

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 29, 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.

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No. 97-2436-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SEVERAN LARON LEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed.*

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

PER CURIAM. Severan Laron Lee appeals from a judgment of conviction after a jury found him guilty of two counts of first-degree sexual assault contrary to § 940.225(1)(b), STATS., one count of kidnapping contrary to § 940.31(1)(a), STATS., and one count of substantial battery contrary to

§ 940.19(2), STATS. He also appeals from an order denying his motions for postconviction relief.

Lee raises four issues of trial court error that he claims warrant a new trial: whether the trial court erroneously exercised its discretion (1) in allowing into evidence prior consistent statements of the victim, (2) in denying a request for a *Machner* hearing as to trial counsel's deficiency for failing to object to the use of prior consistent statements of the victim,¹ (3) in admitting expert testimony on "Battered Woman's Syndrome," and (4) in excluding from evidence prior inconsistent statements of the victim. Because the trial court properly exercised its discretion, we affirm.

I. BACKGROUND

The sequence of events leading to the charges lodged in this case occurred on October 21-23, 1994. Lee and Teresa S., the victim, had a tempestuous live-in relationship for five to six years. Teresa had three children by Lee ranging in ages from one to five years of age. In early October 1994, Teresa decided to terminate their relationship. When Lee refused to move out of the residence they had been sharing, Teresa moved in with her mother, taking the children with her. Lee reacted angrily to this turn of events. On October 21,

¹ In deciding postconviction motions, the trial court did not specifically address Lee's request for a *Machner* hearing. It summarily rejected all of Lee's grounds for a new trial. Based on this court's review of the postconviction motion, we conclude that the trial court did not err in summarily denying Lee's ineffective assistance claim. A hearing should be granted only when a postconviction motion alleges "facts which, if true, would entitle the defendant to relief." *Nelson v. State*, 54 Wis.2d 489, 497, 195 N.W.2d 629, 633 (1972). In reviewing a trial court's refusal to hold a *Machner* hearing, this court independently reviews the postconviction motion "to determine whether it alleges facts sufficient to raise a question of fact necessitating a *Machner* hearing." *State v. Toliver*, 187 Wis.2d 346, 360, 523 N.W.2d 113, 118 (Ct. App. 1994). Lee's motion failed to delineate sufficient facts to trigger his right to a hearing.

Teresa returned to the residence for an incidental purpose. Lee was at the residence and a conversation about their relationship ensued. During the conversation, he dragged her out of the house to nearby Washington Park and attempted to convince her to take him back.

On the following evening, October 22, Lee confronted Teresa and her girlfriend Anitra as they were leaving a local nightclub. He grabbed Teresa's car keys, pushed her into the front seat of the car and drove off. Anitra accompanied them. Lee dropped Anitra off near her home but would not let Teresa out of the car, in spite of her attempt to leave with Anitra. Anitra reported these events to Teresa's mother who, in turn, called the police.

After dropping Anitra off, Lee drove around. Teresa testified that he began hitting her on the legs before stopping at Washington Park where he ordered her to get out of the car, "slammed her to the ground," punched her numerous times, and threatened to kill her. When they got back in the car, Lee told her to return their daughters from her mother's house or he would go to the house and start "stabbing everyone." Lee also demanded money from her to buy drugs, but she refused, telling him she only had \$2.

Eventually, Lee drove Teresa to a duplex residence of a "close" friend, Marie Sanders, nicknamed "Peaches." He announced to Sanders that they were going to spend the night in the downstairs unit. Teresa claimed at trial that she was too afraid to flee. During the course of the evening, Lee threatened Teresa with a 12-inch knife, sexually assaulted her twice, and burned her leg with a red-hot knife blade. The following morning, October 23, Lee drove Teresa to her mother's residence, after Teresa promised to get their daughters and return home. Her mother was not there, but her brother was. She told him what had

happened and then left with the children. Her brother called the police to report the incident. Lee and Teresa then returned to their home. Shortly thereafter, on the pretext of returning to her mother's home to report that everything was all right between them, Teresa convinced Lee to allow her to leave. She drove to a nearby aunt's home where she met her friend Anitra, her mother, and aunt. They informed Teresa that the police were on their way to her home. When she returned home, the police had already arrived. She saw Lee jump from their second floor residence to escape the police. He was apprehended six days later. Before the police left the scene, she informed them of the events of the previous evening, showed them her bruises and leg burn, but she did not report the sexual assaults because, as she stated later, she was embarrassed. Three days later, after urgings by a relative and friend, she finally reported the sexual assaults. Many of the evidentiary facts were contested by Lee. His defense at trial was a denial of many of the events and he also claimed that the sexual contact was consensual.

