

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 24, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2008AP949-CR

Cir. Ct. No. 2005CF770

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY Q. WALLACE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: T. J. GRITTON, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 CURLEY, P.J. Anthony Q. Wallace appeals the judgment entered following a jury trial finding him guilty of: three counts of second-degree sexual assault; two counts of false imprisonment; one count of child abuse, intentionally

causing harm; one count of intimidating S.R., a victim, with threats of force; and battery to S.R., all as a repeater, contrary to WIS. STAT. §§ 940.225(2)(a), 940.30, 948.03(2)(b), 940.45(3), 940.19(1), and 939.62(1)(a)-(c) (2005-06).¹ Wallace contends that there was insufficient evidence to convict him: (1) of two counts of second-degree sexual assault concerning the victim, C.B.; (2) of one count of second-degree sexual assault of the victim, S.R.; and (3) of the count charging him with intimidation of S.R.² Because sufficient evidence was presented to support the three charges of second-degree sexual assault, we affirm. As to the charge of intimidating a witness, we note that while the amended information and the amended judgment of conviction both reference WIS. STAT. § 940.45(3), a felony, the trial court read the jury instruction for WIS. STAT. § 940.44, a misdemeanor. We conclude there was sufficient evidence to support Wallace's conviction for misdemeanor intimidation of a witness. Consequently, we affirm the conviction of a violation of § 940.44 and remand the matter to the trial court to correct the judgment to reflect a conviction of § 940.44, rather than § 940.45(3), and to resentence Wallace on this count.³

I. BACKGROUND.

¶2 C.B. testified at the jury trial that she met Wallace in Chicago where she went after running away from her Indiana home sometime in late October or early November 2005. She was seventeen years old at the time. After staying

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

² Due to the sensitive nature of the crimes, we use only the victims' initials.

³ Wallace is not challenging his convictions for the two counts of false imprisonment, the one count of child abuse, or the misdemeanor battery charge.

with Wallace in Chicago for one night, the two then traveled by car to Menasha, Wisconsin. There they went to an apartment that belonged to Wallace's girlfriend. C.B. told the jury that, for several days, "Things were okay." She said they smoked a lot of cocaine and slept. During this time, numerous people came to the apartment to buy drugs. However, one day she woke up to Wallace punching her in the face and saying, "Where's my stuff?" "Where's my stuff?" When she denied taking Wallace's drugs, he left her alone and she went back to sleep. Several hours later, he returned and struck her again in the face with his fist. C.B. then suggested to Wallace that S.R., a woman who had been in the apartment during the last several days, may have taken his drugs. Wallace then told C.B. that if she did not take the drugs, then she had to "slice [S.R.'s] throat." C.B. agreed to the plan. For the next couple of days, C.B. stayed at the apartment smoking cocaine. She told the jury she was afraid to leave and had no money or transportation.

¶3 Several days after the first incident where Wallace punched C.B. in the face, S.R. came to the apartment. C.B. woke up to witness Wallace and another man punching S.R. in the face. S.R. fell down. C.B. heard Wallace ask S.R. if she took his drugs, which S.R. denied taking. Wallace, apparently believing that one of the two women had stolen his drugs, instructed both women to undress, take a shower and then get on the bed on their knees. According to C.B., they both did as Wallace instructed. Wallace and the other man who was present said that they were going to torture them for awhile. C.B. said that Wallace then had anal intercourse with her while using a condom, and also stuck a vase in her anus. C.B. testified that Wallace then attempted to have anal intercourse with S.R., but was unsuccessful. During this attempt, C.B. was told to get a t-shirt and to tie it around S.R.'s mouth. When S.R. struggled, C.B. hit her in

