COURT OF APPEALS
DECISION
DATED AND FILED

October 24, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0529-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DONALD J. LALLAMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the trial court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Donald Lallaman appeals a judgment of conviction for attempted first-degree sexual assault of a child in violation of WIS. STAT.

§§ 948.02(1)[1] and 939.32.[2] Lallaman complains that critical evidence was improperly excluded and that unfairly prejudicial evidence was improperly included. He further claims that the trial court denied him the right to a fair trial when it allowed the prosecutor, during closing argument, to make inflammatory and inappropriate remarks calculated to prejudice the jury. He also challenges the court's authority to order a DNA sample under WIS. STAT. § 973.047 when he was only convicted of attempting to violate § 948.02(1). Finally, he asserts that this court should reverse the judgment and order a new trial in the interest of justice. For the reasons stated below, we affirm the judgment of conviction. We conclude, however, that § 973.047 does not apply to convictions for attempted crimes. We therefore reverse the trial court's order requiring Lallaman to provide a DNA sample.

BACKGROUND

¶2 Lallaman was charged with attempted first-degree sexual assault of Megan R., an eleven-year-old child. A jury convicted him of the crime, and the

[1] WISCONSIN STAT. § 948.02(1), provides: "Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony." All references to the Wisconsin Statutes are to the 1997-98 version.

[2] WISCONSIN STAT. § 939.32, the attempt statute, provides at subsec. (1): "Whoever attempts to commit a felony … may be fined or imprisoned or both not to exceed one-half the maximum penalty for the completed crime …." Subsection (3) provides :

> An attempt to commit a crime requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that the actor does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that the actor formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

trial court sentenced him to twelve years in prison. The trial court denied Lallaman's motion for a new trial. Lallaman now appeals.

¶3 Megan reported to the police that Lallaman had attempted sexual contact with her when she was living temporarily with her older sister, Gena R., and Gena's live-in fiancé, Lallaman. She reported three instances of inappropriate conduct that occurred on March 8, 9 and 11. The March 9 incident was charged as an attempt to commit first-degree sexual assault. The other two incidents were admitted as other acts evidence to show motive and intent.

¶4 Megan testified that on the night of March 8, she was sleeping on an air mattress in the living room. She awoke sometime during the night and discovered Lallaman lying on the mattress next to her with his arm positioned across her body touching, her opposite shoulder. There was no other reported contact and no conversation.

¶5 The second incident occurred on the night of March 9. Lallaman and Gena returned to the apartment at approximately 2 a.m. and, with Gena, watched a video. Megan was on the air mattress on the floor, Gena was on one couch and Lallaman on another couch. Megan testified that when the movie ended, Gena and Lallaman were sleeping on their respective couches. Megan stated that she rewound the movie and turned off the television set. At 3 or 4 a.m., she asserted, she fell asleep on the air mattress. Megan reported that she awoke sometime before daylight and discovered Lallaman lying on the air mattress next to her. Although he was not moving, Lallaman had his leg on top of Megan and his hand was inside the band of her shorts. Megan also stated that his hand was also partially inside her underpants, but was not touching her "intimate parts." Megan related that she rolled away from him, off the air mattress, and lay down on

the floor. No words were exchanged. She testified that she was scared, but fell asleep again in five or ten minutes. Even though she had fallen asleep on the carpeted floor, she woke up on the air mattress. Lallaman denied being on the air mattress.

¶6 The third incident occurred two nights later, on March 11. On this night, Megan slept in Gena's single bed. She woke up and found Lallaman lying in bed with her. He was rubbing the outside of her bare upper thigh. When he realized she was awake, Megan relates, he slapped her thigh and said, "5:30, time to get up" or "time for school." Five-thirty in the morning is the usual time she gets up for school.

¶7 In response to this testimony, Lallaman made offers of proof in an attempt to introduce several witnesses. He sought to introduce the testimony of Megan's therapist, Linda Blohowiak; Lallaman's daughter and niece; and Megan's school's record custodian, Diane Oteiro. He sought to have Gena testify to a prior false accusation that he alleged that Megan made against Lallaman. The trial court denied his requests for reasons disclosed below.