II. ANALYSIS

A. Admission of Prior Consistent Statements/Ineffective Assistance Claim.

Lee's first claim of error relates to the admission into evidence of certain statements that Teresa made to police about the events of October 22-23. This evidence was introduced both through the re-direct examination of Teresa and through the testimony of Police Officer Robert Hernandez, who interviewed her on the morning of October 23 at her home. The purpose of introducing this testimony was to rebut any damage done to Teresa's credibility during her cross-examination. On cross, Lee endeavored to attack Teresa's credibility by emphasizing inconsistencies between her trial testimony and her statements to

police. He further questioned her failure to recount important details to the police that were revealed at trial.

Lee contends that the trial court erred in admitting these prior consistent statements because they were inadmissible hearsay under § 908.01(4)(a)2, STATS. He argues that these statements cannot be used to rebut any expressed or implied charge of recent fabrication or improper influence or motive on Teresa's part for two reasons. First, he argues Teresa's statements to the police did not in fact rebut a charge of recent fabrication. More specifically, the statements the State reviewed with her and with Officer Hernandez did not explain or rebut the delay between Teresa's original report to the police and the subsequent report, which was the first time she mentioned the sexual assaults. Second, because Lee denied that any of the claimed events ever took place, and that all of Teresa's testimony was a fabrication, the prior consistent statements did not precede the events of the alleged fabrication. *See State v. Peters*, 166 Wis.2d 168, 177, 479 N.W.2d 198, 201 (Ct. App. 1991); *State v. Mares*, 149 Wis.2d 519, 525-27, 439 N.W.2d 146, 148 (Ct. App. 1989).

In the alternative, Lee claims that if he waived this specific claim of error for failure to interpose a sufficient hearsay objection, then his trial counsel was ineffective for not objecting, requiring a reversal and new trial. We reject Lee's contentions because of waiver and the application of the rule of completeness. *See* § 901.07, STATS.

Teresa's re-direct testimony covers sixteen pages of transcript. The objections that were made by Lee to the re-direct by the State fell woefully short of satisfying the standard for the proper preservation of a record. Our search of the record reveals only objections to questions that were phrased as "cumulative,"

“outside ... the scope” of cross-examination or “leading” in nature. The re-direct examination of Officer Hernandez, called for the same purpose as Teresa was called, comprised only three pages of transcript to which no objections were raised. We conclude there is no basis to construe Lee’s objections as sounding in hearsay. Of equal significance is Lee’s acknowledgment in his brief-in-chief “[a]t no time did counsel object to the testimony as improper use of prior consistent statements.” For these reasons, Lee has waived this claim of error.

Anticipating a waiver conclusion, Lee next argues his trial counsel was ineffective for failing to properly interpose a hearsay objection. The rubrics for a successful imposition of ineffective counsel defense are familiar to all concerned so we need not repeat them here. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Sanchez*, 201 Wis.2d 219, 548 N.W.2d 69 (1996). Suffice it to say, however, we need not address both the deficient performance and prejudice components of an ineffective assistance of counsel challenge if Lee cannot make a sufficient showing on one or the other. *See Strickland*, 466 U.S. at 697. Because, under the rule of completeness, the prior consistent statements were admissible, trial counsel’s failure to object to hearsay was not deficient performance. Thus, we also reject this alternative claim of error.

