COURT OF APPEALS
DECISION
DATED AND RELEASED

November 13, 1996

No. 95-3265-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL E. NEAL,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Racine County: DENNIS J. FLYNN, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Michael E. Neal appeals from a judgment of conviction and an order denying his postconviction motion. He challenges an evidentiary ruling permitting rebuttal testimony and seeks resentencing because a portion of the sentencing hearing was not recorded when the court reporter's machine malfunctioned. We reject both challenges and affirm.

Neal was convicted as a repeater of false imprisonment, battery, first-degree recklessly endangering safety, child abuse, mistreatment of animals

and second-degree recklessly endangering safety arising out of a September 1993 incident at the home of Retha Grandberry. Grandberry testified that during an argument, Neal hit her, swung a butcher knife at her and her son, cut her son in the face and the arm, cut her dog, and prevented her from taking her son for medical treatment. Neal testified that during the confrontation, he grabbed the knife from Grandberry during a struggle and swung it to ward off the son who was approaching with his own knife.[1] Neal admitted injuring the dog.

The evidentiary ruling on appeal involves the State's response to evidence that Grandberry recanted a 1991 accusation that Neal battered her. The defense referred to the recantation in its opening statement. On direct examination, Grandberry testified that she was convicted of misdemeanor obstruction of justice as a result of the 1991 incident. On cross-examination, Neal sought to impeach Grandberry with evidence that when she recanted her battery accusation against Neal, she claimed that she had been injured in a fight with another woman. Neal did not mention the 1991 incident in his direct examination. However, on cross-examination he claimed that the 1991 incident involved Grandberry and another woman and that he attempted to stop the fight when he arrived at the scene. However, Neal later testified that he told the police at the time that he had been fighting with Grandberry.

In rebuttal, the State offered the testimony of the arresting officer in the 1991 incident, Richard Geller. Neal objected to the testimony as relating to a collateral matter. While the trial court agreed that the officer's testimony would be collateral, the court noted that Neal had raised the 1991 incident as part of his strategy to impeach Grandberry. The court ruled that the State had a right to rehabilitate Grandberry.

Geller testified that he responded to an incident at Grandberry's home in 1991. Grandberry was the victim, and Neal was present. Neal did not tell him that a third party had been involved in the altercation, and Geller did not inquire whether a third party had been involved.

[1] Grandberry testified that her son never wielded a knife during the incident.

Neal argues that the officer's testimony was inadmissible because it was extrinsic evidence of a collateral matter. Section 906.08(2), STATS., prohibits proof by extrinsic evidence of specific instances of a witness's conduct in order to attack or support the witness's credibility. *See also* ***McClelland v. State,*** 84 Wis.2d 145, 159, 267 N.W.2d 843, 849-50 (1978) (a witness may not be impeached by extrinsic evidence on a collateral matter). Extrinsic evidence is "testimony obtained by calling additional witnesses, as opposed to evidence obtained by the cross-examination of a witness." ***State v. Sonnenberg,*** 117 Wis.2d 159, 168, 344 N.W.2d 95, 99 (1984). The parties do not dispute that Geller's testimony was extrinsic evidence of a collateral matter.[2]

Neal mentioned Grandberry's recantation in his opening statement and elicited her testimony about the incident during cross-examination. Neal then testified that the incident did not occur as Grandberry testified. In its discretion, a trial court may permit the introduction of supportive evidence if "the trial court believes that the nature of the evidence and the tone of the examinations, when considered as a whole, are tantamount to an accusation that a witness is lying ...." *Cf.* ***State v. Anderson,*** 163 Wis.2d 342, 349, 471 N.W.2d 279, 281 (Ct. App. 1991) (supportive character evidence admissible under these circumstances). Geller's testimony was offered to buttress Grandberry's version of the 1991 incident, which Neal put before the jury and disputed in his testimony. We conclude that the trial court properly exercised its discretion in permitting Geller to testify.

Even if we were to conclude that Geller's testimony should have been excluded under § 906.08(2), STATS., we would conclude that admission of the testimony was harmless error. An error is harmless if there is no reasonable probability that it contributed to the conviction. ***State v. Dyess,*** 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985). Evidence of the 1991 incident was in the record by virtue of Grandberry's and Neal's testimony. Their versions conflicted. Geller's testimony was cumulative, but harmlessly so in light of the other evidence adduced at trial that Neal committed the crimes for which he was convicted.

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[2] A matter is collateral if "the fact, as to which error is predicated, [could] have been shown in evidence for any purpose independently of the contradiction ...." ***State v. Sonnenberg,*** 117 Wis.2d 159, 168-69, 344 N.W.2d 95, 100 (1984).

We turn to Neal's challenge to his sentence. A portion of the sentencing hearing was not transcribed because the battery failed in the court reporter's machine. The machine was repaired and the proceedings resumed. The parties were then given a chance to recreate the record as they wished. The prosecutor stated that he had been reading from the presentence report to highlight Neal's prior violent offenses. Neal did not offer any supplement to the record.

At the postconviction motion hearing on the question of the incomplete transcript, the court found that between one and ten minutes of the prosecutor's discussion of the presentence investigation report were missing. The court found that neither party alleged that the missing portion of the hearing contained arguably prejudicial error which would evade review in the absence of a complete transcript.

Neal argues that he has been denied his right to an appeal because the sentencing hearing was not fully transcribed. A defendant must allege that some error occurred during the unrecorded proceedings in order to make a colorable claim of prejudice arising from an incomplete record. ***State v. Perry,*** 136 Wis.2d 92, 103, 401 N.W.2d 748, 753 (1987). Neal has not made a specific claim of error other than to argue that a complete record is required for appellate review. In the absence of such an allegation, the trial court did not err in declining to hold a new sentencing hearing.

By the Court.—Judgment and order affirmed.

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