STANDARD OF REVIEW

¶8 The admission of evidence is a decision left to the discretion of the trial court. *See* ***In re Michael R.B.***, 175 Wis. 2d 713, 723, 499 N.W.2d 641 (1993). We will overturn the court's decision if it erroneously exercised its discretion by incorrectly applying the facts to the accepted legal standards. *See* ***State v. Kuntz***, 160 Wis. 2d 722, 745, 467 N.W.2d 531 (1991). We will uphold the court's decision if a proper legal analysis supports the trial court's conclusion, even if the trial court applied a mistaken view of the law. *See* ***State v. Hereford***, 195 Wis. 2d 1054, 1065-66, 537 N.W.2d 62 (Ct. App. 1995).

¶9 We defer to the trial court's findings of historical facts as they relate to constitutional challenge unless they are clearly erroneous. *See* ***State v. McMorris***, 213 Wis. 2d 156, 165, 570 N.W.2d 384 (1997). However, we apply those facts to the constitutional standard independently of the trial court's decision. *See* ***id.***

DISCUSSION

JUDGMENT OF CONVICTION

¶10 We begin our analysis of whether evidence was improperly admitted or excluded with WIS. STAT. § 901.03, which provides that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected" and counsel properly objected to the error at trial or made an offer of proof. A defendant has no right to present irrelevant evidence or evidence whose prejudicial effect outweighs its probative value. *See* ***State v. Pulizzano***, 155 Wis. 2d 633, 646, 456 N.W.2d 325 (1990). A defendant's constitutional right to present a defense is not violated when a judge excludes irrelevant evidence. *See* ***id.***

1. Evidence Properly Excluded

a. The Therapist's Testimony

¶11 Lallaman sought to call Blohowiak to testify as to Megan's truthfulness. The trial court rejected his offer of proof and sustained the State's objection to this testimony. Lallaman argues that the trial court's ruling denied him the right to present a defense and to confront his accuser. He also claims that the trial court erroneously exercised its discretion by rejecting this testimony

because the court modified its reasoning at the postconviction hearing. We disagree.

¶12 Lallaman wanted Blohowiak to testify to her general belief that Megan was not truthful and that Blohowiak's concerns led her to call the police to report that belief. Lallaman argues that this opinion evidence was admissible under ***State v. Shiffra***, 175 Wis. 2d 600, 611-12, 499 N.W.2d 719 (Ct. App. 1993). He contends that the testimony is also admissible under WIS. STAT. § 906.08(1), which provides that "the credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion …." Lallaman asserts that he offered the evidence to show Megan's "ability or willingness to tell the truth in court," as permitted under § 906.08. He claims that Blohowiak could have given her opinion without revealing confidential information.

¶13 The State argued that the testimony Lallaman sought to introduce violated the confidential relationship between counselor and patient. After conducting the appropriate review under ***Shiffra***, the court ruled that the medical records were inadmissible with the exception of an intake form Megan's mother had filled out indicating that Megan had "difficulty with honesty." Because most of the medical records were excluded, the State contended that it was prevented from testing Blohowiak's foundation for her opinion.

¶14 The trial court invited Lallaman to show that Blohowiak's opinion was based on facts that existed outside the confidential relationship. After a brief recess and consultation with Blohowiak, Lallaman stated that he was not prepared to argue further on the issue. He instead offered that Blohowiak would not testify as to Megan's character, but would testify only that when she heard about the sexual assault charge, she was concerned and called the police. The trial court

rejected the offer of proof, finding that Megan had not waived her right to maintain confidentiality with her counselor.

¶15 At the postconviction hearing, Lallaman again raised the issue, arguing that the evidence should have been admissible under ***Shiffra***. He further argued that the court should have compared the privilege of confidentiality against his due process right to present a defense. He claimed that this evidence was critical to his case. The State opposed, arguing that introducing the opinion testimony without the support of the medical records would make Blohowiak appear to give an expert opinion on the ultimate issue of Megan's credibility.