The evidentiary rule of completeness, as codified in § 901.07, STATS., has received recent explication by this court in *State v. Sharp*, 180 Wis.2d 640, 511 N.W.2d 316 (Ct. App. 1993). There, we noted that its use for rehabilitative purposes is within the sound discretion of the trial court. *See id.* at 656, 511 N.W.2d at 323 (citing *United States v. Pierre*, 781 F.2d 329, 333 (2d Cir. 1986)). It may be employed “[w]hen the prior statement tends to cast doubt on whether the prior inconsistent statement was made *or on whether the impeaching statement is really inconsistent with the trial testimony*” or “when the consistent

statement will amplify or clarify the allegedly inconsistent statement.” *Sharp*, 180 Wis.2d at 656, 511 N.W.2d at 323. Thus, if an opponent elicits a part of a conversation to impeach the credibility of a witness, the trial court may, in its discretion, allow the other side to present “the whole of such conversation, at least so far as it has relation to the subject matter of the action, and is not confined to that particular part thereof given by his adversary.” *Wilson v. State*, 184 Wis. 636, 647, 200 N.W. 369, 374 (1924) (citations omitted). Furthermore, “the rule of completeness may logically extend beyond the limits of a single document, interview, or other unit of communication.” *Sharp*, 180 Wis.2d at 656, 511 N.W.2d at 323.

A review of Lee’s cross-examination of Teresa demonstrates several objectives. First, Lee’s defense was based on the theory that the entire reported event was a fabrication of “fairy-tale” proportions. To support this strategy, he sought to show that her description of the events to the police was considerably different than the version she gave at trial.² He further suggested that because it took Teresa “three days at least to think about this” before “pressing charges,” the jury should question her motive in leveling these charges.

In an effort to rehabilitate Teresa’s testimony on re-direct, the State turned to prior consistent statements that were part and parcel of the same conversation Teresa had with police that was the source of the claimed

² Contrary to her testimony on direct examination, Teresa’s testimony on cross-examination: admitted she failed to tell police that Lee had asked her for money to buy drugs, but she refused because she only had \$2, and that she failed to report that the knife involved was a foot long with a serrated blade; additionally, she admitted she forgot to tell police that Lee bit her left hand before they exited the car at Peaches’ residence, that Lee put the hot knife into his coat pocket before intercourse took place and that Lee accompanied her to the bathroom after the alleged assault. Teresa also admitted she did not initially report the sexual assaults because she was embarrassed and it took her three days to finally press charges.

“inconsistent” statements. This action allowed the jury to evaluate the nature of any existing inconsistencies in total context and thereby better assess Teresa’s credibility. This process fulfills the purpose for which the rule of completeness exists. Had an appropriately addressed objection been interposed, the rule of completeness would have served as the basis for its proper denial. Thus, trial counsel’s performance was not deficient for failing to raise a hearsay objection.

B. Admission of Battered Women’s Syndrome Testimony.

Next, Lee contends the trial court erroneously exercised its discretion by permitting the State to introduce expert testimony on “battered woman’s syndrome.” Whether an expert’s opinion should be admitted into evidence is largely a matter of trial court discretion. *See State v. Jensen*, 147 Wis.2d 240, 246, 432 N.W.2d 913, 915-16 (1988). We shall sustain such a discretionary decision if it has a reasonable basis, and was made in accordance with accepted legal standards and the facts of record. *See State v. Blair*, 164 Wis.2d 64, 74, 473 N.W.2d 566, 571 (Ct. App. 1991). It may be permitted if it will “assist the trier of fact to understand the evidence.” RULE 907.02, STATS.; *State v. Whittaker*, 167 Wis.2d 247, 255-56, 481 N.W.2d 649, 652 (Ct. App. 1992). Expert testimony will assist a trier of fact “when the issue to be decided requires an analysis that would be difficult for the ordinary person in the community.” *Blair* at 75, 473 N.W.2d at 571. Here, the trial court did not erroneously exercise its discretion in concluding that expert witness testimony would assist the jury.

Before trial, the State informed the court and defense of its desire to present expert testimony on “battered woman’s syndrome” to explain the on-again, off-again violent relationship of Lee and Teresa; her passivity towards his

conduct; her inclination to minimize his actions towards her; and her reluctance to report his abuse of her. This testimony was to be presented as a counter to Lee's defense of consent. The State advised that it would, through questions, provide hypothetical information which would be consistent with the facts of Teresa's testimony and then would ask if the hypothetical reactions were consistent with battered woman's syndrome. This would be accomplished without eliciting an opinion as to whether Teresa suffered from battered woman's syndrome. Lee objected to this offer of proof, disputing the theory that Teresa suffered from the syndrome and asserting that the expert testimony was irrelevant because the expert had never personally examined Teresa or himself. Lee is incorrect for two reasons.

