct. No. 00CF1584**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN L. DYE, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KITTY K. BRENNAN and RICHARD J. SANKOVITZ, Judges. *Affirmed*.

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

¶1 PER CURIAM. John L. Dye appeals the judgment, entered following a jury trial, convicting him of kidnapping and first-degree sexual assault, while armed, contrary to WIS. STAT. §§ 940.31(1)(b), 940.225(1) and

939.63,[1] and the order denying his postconviction motion.[2] He submits that the trial court erred: (1) in finding his attorney was not prejudicially ineffective; (2) in denying his request to impeach a State witness's credibility with evidence of her drug addiction; and (3) in determining that sufficient evidence existed to convict him of the crimes. We affirm.

¶2 Dye and the victim, T.G., met through a dating chat line. At Dye's request, T.G., who lived out of state, traveled to Milwaukee on March 23, 2000, to visit Dye. Once she arrived, Dye took her to several places, including a residence where he kept her against her will for a couple of days by beating and threatening to kill her. While there, he also forced her to have sex with him. After being terrorized for several days, T.G. called the police when Dye left for work. Dye was charged with the aforementioned two counts. Shortly thereafter, the State filed a motion to admit "other acts evidence," pursuant to WIS. STAT. § 904.04(2). The proffered testimony was of several other women who, on different occasions, claimed to have been held against their will by Dye, threatened, and forced into non-consensual sex acts with him. The State claimed this testimony would show Dye's plan, motive and intent with respect to T.G. The trial court granted the State's motion in part, permitting the State to introduce the testimony of only three of the women who claimed to have been subjected to similar conduct by Dye.

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] The Honorable Daniel L. Konkol heard the pretrial motions. The Honorable Kitty K. Brennan presided over the trial. The Honorable Richard J. Sankovitz presided over the postconviction motion.

¶3 During the jury trial, only one of the women who was named in the pretrial motion, T.P., testified. She claimed she was both kidnapped by Dye and forced to have sex with him against her will. A jury found Dye guilty on both counts and he was sentenced to thirty years' confinement and ten years' extended supervision on count one, and thirty-five years' confinement and ten years' extended supervision on count two. The sentences were ordered to be served concurrently. A postconviction motion that challenged several aspects of the proceedings was filed, heard, and denied.

¶4 Dye first argues that his attorney was ineffective because: (1) he failed to offer to stipulate to certain elements of the crime of kidnapping that would have prevented T.P. from testifying, as permitted under ***State v. Wallerman***, 203 Wis. 2d 158, 552 N.W.2d 128 (Ct. App. 1996); and (2) his attorney failed to call Dye's sister to the stand, who would have testified that T.G. called her two days before the trial and recanted her earlier statements made to the police when she said, "I am very sorry for what I did to John." We disagree with both contentions.

¶5 In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced as a result of his attorney's deficient conduct. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). *See also* ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). A defendant claiming ineffective assistance of counsel must prove both that his or her lawyer's representation was deficient, and, as a result, the defendant suffered prejudice. ***Strickland***, 466 U.S. at 687. To prove deficient performance, the defendant must show specific acts or omissions of his attorney that fall "outside the wide range of professionally competent assistance." ***Id.*** at 690. To show prejudice, the defendant must demonstrate that

the result of the proceeding was unreliable. ***Id.*** at 687. If the defendant fails on either prong – deficient performance or prejudice – his ineffective assistance of counsel claim fails. ***Id.*** at 697. We "strongly presume" counsel has rendered adequate assistance. ***Id.*** at 690.

¶6 Dye's attorney's failure to propose a ***Wallerman*** stipulation that might have prevented the "other acts evidence" from being admitted did not prejudice Dye. As the trial court noted, in ***State v. Veach***, 2002 WI 110, 255 Wis. 2d 390, 648 N.W.2d 447, the supreme court "undercut the strategic usefulness of ***Wallerman***," concluding that "neither the state nor the court is required to accept a ***Wallerman*** stipulation," and overruling other cases that suggested such a stipulation, when offered by a defendant, must be accepted.

