COURT OF APPEALS
DECISION
DATED AND RELEASED

January 14, 1997

NOTICE

No. 96-0782-CR

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

State of Wisconsin,

Plaintiff-Respondent,

v.

Homer L. Burks,

Defendant-Appellant.

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

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

PER CURIAM. Homer L. Burks appeals from the judgment of conviction, following a jury trial, for second-degree sexual assault, false imprisonment, and battery. He raises numerous issues. We affirm.

I. FACTUAL BACKGROUND

At the trial, Shirley M. and Burks offered different accounts of the events. Shirley M. testified that on the evening of October 5, 1994, she and Burks went to his house where they smoked cocaine. She said everything was "comfortable" until early the next morning when Burks got in "a rage," began "screaming" at her and "acting weird." Shirley M. said that Burks hit her in the face causing her to fall across a bed. He ordered her not to move, jumped on the bed, and "karate"-chopped her chest. He then talked about Vietnam and "kick boxing" and "killing techniques" he could use, and told her about beating a woman at his house.

Shirley M. testified that Burks ordered her to take off her clothes, pulled her hair, and forced her to put her mouth on his penis. Burks then said, "You don't even know how the fuck to do it. Get away from me."

Shirley M. testified that Burks reacted angrily when she asked to go home. During brief periods when Burks left the house, she tried to leave through a kitchen window and the front door but could not open them. She said she was afraid to call 911 because of Burks's threats. On one occasion when Burks ordered chicken, she went outside to meet the delivery but was afraid to use this opportunity to get away. Burks allowed her to call her employer and one of her daughters but, Shirley M. testified, she was afraid to ask them for help.

Shirley M. testified that she and Burks continued to use cocaine. Burks accused her of "going through his things," "trying to escape," and "stealing cocaine," and said that a "demon had got into me." She said he "broke out in a real rage," sliced her bra and panties with a box cutter, struck her leg with "a miniature bat," dragged her through the house, and threatened to kill her. On October 7, after Burks had begun to "com[e] down" from the cocaine, he drove her home.

After reporting the incident to her family and the police, Shirley M. received hospital treatment for "a big knot" on her forehead, swollen eyes and a bruised thigh. Photographs of her injuries were received in evidence, and a hospital nurse provided testimony further establishing some of Shirley M.'s injuries.

Burks also testified. He confirmed the consensual nature of his initial contact with Shirley M. and their cocaine use at his home. He denied, however, all of the non-consensual actions Shirley M. alleged. He said they had sexual intercourse, slept, used more cocaine, ordered chicken and ate together. He said that Shirley M. called work and said she would not be coming in because of "an emergency in the family," and called one of her daughters to say she would be spending the night with Burks. Burks said that although the front and back doors had dead bolt locks, the back door dead bolt was unlocked and a side door could be opened from the inside. He also said that "[a]ll of my windows are very easy to open."

Burks testified that Shirley M. became upset when he was on a lengthy phone call with another woman and, shortly thereafter, became "real psychotic, paranoid ... going from window to window ... running through [the] house saying she didn't steal anything." He said Shirley M. got his son's miniature baseball bat, "started swinging" it at his head and, when he "grabbed her,... that's when the baseball bat hit her thigh in the process of us struggling." After he wrestled the bat from her, Shirley M. "broke away" and "ran into the bathroom door," bruising her forehead. It was at this point, Burks explained, that when Shirley M. broke away, he "grabbed her panties," causing them to tear and also "grabbed her bra," tearing the strap.

Burks testified that Shirley M. got dressed, except for her panties, which she put in a paper bag in the garbage. He then drove her home and when she asked about getting together again, he told her that another woman friend would be coming over. Burks said that Shirley M. then complained that he was treating her like "a dope date" and told him, "I will get mine." He said that subsequently he was arrested while on the way to return Shirley M.'s purse.

Milwaukee Police Detective William Stawicki testified that on October 7, 1994, after interviewing Shirley M., he executed a search warrant at Burks's home and recovered a box cutter from a bedroom floor and the torn panties from a bag in a wastebasket. He did not find a miniature bat.