First, it is uncontroverted that the State's expert neither examined Teresa nor diagnosed her as suffering from battered woman's syndrome. Contrary to Lee's contention, however, the State's expert's opinions are not rendered irrelevant because the expert has not examined her nor diagnosed her as a person with battered woman's syndrome. *See State v. Bednarz*, 179 Wis.2d 460, 464-65, 507 N.W.2d 168, 171 (Ct. App. 1993).

Second, and of equal importance, is the nature of the record before us. We have reviewed the testimony describing the six-year relationship between Lee and Teresa, a relationship marked by physical violence, expressions of love, then hatred, reconciliation, and resignation, which are, as the expert testified, all common characteristics of battered woman's syndrome. Since the essence of Lee's defense was Teresa's consent to his actions, expert testimony about the characteristics of battered woman's syndrome was highly relevant to combat the defense. The trial court did not erroneously exercise its discretion in allowing this expert testimony into evidence.

C. Exclusion of Prior Inconsistent Statements.

Lee also contends that the trial court erred when it excluded evidence that Teresa had recanted some of her accusations made about a 1993 “other acts” incident to which she had testified. In the State’s case-in-chief the trial court allowed Teresa to testify about the details of an altercation she had had with Lee on July 3, 1993, which resulted in his criminal conviction. Included in the incident were allegations that, while she was driving to elude him, Lee rammed her car from the rear and the side; and that once stopped, he punched his way through her car’s windshield, entered the car, repeatedly punched her, and then snatched a necklace from around her neck.

During cross-examination in the current case, Teresa denied she had ever appeared in court on Lee’s behalf at a sentence modification hearing to inform the court that she had lied about certain details of the July 1993 incident, and that she had been advised by Lee’s then attorney, Edward Ehrlich, not to testify because she could be charged with perjury.

For the purposes of rebuttal, Lee sought to have Attorney Ehrlich’s testimony admitted. The thrust of his proposed testimony was that Teresa lied about how damages occurred to the rear of her car and that she lied about Lee taking the necklace from around her neck. The trial court excluded the evidence because the evidence was not reliable, the trial court was unwilling to revisit the merits of the old case, and the trial court did not want to engage in a mini-trial about who said what. Lee now argues that the proffered testimony should have been admitted as a prior inconsistent statement under § 908.01(4)(a)1, STATS. We reject Lee’s contention.

We review a discretionary decision of a trial court “only to determine whether the trial court examined the facts of record, applied a proper legal standard, and, using a rational process, reached a reasonable conclusion.” *State v. Hamm*, 146 Wis.2d 130, 145, 430 N.W.2d 584, 591 (Ct. App. 1988). If, however, the trial court fails to set forth the reasoning behind its exercise of discretion, we need not reverse if an independent review of the record reveals a basis for sustaining the trial court’s action. See *State v. Pharr*, 115 Wis.2d 334, 343, 340 N.W.2d 498, 502 (1983).

Section 904.03, STATS., provides that even if evidence may be relevant, it may be excluded if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

In denying Lee’s motion, the trial court, among other things, observed:

In order for the jury to have a complete assessment of what she said and why she said it and under what conditions she said it in Judge Sykes’ court, we would have to call Judge Sykes as a witness, Mr. Ehrlich, Mr. Stingl, recall Ms. Teresa S.[] and perhaps even subpoena or get certified records of that modification hearing.

The Court will not do that in this case. There is no basis for it, and your motion ... is denied.

The proffering of this evidence by Lee served no other discernible purpose than to attack Teresa’s credibility about matters collateral to the issue of his liability for the criminal acts alleged. When the trial court instructed the jury how it should consider the “other acts” evidence, with scalpel-like precision it instructed: “If you

find this conduct did occur, you should consider it only on the issues of motive and the context of their relationship.” Thus, even if admitted, this evidence would have little relevance to the events in question. As is clear from the record, Lee’s contrary argument notwithstanding, the trial court recognized the possible hazard of provoking a mini-trial and chose a course of action to avoid it. There is a rational basis for this determination. The trial court did not erroneously exercise its discretion.

By the Court.—Judgment and order affirmed.

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