the head at the request of Wallace. S.R. hit her back and they fought for several minutes while Wallace and the other man laughed. Shortly thereafter, Wallace allowed S.R. to get dressed, but told C.B. to go into the living room and get on her hands and knees. C.B. stated that when she went to the living room and got on her hands and knees, Wallace started hitting her back with a cell phone charging cord at least twenty times. After he stopped whipping her with the cord, Wallace ordered C.B. to perform oral sex on him, which she did. Wallace then insisted that she take a hit off a crack pipe, and after she complied, he burned her arm with the pipe. He then began to hit her with the cell phone cord again. During this time, as C.B. explained to the jury, she thought that if she admitted to taking the drugs he would stop hitting her, so she told him that she had taken the drugs, even though she had not taken them. Instead of stopping his abuse, Wallace began hitting her again because she admitted taking the drugs. After striking her approximately ten times, Wallace then poured salt and rubbing alcohol on her bleeding back. Following this, Wallace forced her to eat cat food. C.B. said that the violence only ended when Wallace's aunt came to the apartment and she told Wallace to stop, and convinced him to let C.B. take a shower. C.B. was then allowed to get dressed, and S.R. was permitted to leave the apartment. Before S.R. left, C.B. overheard Wallace talking to S.R. and another man about killing C.B.

¶4 Later that evening, C.B. escaped out of a door after moving a bicycle and unlocking two locks. She ran outside and knocked on doors until a family answered and helped her. She was taken away by ambulance and the police investigation began.

¶5 S.R. also testified for the State. She told the jury that she had known Wallace for about five months before the November 8, 2005, incident. She explained that she sometimes would cook for Wallace and he would either pay her

in cash or in drugs. On that date she agreed to cook for Wallace, and he picked her up at the emergency shelter where she was living with her children and took her to the Menasha apartment. After she entered the apartment, put her bag down containing cooking equipment, and went to the kitchen, Wallace suddenly began punching her in the head. She asked him why he was hitting her and he said his drugs were missing. Present in the apartment beside Wallace were C.B. and another man. There was a brief discussion between Wallace and C.B. about why C.B. did not stab S.R. when she came into the apartment. C.B. was crying at this time. After punching S.R. again, Wallace told her to get undressed and she complied. Wallace then indicated that he was going to have intercourse with her and told her to take a shower. S.R. said she tried to escape when she was in the shower, but every time she stepped out of the tub, one of the men would walk past. She also said that there was a lot of stuff blocking the door, including a ten-speed bike. After she showered, Wallace took her into an empty bedroom and ordered her to bend down. He then placed his penis in her anus. She pleaded with him not to and asked him to use a lubricant, but he refused, saying he wanted it to be painful. While engaging in penis-to-anus sex, Wallace wrapped an extension cord around her neck and applied pressure. Later, he had her get on top of him and he had penis-to-vagina intercourse with her. S.R. testified that Wallace said he did not want any evidence, so he pulled his penis out of her vagina and ejaculated elsewhere. After he finished having sex with S.R., he ordered her to smoke some crack cocaine.

¶6 Following this, S.R. testified that Wallace took her into the bedroom where C.B. was and demanded that S.R. perform oral sex on C.B. S.R. refused, and Wallace began punching her again. While in the bedroom with C.B., Wallace told C.B. to gag S.R., and in the course of trying to put the gag in her mouth, C.B.

punched S.R. and the two of them began fighting. After the two women stopped fighting, S.R. watched Wallace beat C.B.'s back with a cord. S.R. also saw Wallace have anal intercourse with C.B., and also saw him place a bottle and a vase into C.B.'s anus and poke her anal area with a screwdriver. She related that after approximately seven and one-half hours, C.B. confessed to taking the drugs. S.R. was so mad at her for making S.R. go through so much pain, that S.R. began hitting C.B. S.R. also saw Wallace pour salt and rubbing alcohol on C.B.'s back. S.R. recounted how Wallace made her and C.B. eat cat food. S.R. stated that during this ordeal, while she and C.B. were on the floor naked, twenty to thirty people came to the apartment to buy drugs. Wallace told these people, "This is what happens when you steal from me." After C.B. confessed to taking the drugs, Wallace let S.R. get dressed. After she was dressed she watched as Wallace punched, kicked, and slapped C.B. and burned her with a pipe. Eventually, S.R. was allowed to leave, but only after she promised to participate in the murder of C.B. She was also told more than once by Wallace that if she went to the police, Wallace would kill her and her children. S.R. left and went to her brother's residence, where she obtained several butcher knives and returned to the apartment with the intention of killing Wallace. When she got back to the apartment, she saw that the building was surrounded by the police so she went back to her brother's house. She called the police the next day and reported the sexual assaults.