Two other women provided significant ***Whitty*** evidence, describing their encounters with Burks within the seven months preceding his assault of Shirley M.

Tabitha F. testified that on March 17, 1994, she and Burks were at his home where they smoked cocaine and had consensual sexual intercourse. She said that after Burks smoked more cocaine he became "aggressive," calling her names, ranting about Vietnam, and talking of his karate skills and "how to kill." She said he slapped and kicked her, became "real paranoid" and concerned that "somebody was coming to kill him," and struck her with the end of a "long gun." She said Burks would not let her leave or use the phone, and that the doors were locked.

Tabitha F. testified that Burks dragged her upstairs, took off her clothes, and forced her to perform fellatio. He then hit her "because I didn't suck him right," forced her to have penis-to-vagina intercourse, and then demanded fellatio again while verbally and physically abusing her. Tabitha F. said that when she broke a window and tried to jump out, Burks restrained her and cut her leg with a box cutter. Photographs of her injuries were received in evidence.

Dana S. testified that on June 2, 1994, she and Burks were drinking beer on her front porch when he convinced her to go to his house so that he could make a phone call. Burks insisted that she come inside his house where he smoked cocaine and attempted to put his cocaine pipe in her mouth. Dana S. said that Burks spoke of his karate skills in an apparent attempt to scare her, grabbed her by the jaw and told her to undress. When she refused, he brandished a shotgun or rifle and threatened to "blow my head off and then throw me out the window." Dana S. then allowed Burks to undress her. He attempted to "kiss on" her by putting his mouth "on my thighs and between my legs." He let her leave the next morning. Investigating Dana S.'s allegations, police recovered a BB gun from under Burks's bed.

Shirley M., Tabitha F., and Dana S. all testified that they did not know each other.

II. SHIRLEY M.'S PRE-TRIAL STATEMENTS

Burks first argues that the trial court erred in allowing the State to introduce Shirley M.'s written statement to his probation agent and her testimony from his probation revocation hearing.

Cross-examining Shirley M. at trial, the defense asked questions about her testimony at Burks's revocation hearing in an effort to establish inconsistency between that testimony and her trial testimony on two subjects: her history of drug use, and whether she had called Burks on October 4 and 5. Burks contends that the State's "effort to rehabilitate its principal witness went well beyond those two limited areas, by introducing a four-page statement…[that] recited Shirley M.'s version of the event, and in effect amounted to a summary of the prosecution's case." Similarly, Burks contends that the State's introduction of Shirley M.'s revocation testimony "to rehabilitate Shirley M. ... [was] not to explain the context of her false denials on these two points, but simply to rehash her entire version, again illicitly bolstering her trial version."

The parties agree that both the written statement and the revocation hearing testimony were hearsay. They disagree, however, about whether the evidence was admissible under the rule of completeness, *see* ***State v. Sharp***, 180 Wis.2d 640, 511 N.W.2d 316 (Ct. App. 1993). They also disagree about our standard of review under the rule of completeness. Finally, they disagree about whether these alleged trial court errors were harmless. We need not resolve the parties' disagreements over the admissibility of either the written statement or the revocation testimony because, we conclude, any error was harmless.

An error in the admissibility of evidence is harmless if there is no reasonable possibility that the evidence contributed to the verdict. ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985). In this case there is no such possibility for at least three reasons.