¶7 Countering this argument, Dye insists that ***Veach*** only applies to *child* sexual assault cases. We disagree. The supreme court's primary reason for rejecting the holding in ***Wallerman*** was its judgment that the holding barred the State from providing the jury with evidence relevant to an element of the crime. The supreme court did not restrict its rationale to cases with child victims and, thus, we conclude ***Veach*** applies to charges in addition to those of child sexual abuse. Dye has offered nothing to establish that, had his attorney proposed such a stipulation, it would have been accepted.

¶8 Dye next argues that his attorney's failure to call his sister, who would have told the jury of T.G.'s call, was prejudicial. We are not persuaded. Following the jury trial, Dye employed a private investigator who interviewed Dye's sister. His sister claimed that the victim, T.G., called her two days before the trial and proclaimed she was sorry for what she did to Dye. The trial court found that this statement, if true, did not constitute a recantation. As noted by the

trial court, T.G. did not state that she had lied or that her testimony, not yet given, would be untruthful; rather, she expressed her regret for what had occurred. The trial court stated:

> I am not persuaded that the victim's statements, assuming they truly were made, constitute a recantation or would have undermined the victim's testimony if the trial court had permitted the defense to use them for impeachment purposes. The defendant's brief explicitly states the question that his argument begs: Why would a victim say she was sorry for her role in a proceeding that resulted in the jailing of the defendant? Our experience as courts with victims of sexual violence and domestic violence and with victims of broken hearts generally tells us that there are many possible answers to that question, and not many of them have to do with whether a victim has testified truthfully. I think it is highly likely in this case that the victim's statements were ones of sympathy or pity, not of remorse for fabricating accusations.

¶9 We agree. T.G.'s comments could have been inspired by a host of emotions. More importantly, her comment, standing alone, does not conflict with earlier explanations of what occurred. Thus, Dye's trial attorney's failure to call Dye's sister as a witness did not fall outside the wide range of "professionally competent assistance," nor was it prejudicial.

¶10 Dye next contends that the trial court erroneously exercised its discretion when it denied him the right to cross examine T.P. about her drug use. T.P. admitted to Dye's investigator, prior to the trial, that she was a heavy user of cocaine during the time Dye kidnapped and assaulted her. Dye raised this issue shortly before T.P. took the stand. The trial court ruled that unless T.P. stated she was using drugs at the time of her kidnapping and sexual assault, it was irrelevant.

¶11 We first note that Dye did not raise this issue below, which prevents this court from considering it, pursuant to ***State v. Rogers***, 196 Wis. 2d 817,

825-27, 539 N.W.2d 897 (Ct. App. 1995) (failure to raise specific challenges in the trial court waives the right to raise them on appeal); *see also* ***State v. Holt***, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985). Moreover, the record belies Dye's contention. During her testimony on direct, T.P. readily admitted that she was a drug user while involved with Dye. On cross-examination, she was asked about her cocaine use and she revealed that she never used drugs until she met Dye, and that he was her supplier. She also freely admitted to having psychiatric problems. Thus, Dye was neither prevented from exploring her drug use nor her psychiatric history.

¶12 Finally, Dye argues that insufficient evidence was presented at trial to convict him. He contends that his conviction for kidnapping should be set aside because the undisputed evidence at trial revealed that he left T.G. alone on several occasions, and thus, she was not being held against her will. He contends that since both crimes are intertwined, his conviction for the sexual assault should also be set aside. We disagree.

¶13 As the trial court noted, before a court can conclude that the jury's verdict should be set aside and a defendant given a new trial, the defendant must show that:

> 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. 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 (1990) (citations omitted). In addition, the credibility of the witnesses and the weight of the

evidence is for the jury, not the judge, to decide, as is the resolution of inconsistencies within a witness's testimony. *See* ***Wirsing v. Krzeminski***, 61 Wis. 2d 513, 525, 213 N.W.2d 37 (1973). Thus, a person "attacking a jury verdict has a heavy burden, for the rules governing our review strongly favor the verdict." ***State v. Allbaugh***, 148 Wis. 2d 807, 808-09, 436 N.W.2d 898 (Ct. App. 1989). Here, the jury elected to believe T.G.'s testimony as to why she did not leave even when Dye was not physically present. The State provided sufficient evidence on all elements of the crimes to permit the jury to find him guilty beyond a reasonable doubt on both counts. For the reasons stated, we affirm.

By the Court.—Judgment and order affirmed.

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