¶7 Based upon C.B.'s account of what had occurred, the police obtained a search warrant for the apartment. Found in this search, among other items were C.B.'s purse, three phone cords, C.B.'s shoes, and condoms. The next day, after S.R. went to the police and told them what had happened, including that Wallace had stuck a vase and a forty-ounce beer bottle in C.B.'s anus, and that she also saw

Wallace poking at C.B.'s anus with a screwdriver, the police obtained another search warrant to seize items that were observed at the apartment but not taken because they did not believe the items had any significance to the investigation until after hearing S.R.'s account. The search warrant return reflects that the following items were found: a candle holder covered with brown matter, a forty-ounce clear glass beer bottle, used condoms, belts, paperwork listing the apartment renter, a screwdriver, and a photo of the suspect.⁴ Some of the items obtained during the search warrants were sent to the State Crime Lab. Days later Wallace was charged with nine counts. Wallace was arrested one month later in Chicago and he waived extradition back to Wisconsin.

¶18 Prior to trial, various motions were filed by the State and by Wallace's attorney.⁵ Ultimately, a jury trial was held, at which numerous witnesses testified. Besides the testimony of the two victims, police officers, a sexual assault nurse, and a DNA analyst from the State Crime Lab testified. The crime analyst told the jury the results of her examination of the items taken during the two searches of the apartment. The candle holder revealed a mixture of DNA on it, with C.B.'s DNA being the major component of the mixture, and a red stain was consistent with C.B.'s DNA. Also, the crime analyst found a mixture of C.B.'s, Wallace's, and an unidentified female's DNA on the beer bottle, and on one of the four condoms sent to the lab the lab tech found evidence containing both C.B.'s and Wallace's DNA that was consistent with the DNA profiles of their blood standards. The analyst also explained that often there is an absence of

⁴ The item called a candle holder is also referred to by others as a vase.

⁵ Wallace's trial counsel was allowed to withdraw and a new attorney was appointed.

semen due to a person's delayed reporting of a sexual assault or after showering or wiping.

¶9 On June 13, 2007, Wallace was found guilty of all charges except one count of child abuse. Although the criminal complaint, the amended information, and the verdict all reflect that Wallace was charged with the felony charge of intimidation of a victim as a repeater contrary to WIS. STAT. § 940.45(3), the trial court read the jury instruction for the misdemeanor charge of intimidation of a victim found in WIS. STAT. § 940.44, a class A misdemeanor. Additionally, in his closing argument, the prosecutor only referred to the elements of the misdemeanor charge. The felony charge requires an additional element, that the act of intimidation be “accompanied by any express or implied threat of force, violence, injury or damage.” Sec. 940.45(3). However, the jury was never instructed that they needed to find evidence of this additional element. Wallace was sentenced to a cumulative sentence of thirty-seven years of incarceration, to be followed by twenty-eight years of extended supervision. The trial court sentenced him on the intimidation count to two years of incarceration, to be followed by three years of extended supervision, but the maximum penalty for a class A misdemeanor is nine months of incarceration or a \$10,000 fine, or both. *See* WIS. STAT. § 939.51(3)(a).

II. ANALYSIS.

A. There was ample evidence to convict Wallace of the two counts of second-degree sexual assault of C.B.

¶10 The two counts of second-degree sexual assault of C.B. concern the allegations that Wallace had both penis-to-anus sexual intercourse with C.B., and also had sexual intercourse with C.B. by inserting a vase in C.B.'s anus.

¶11 Wallace submits that C.B.’s testimony concerning the incidents that led to these charges was incredible, and as a consequence, the State did not prove these charges beyond a reasonable doubt. He points to the fact that C.B. was a drug addict, who testified in a co-defendant’s case that she had some trouble remembering things that occurred that day due to ingesting large amounts of crack cocaine, and she admitted to lying to the police when she was first questioned about some issues. He also notes that there was little physical evidence corroborating the sexual assaults. We disagree with his conclusion that the evidence was insufficient.