First, although the trial court allowed references to the written statement, the statement itself was not disclosed to the jury until the jury

requested it during deliberations. Burks did not object to the statement going to the jury. *See* ***State v. Boshcka***, 178 Wis.2d 628, 642-43, 496 N.W.2d 627, 632 (Ct. App. 1992) (failure to object to trial court decision declining jury request for exhibit during deliberations waived issue on appeal). Second, the prior statements were cumulative to Shirley M.'s trial testimony. *See* ***State v. Mainiero***, 189 Wis.2d 80, 103-04, 525 N.W.2d 304, 313-14 (Ct. App. 1994) (cumulative nature of prior consistent statements recognized as basis for finding wrongful admission to be harmless error). Third, the evidence was overwhelming. Contrary to Burks's assertion, the trial did not reduce "to Burks' word against Shirley M.'s." The testimony of Tabitha F. and Dana S. established that the crimes against Shirley M. were but the latest in a series of remarkably similar offenses involving distinctive characteristics: consensual initial contacts; cocaine use; false imprisonment; verbal and physical abuse; Vietnam references and martial arts actions and threats; oral sex and dissatisfaction of the performance of fellatio; use of weapons and assaults with a box cutter.

III. COMMENT ON WITNESS CREDIBILITY

Citing ***State v. Haseltine***, 120 Wis.2d 92, 352 N.W.2d 673 (Ct. App. 1984), and ***State v. Kuehl***, 199 Wis.2d 143, 545 N.W.2d 840 (Ct. App. 1995), Burks next argues that "[t]he prosecution improperly impeached defendant, by repeatedly asking him to comment on the credibility of other witnesses, thereby encouraging the jury to draw illicitly invidious comparisons between him and other witnesses." As Burks concedes, however, his "objections to these sorts of questions were sparse." Moreover, as the State points out, although Burks objected that some of the questions were argumentative or that they mischaracterized testimony, he "never specifically objected ... that he was wrongly being asked to comment on the credibility of other witnesses in violation of ***Haseltine***." Thus, we conclude that Burks waived this issue. *See* ***State v. Peters***, 166 Wis.2d 168, 174, 479 N.W.2d 198, 200 (Ct. App. 1991) ("defendant must apprise the trial court of the specific grounds upon which the objection is based" to preserve issue for appeal).

IV. REFERENCE TO CRIMINAL COMPLAINT

Burks next argues that the trial court erred in allowing the State to refer to hearsay assertions contained in the criminal complaint that had been

issued against him in the case involving Tabitha F. The prosecutor, cross-examining Burks, asserted, "the criminal complaint also talks about you slashing her with a box cutter and multiple stitches," and "that's what you were charged with." The prosecutor also asserted that, according to the complaint, "there came a time when [Tabitha F.] wanted to leave, you became very angry and wouldn't let her leave," and "that as the hours wore on you became increasingly violent." The trial court overruled Burks's objection and the prosecutor continued by eliciting Burks's acknowledgment that the complaint stated that Tabitha had tried to escape by jumping out a window and that he had pulled her back and cut her leg with a box cutter causing an injury requiring forty-seven stitches.

The trial court allowed reference to the complaint because "it's a certified record." Burks correctly argues that whether or not the complaint was a certified record is irrelevant to his hearsay objection. The State contends that the rule of completeness allowed for the admission of this hearsay because of Burks's testimony that he had been charged in Tabitha F.'s case "due to circumstantial evidence."

Once again, we need not resolve questions of admissibility because any error in allowing references to the complaint was harmless. The complaint's allegations were cumulative to Tabitha F.'s testimony. Further, as we have explained, the evidence was overwhelming so that, clearly, these references did not contribute to the jury's verdict.

V. SELF-DEFENSE INSTRUCTION

Burks challenges his battery conviction arguing that, on that charge alone, he was entitled to an instruction on self-defense. His argument derives differently from two differing versions of the assault: (1) his trial testimony that in the course of their struggle, Shirley M. struck herself in the thigh, broke free, and ran into a bathroom door, bruising her forehead; and (2) his prior inconsistent statement, introduced by the State, that when Shirley M. picked up the bat and came at him, he took it away and hit her in the thigh. Under the former version, Burks contends that his conduct in self-defense was a substantial, causal factor producing Shirley M.'s injury, even though it was not the direct, proximate cause. Under the latter version, Burks maintains that his conduct in self-defense was direct.