¶16 The trial court again determined that Blohowiak's testimony was properly excluded, but for a different reason than it relied upon previously. Although it concluded that Blohowiak's opinion testimony was not privileged and thus not excludable for that reason, it was still inadmissible because the jury would have viewed Blohowiak as an expert witness on Megan's credibility.

¶17 Lallaman first complains on appeal that the court's ruling abridged his right to present a defense. We reject this claim because it was not advanced at the time the trial court was considering Lallaman's offer of proof. A claim of constitutional error is deemed waived unless timely raised in the trial court. *See* ***Maclin v. State***, 92 Wis. 2d 323, 328-29, 284 N.W.2d 661 (1979). An argument must be made with enough specificity to alert the trial court that it is being asked to rule thereon. *See* ***State v. Johnson***, 184 Wis. 2d 324, 345, 516 N.W.2d 463 (Ct. App. 1994). Here, when the court asked counsel whether Blohowiak's opinion of Megan's truthfulness was based on other than confidential information, counsel

eventually responded that he had no further argument. We conclude that Lallaman waived his due process right to present a defense contention.[3]

¶18 Lallaman next contends that it was "fundamentally unfair" for the court to change its analysis post-conviction. He complains that the court did not "document" the new reason for excluding the evidence or explain how it differed from the privilege theory. He insists that he was denied the right to make an offer of proof or response based on the new theory. Finally, he contends that "[t]his court should require trial courts to state their rulings on important issues with specificity, and to live with those rulings. How else can the parties to a lawsuit conduct their trial, or seek appellate review?"

¶19 We reject Lallaman's argument. Except for his reference to ***Shiffra***, Lallaman fails to state any standard of review or authority for his propositions. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered."). Lallaman does not contend that the trial court failed to or improperly conducted a ***Shiffra*** review of Megan's medical records. Moreover, ***Shiffra*** only allows for an *in camera* inspection of medical documents; it does not provide an analysis for the admissibility of doctors', psychologists' or counselors' testimony when the patient or client has not waived her confidentiality privilege. *See* ***id.*** at 602. Further, Lallaman fails to explain why evidence that was improperly excluded for one reason, but properly excludable for another, prejudices him. Had the trial court continued to hold that Blohowiak's opinion was based on privileged information and therefore inadmissible, this court would

[3] We are satisfied that the interests of justice do not require discretionary review by this court. *See* ***State v. Bertrand***, 162 Wis. 2d 411, 415, 469 N.W.2d 873 (Ct. App. 1991).

nevertheless have affirmed if another legal basis would support exclusion. *See* ***Hereford***, 195 Wis. 2d at 1065-66. Thus, any trial court error was harmless. ***Id.***

b. ***Whitty***[4] Evidence

¶20 Lallaman also claims that he was denied the right to present a defense because he should have been permitted to introduce his daughter's and niece's testimony. At trial, he offered to prove that the two girls were similar in age to Megan and would testify that he never acted inappropriately with them. While Lallaman concedes that the March 11 and March 8 incidents could be properly introduced to show intent or absence of mistake or accident, they nevertheless had the effect of painting him as someone with a proclivity to have sexual contact with young girls. Lallaman's proffered evidence was intended to refute the State's claim that he had such a predisposition or propensity.

¶21 The State argued that evidence of the other incidents was introduced solely to demonstrate Lallaman's intent to assault Megan and not to prove a propensity to molest young girls. It argued that the ***Whitty*** evidence's probative value outweighed its prejudicial effect. *See* WIS. STAT. § 904.04; ***Whitty v. State***, 34 Wis. 2d 278, 149 N.W.2d 557 (1967). Finally, the State urged the court to employ the greater latitude rule applicable in cases involving sexual assault of a child. *See* ***State v. Fishnick***, 127 Wis. 2d 247, 256, 378 N.W.2d 272 (1985).

¶22 While the trial court recognized that propensity evidence is not admissible, it concluded that the other acts evidence was being offered only to prove Lallaman's intent to touch Megan sexually. The trial court cautioned the

[4] *See* ***Whitty v. State***, 34 Wis. 2d 278, 149 N.W.2d 557 (1967).

jury to only consider the evidence of the other acts, if the jury believed they occurred, as proof of intent and for no other purpose. The court also specifically advised the jury to disregard stricken testimony. Because the State was not attempting to prove propensity and Lallaman's witnesses were only testifying to show that Lallaman lacked a propensity to improperly touch young girls, the court concluded that the proffered evidence was irrelevant. We agree.