¶12 When we review a challenge to the sufficiency of the evidence, we view the evidence most favorably to the State and to the conviction. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). If more than one reasonable inference can be drawn from the evidence presented at trial, we accept the inference most favorable to the verdict, even if other inferences could be drawn. *State v. Routon*, 2007 WI App 178, ¶17, 304 Wis. 2d 480, 736 N.W.2d 530. The test is whether “‘the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true.’” *State v. Schutte*, 2006 WI App 135, ¶14, 295 Wis. 2d 256, 720 N.W.2d 469 (quoting *Poellinger*, 153 Wis. 2d at 503-04; one set of internal quotations marks omitted). This highly deferential standard of appellate review of a challenge to the sufficiency of the evidence is the same whether the fact finder is a jury or the trial court. *Routon*, 304 Wis. 2d 480, ¶17. Whether the evidence viewed most favorably to the verdict satisfies the legal elements of the crime presents a question of law, which we review *de novo*. *Id.* It is the jury’s function to decide the credibility of witnesses. *See Poellinger*, 153 Wis. 2d at 506.

¶13 Second-degree sexual assault, as defined in WIS. STAT. § 940.225(2)(a) of the Criminal Code of Wisconsin, is committed by one who has sexual intercourse with another person without consent and by use or threat of force or violence. *See* WIS JI—CRIMINAL 1208. “‘Sexual intercourse’ means any intrusion, however slight, by any part of a person’s body or of any object, into the genital or anal opening of another. Emission of semen is not required.” WIS JI—CRIMINAL 1200B.

¶14 If the jury believed C.B.’s testimony, this alone would be sufficient evidence to convict Wallace of the two counts of second-degree sexual assault. However, her testimony was corroborated by S.R. S.R. was an eyewitness to the acts of anal intercourse and she corroborated much of C.B.’s account of what occurred during the incident. To be sure, there were inconsistencies in C.B.’s testimony and her testimony during the trial of a co-defendant. There were also inconsistencies between what S.R. testified to at trial and the police reports that memorialized her statements. However, there was general agreement in the women’s accounts regarding the circumstances surrounding Wallace’s acts of anal intercourse with C.B. What makes their testimony even more believable was that the women did not like each other, indeed, they engaged in a physical fight during the incident, and each had agreed to help murder the other. Moreover, even if they had wanted to conspire to have Wallace charged, they would have had no time to do so as C.B. went to the hospital shortly after the incident and never spoke to S.R. again that night or the next morning, and S.R. independently reported the incident the next day.

¶15 Furthermore, there also was physical evidence to support C.B.’s accusations. A lab technician testified at trial that C.B.’s DNA was found on the vase, along with a stain on the vase that, when analyzed, revealed a mixture of

DNA, the major component of which was consistent with C.B.'s DNA profile. Also, evidence taken from the inside of a condom found at the apartment by police was consistent with Wallace's blood standard, and evidence taken from the outside of that same condom was consistent with C.B.'s DNA profile. The State presented more than enough evidence to convict Wallace of these two counts of second-degree sexual assault.

B. There was sufficient evidence to convict Wallace of the second-degree sexual assault of S.R.

¶16 Wallace contends that there was insufficient evidence to convict him of sexually assaulting S.R. He points to the fact that there was no physical evidence that supported S.R.'s account, and the only testimony concerning this conviction was S.R.'s, a confessed drug abuser, who admitted to using drugs during the incident. Further, C.B. testified that, contrary to S.R.'s account, the only time that she witnessed Wallace trying to have anal intercourse with S.R., he was unsuccessful. Wallace also argues that S.R. had a powerful motive to lie because, in exchange for her testimony, two criminal charges in another county were dismissed.

¶17 Like the sexual assault charges concerning C.B., the State was obligated to prove the same elements and the same rules of law apply to our analysis of this charge as applied to those charges where C.B. was the victim.

¶18 Wallace correctly notes that C.B. does not support S.R.'s account of her being anally assaulted by Wallace, but this is easily explained. First, according to S.R.'s testimony, C.B. was in a different bedroom when S.R. was anally assaulted by Wallace, so it is quite possible that C.B., having never witnessed the attack, did not know it occurred. Second, the entire incident lasted

seven to eight hours and, given that C.B. was traumatized by the beatings, torture and sexual assaults inflicted on her, she could have witnessed the incident of S.R. being anally assaulted and simply forgot it. In any event, C.B. did testify to Wallace's unsuccessful attempt to have anal intercourse with S.R. while the two women were in the same room. Consequently, there was no reason for S.R. to fabricate a sexual assault because, on the strength of C.B.'s observations, Wallace could have been charged with attempted second-degree sexual assault.