A self-defense instruction is required when the evidence, "'viewed in the most favorable light it will "reasonably admit of from the standpoint of the accused"'" would allow a jury to conclude that the defendant acted in self-defense. ***State v. Jones***, 147 Wis.2d 806, 816, 434 N.W.2d 380, 383 (1989) (citation omitted). Whether a particular jury instruction is required presents a question of law. ***Farrell v. John Deere Co.***, 151 Wis.2d 45, 60, 443 N.W.2d 50, 54 (Ct. App. 1989).

As applicable to this case, before a self-defense instruction would have been required, the evidence would have had to have shown that Burks reasonably believed he had to act to terminate Shirley M.'s unlawful interference with him, and that he reasonably believed his action was necessary to prevent or terminate her interference. *See* ***State v. Gomaz***, 141 Wis.2d 302, 310 & n.5, 414 N.W.2d 626, 630 & n.5 (1987). "Reasonableness" means that a defendant actually believed the defensive actions were necessary and that the defendant's beliefs were objectively reasonable. ***State v. Mendoza***, 80 Wis.2d 122, 155-56, 258 N.W.2d 260, 272 (1977). We conclude that under either version Burks offers, a self-defense instruction was not required.

Under the version presented in Burks's trial testimony, Shirley M.'s injuries resulted not from Burks's actions in self-defense, but rather, by accident. As the State correctly argues:

> [D]efendant's argument ... ignores the element of "intent" in the charge of battery. The crime of battery entails not simply conduct causing bodily harm but also "intent to cause" bodily harm. Defendant's testimony rendered the question of self-defense moot, because if the jury were to accept his testimony that he only "grabbed" Shirley after Shirley swung a bat at him, as it would have to do to find self-defense under that testimony, then the jury also would have to conclude that defendant did not intend to cause bodily harm to Shirley even if it believed that his act of grabbing Shirley actually contributed to harming her.

Under the version presented in Burks's prior inconsistent statement, Burks points to no evidence that would support the reasonable view that Burks, having disarmed Shirley M., also reasonably believed that he had to strike her with the bat to prevent or terminate her attack. Thus, the self-defense instruction was not required.

VI. ATTORNEY WITHDRAWAL

Burks argues that the trial court erred by failing to adequately inquire into defense counsel's request to withdraw. On the third day of trial, defense counsel informed the trial court that Burks had become "rather heated" in a conversation with him, apparently displeased with his questioning of witnesses. Counsel said that Burks accused him of being unprepared and said that "there would be a big-old fallout between us" if he were convicted. Thus, counsel advised the trial court, he felt ethically obligated to withdraw though he offered to continue as stand-by counsel.

Apparently construing Burks's conflict with counsel as relating to counsel's questioning of witnesses, the trial court commented on the active communication it had observed between Burks and counsel during the trial. The trial court addressed Burks directly and advised him that while he shared responsibility with counsel for certain trial decisions, "trial counsel makes the call after having informed and worked with the trial defendant, and there has been no showing ... that that doesn't exist in this case, and cannot continue to exist during the course of this trial." Burks did not respond; defense counsel

offered no further information or argument. Burks never asked for a new lawyer.

The trial court denied counsel's motion to withdraw. Burks now seeks a new trial or, at the very least, a retrospective hearing on counsel's motion to withdraw. He invokes ***State v. Lomax***, 146 Wis.2d 356, 432 N.W.2d 89 (1988), and argues that the trial court was required to inquire further as to the basis for counsel's request. We conclude, however, that Burks's reliance on ***Lomax*** is misplaced.

Lomax considered whether a *defendant's* request for new counsel asserted grounds to establish that a breakdown in communication with counsel frustrated the defendant's right of representation. Here, by contrast, Burks never requested new counsel. Further, he does not argue that counsel rendered ineffective assistance. The trial court addressed the apparent problem. After receiving the trial court's advice, neither Burks nor his counsel complained further. Accordingly, we conclude that the trial court correctly denied counsel's request to withdraw and that no retrospective hearing or new trial is required.

By the Court. – Judgment affirmed.

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