COURT OF APPEALS
DECISION
DATED AND RELEASED

November 12, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3469-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

VICTOR M. VENCES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Victor M. Vences appeals from a judgment of conviction of attempted first-degree intentional homicide and aggravated battery. He argues that the trial court erroneously exercised its discretion in excluding the testimony of the victim's son about Vences' telephone call after commission of the

crimes. We conclude that the evidence was irrelevant and even if the failure to admit the evidence was error, it was harmless error. We affirm the judgment.

Vences was charged with attacking his live-in girlfriend, Marina Hernandez. After an afternoon of drinking beer and arguing, Hernandez and Vences got into a car together. They continued to fight and Vences parked along side of the road. Hernandez left the car and walked into a nearby field. Vences followed. Eventually the two were engaged in a physical encounter in the field. Vences grabbed the rock from Hernandez. Telling Hernandez he would kill her, Vences hit her in the back of the head with the rock. Hernandez was rendered unconscious.

Eyewitnesses saw two people struggling in the field. One saw a man kneeling over a woman and repeatedly hitting her over the head with an object that looked like a rock. By the time help arrived, Vences had left the scene and Hernandez was attempting to crawl to the road. Hernandez's treating physician testified that it appeared she had been struck a number of times.

At trial Vences sought to introduce the testimony of Hernandez's nineteen-year-old son, Melachia Vega. Through Vega, Vences would prove that Vences had called Vega approximately five hours after the incident and asked Vega where his mother was. The trial court excluded the evidence as impermissible hearsay and as irrelevant.

Evidentiary rulings are addressed to the trial court's discretion. *See* ***State v. Plymesser***, 172 Wis.2d 583, 591, 493 N.W.2d 367, 371 (1992). We will uphold the trial court's decision absent an erroneous exercise of its discretion. *See* ***id.***

Vences argues that the trial court's exercise of discretion was based on an error of law. He claims that the recounted phone call to Vega was not hearsay evidence. *See* § 908.01(3), STATS. We assume without discussion, *in arguendo*, that the evidence was not hearsay.

We turn to the relevancy determination. Relevancy is a function of whether the evidence tends to make the existence of a material fact more or less probable than it would be without the evidence. *See* ***State v. Denny***, 120 Wis.2d 614, 623, 357 N.W.2d 12, 16 (Ct. App. 1984). "Material facts are those that are of consequence to the merits of the litigation." ***In re Michael R. B.***, 175 Wis.2d 713, 724, 499 N.W.2d 641, 646 (1993).

Vences argues that the evidence was relevant to negate an intent to kill Hernandez. Vences summarizes: "The phone inquiry simply showed, albeit circumstantially, that Vences believed Hernandez still to be alive. He logically would not have inquired as to her whereabouts if he believed her to be dead."

The jury had to decide if Vences had the intent to kill Hernandez when he was repeatedly striking her on the head with the rock. The phone call Vences placed five hours after the assault has little bearing on his intent at the time of the assault. This is, in part, because Vences' inquiry as to Hernandez's whereabouts five hours after he left her in the field does not prove any knowledge of whether Hernandez was dead or alive. The relevancy of Vences' phone call to Vega can be contrasted with the relevancy of Vences' statement to a friend two days after the assault that he had killed his girlfriend. That statement reflected knowledge of the consequences of his action and his state of mind at the time of the assault. The phone inquiry to Vega lacked any link to the assault and was therefore irrelevant.

Even if Vega's testimony should have been admitted, the error was harmless. An error is harmless in a criminal case if there is no reasonable possibility that the error contributed to the conviction. *See* ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985). We consider whether there is a reasonable possibility of a different outcome, or a "'probability sufficient to undermine confidence in the outcome' of the proceeding." ***Id.*** at 544-45, 370 N.W.2d at 232 (quoting ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)). "Where the error affects rights of constitutional dimension or where the verdict is only weakly supported by the record, the reviewing court's confidence in the reliability of the proceeding may be undermined more easily than where the error was peripheral or the verdict strongly supported by evidence untainted by error." ***Dyess***, 124 Wis.2d at 545, 370 N.W.2d at 232-33.

The evidence of Vences' guilt was strong. There was no dispute that Vences was at the scene of the assault. Hernandez identified Vences as her assailant. Hernandez heard Vences tell her three times that he was going to kill her. Eyewitnesses testified that the assailant struck the victim repeatedly with the rock. Vences' intent to kill can easily be inferred from such conduct.

Vences claims that the exclusion of the phone call evidence cannot be harmless when it would have served to rebut the evidence that he told a friend that he had killed his girlfriend. Vences' statement two days after the assault that he had killed Hernandez certainly was circumstantial evidence of his intent to do so. However, the phone call inquiring where Hernandez was does not directly rebut that inference. The phone call was inferentially neutral. It does not demonstrate any particular state of mind and is not a probative building block for rebuttal. Our confidence in the outcome is not undermined by the exclusion of the phone call evidence.

By the Court.—Judgment affirmed.

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