¶19 In addition, S.R.'s account of the attack was powerful and compelling. She told of Wallace striking her numerous times during the incident and knocking her into a wall with such force that she wet her pants. Photos taken of S.R. days later corroborate the fact that she was physically beaten. She also testified how she pleaded with Wallace to use a lubricant to ease the pain if he was intent on having anal intercourse with her, but he refused and indicated he wanted it to hurt. She also described in horrible detail how, during the assault, Wallace wrapped an extension cord around her neck and applied pressure while he shoved his penis into her anus.

¶20 Further, S.R.'s criminal charges were not dropped because she reported she had been sexually assaulted; rather, the charges were dropped because she agreed to testify against both Wallace and a co-defendant. Thus, in all likelihood, whether or not S.R. reported the anal intercourse, the agreement would not have changed. Finally, the lack of physical evidence is not fatal to S.R.'s testimony, as S.R. delayed reporting the incident to the police, and presumably by the next morning she had showered and changed her clothing. Thus, any physical evidence that existed was destroyed. In any event, the jury heard her testimony and believed her. Sufficient evidence was presented to convict Wallace of the sexual assault of S.R.

C. Sufficient evidence was admitted to support the charge of intimidating S.R.

¶21 Wallace was charged with intimidating S.R. Wallace contends that the evidence presented at trial did not prove the three elements of the charge. He argues that when S.R. was allowed to leave, rather than call the police, she grabbed two butcher knives and returned to the apartment. He also claims that the real reason S.R. did not immediately call the police was, as she testified at trial, “[b]ecause I kind of didn’t want the police involved.” Further, he argues that there was no showing that he “knowingly and maliciously” attempted to prevent S.R. from contacting the police. We disagree.

¶22 Generally, before an appellate court can overturn a conviction on insufficiency of the evidence grounds, “the evidence, viewed most favorably to the [S]tate and the conviction, [must be] so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *Poellinger*, 153 Wis. 2d at 501.

¶23 According to WIS JI—CRIMINAL 1296, the State must prove three elements beyond a reasonable doubt for a fact finder to convict someone of intimidation of a victim. Here, the State needed to prove that: (1) S.R. was a victim of a crime; (2) Wallace prevented, dissuaded, or attempted to prevent or dissuade S.R. from reporting the crime to a law enforcement agency; and (3) Wallace acted knowingly and maliciously. *See id.*

¶24 S.R. testified to being brutally sexually assaulted by Wallace over the span of seven hours. She testified she tried to escape but could not, because she was never alone long enough to do so and because items were blocking the door. She was only allowed to leave when she agreed to take part in the murder of C.B. Inasmuch as the jury convicted Wallace of falsely imprisoning her and

sexually assaulting her, S.R. was certainly a victim of a crime. Further, she testified that Wallace told her more than once that if she went to the police, he would kill her and her children. Stating that you will kill someone and their children obviously falls within the category of “attempt[ing] to ... prevent or dissuade” a victim from reporting the episode to the police. *See id.* Further, Wallace’s threats were not jokes. He also discussed killing (and probably would have killed) C.B. When he made the statements to S.R. that if she went to the police he would kill her and her children, he did so knowingly. With regard to malice, malice is defined in WIS. STAT. § 940.41(1r), as follows: “‘Malice’ or ‘maliciously’ means an intent to vex, annoy or injure in any way another person or to thwart or interfere in any manner with the orderly administration of justice.” Applying the definition to Wallace’s conduct, Wallace demonstrated an intent to injure S.R. and her children.

¶25 While it is entirely possible that originally S.R. might have not wanted the police involved because of her drug addiction, that fact does not excuse Wallace’s conduct in threatening to kill her and her children if she did involve the police. The State provided the jury with sufficient evidence to convict Wallace of intimidation of a victim. Accordingly, we affirm. We also remand to correct the judgment to reflect a conviction of WIS. STAT. § 940.44 and for resentencing on this charge.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

