COURT OF APPEALS
DECISION
DATED AND FILED

November 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0904-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFERY L. MCCULLAR,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEAN W. DiMOTTO, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.[1] Jeffery L. McCullar appeals from a judgment entered after a jury found him guilty of battery while using a dangerous weapon, contrary to §§ 940.19(1) and 939.63(1)(a)1, STATS. He claims that the trial court erroneously exercised its discretion when it allowed a police officer to testify that

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

an abrasion on the victim's body was consistent with the bottom of McCullar's cane. Because the trial court did not erroneously exercise its discretion in admitting this testimony, this court affirms.

BACKGROUND

¶2 On June 12, 1998, McCullar's mother, Ophelia, told the police that McCullar had hit her in the left cheek several times with a closed fist, that he knocked her down, stepped on her stomach and struck her in the left knee with his walking cane. McCullar was charged and pled not guilty. Prior to trial, McCullar moved to exclude investigating officer Scott Lemke's opinion that the abrasion to the left knee was consistent with the bottom of McCullar's cane. The trial court denied the motion. The jury convicted. McCullar now appeals.

DISCUSSION

¶3 McCullar raises a single issue in this appeal: whether the trial court should have excluded Officer Lemke's opinion that the abrasion to the victim's left knee was consistent with the bottom of McCullar's cane. This court rejects McCullar's contention that the admission of this testimony was erroneous.

¶4 An appellate court reviews a trial court's evidentiary rulings according to the erroneous exercise of discretion standard. *See* ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983); ***State v. Alsteen***, 108 Wis.2d 723, 727, 324 N.W.2d 426, 428 (1982). If a trial court applies the proper law to the established facts, this court will not find a misuse of discretion if there is any reasonable basis for the trial court's ruling. ***Id.***; ***Village of Shorewood v. Steinberg***, 174 Wis.2d 191, 204, 496 N.W.2d 57, 62 (1993); ***Steinbach v. Gustafson***, 177 Wis.2d 178, 185-86, 502 N.W.2d 156, 159 (Ct. App. 1993). Appellate courts generally look for reasons

to sustain discretionary determinations. ***Steinbach***, 177 Wis.2d at 185-86, 502 N.W.2d at 159.

¶5 McCullar claims that the challenged testimony constituted expert opinion and that Officer Lemke was not properly qualified as a witness. Therefore, he argues that the trial court should not have allowed the testimony into evidence. This court rejects McCullar's contention.

¶6 In responding to McCullar's motion to exclude the testimony, the State argued:

> Your Honor, Officer Lemke can testify to that because he was there. He observed the bottom of the cane. He observed the injury that was consistent with the bottom of the cane. He can testify based on his training and experience, the amount of domestic violence responded to, the number of victims that he has looked at, the number of injuries he has looked at, and basically his training and experience and what he believes that injury's consistent with.

¶7 The trial court agreed with the State's argument. Contrary to McCullar's assertion in this appeal, the State did not offer or suggest that Officer Lemke was testifying as an expert on this issue. Rather, this testimony was lay opinion, which is governed by § 907.01, STATS., and provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

¶8 Under this standard, Officer Lemke's opinion that the abrasion on the knee was consistent with the bottom of McCullar's cane was not an erroneous

exercise of discretion. Officer Lemke was on the scene of the crime, he observed both the injury and the bottom of the cane. This is an opinion that was rationally based on Officer Lemke's perception and was certainly helpful to the jury. Although Officer Lemke's training and experience were mentioned, this does not somehow transform his lay opinion into an expert opinion. The State never qualified the officer as an expert and the trial court never declared the officer an expert. In fact, the trial court, in ruling on the contemporaneous objection interposed during the testimony of the officer stated: "Based on foundation that's been laid, he can give a conclusion. He can't give a medical conclusion, but he can give a conclusion about any observation that he made in that respect."

¶9 The "foundation" that the trial court was referring to was preceding questioning where Officer Lemke indicated that he personally observed the injury to the knee and that it was circular in form, and that he personally observed the bottom of McCullar's cane, which had the same circular pattern. Officer Lemke also testified that the victim reported that McCullar had been hitting her with the cane.

¶10 Based on the foregoing, this court concludes that the trial court did not erroneously exercise its discretion in admitting the lay opinion of the officer regarding the consistency of the abrasion to the victim's knee and the bottom of McCullar's cane.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.