¶23 Ordinarily, the admissibility of evidence lies within the trial court's sound discretion. *See* ***State v. Pepin***, 110 Wis. 2d 431, 435, 328 N.W.2d 898 (Ct. App. 1982). Evidentiary issues may, however, go beyond the question whether the trial court properly exercised its discretion and may implicate a defendant's right to present a defense. *See* ***State v. Johnson***, 118 Wis. 2d 472, 479, 348 N.W.2d 196 (Ct. App. 1984). A trial court may not preclude an accused's opportunity to present "crucial evidence" absent a "compelling state interest." *See* ***id.*** The Sixth Amendment grants defendants "the constitutional right to present relevant evidence not substantially outweighed by its prejudicial effect." ***Pulizzano***, 155 Wis. 2d at 646. It is axiomatic, however, that evidence must be relevant to be admissible. *See* WIS. STAT. § 904.02. As indicated above, a defendant thus does not have a constitutional right to present irrelevant evidence. *See* ***Pulizzano***, 155 Wis. 2d at 646.

¶24 Lallaman did not object to the other acts evidence being introduced to prove intent to sexually touch Megan.[5] He does not demonstrate to our satisfaction why the trial court erred by concluding that this was the only purpose

[5] Lallaman does not dispute that the March 8 occurrence was also introduced for the purpose of showing intent. Therefore, we do not address whether it was properly admitted into evidence.

for which the evidence was offered. Introducing Lallaman's lack of sexual contact with two other young girls was hardly "crucial evidence" because it would not tend to disprove his intent to sexually touch Megan. Thus the daughter's and niece's testimony was irrelevant. The trial court properly denied Lallaman an opportunity to introduce irrelevant evidence at trial.

c. The School Record Custodian's Testimony

¶25 The State examined Megan concerning her school attendance, truancy and suspensions in an effort to prove when the various incidents occurred. According to Lallaman, "Megan timed one of the incidents as being on March 11, 1998, and as having occurred just before Lallaman woke her up for school. Megan testified that she ended up not having to go to school that day because of the weather." Lallaman argues that the trial court erred when it refused to permit him to present the school's records custodian's testimony:

> [T]o the effect that Megan was lying about her various days of school attendance and absence. Specifically he wanted to prove that Megan was considered truant from school on March 11, 1998, and that school was not called off due to weather that day. Lallaman argued that the school records demonstrated not only that Megan lied, but that she actually fabricated the whole story about the weather day and getting up for school.

¶26 At trial, the State argued that Lallaman was attempting to impeach Megan with extrinsic evidence on a collateral matter, which is prohibited. *See* WIS. STAT. § 906.08(2);[6] ***State v. Sonnenberg***, 117 Wis. 2d 159, 161, 344 N.W.2d

[6] WISCONSIN STAT. § 906.08(2) provides in relevant part:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than a conviction of a crime or an adjudication of delinquency as provided in s. 906.09, may not be proved by extrinsic evidence.

(continued)

95 (1984). The State submits that cross-examination on a collateral matter is limited and the examiner must abide by the witness's answers to his questions. *See* ***State v. Spraggin***, 71 Wis. 2d 604, 622, 239 N.W.2d 297 (1976).

¶27 The court concluded that Megan's school attendance was collateral and irrelevant to the case. The court observed, "You're not truant at 5:30 in the morning …. Her intent could have been to get up and go to school." The court reasoned that even if she was truant for some part of the school day, it would not prove that she did not awaken that day at the usual time with the intent to attend school. Furthermore, the alleged acts occurred outside of school hours, so her attendance at school would be peripheral and could lead to a trial within a trial regarding irrelevant facts. We agree with the trial court's analysis.

¶28 Extrinsic evidence is testimony "obtained by calling additional witnesses, as opposed to evidence obtained by the cross-examination of a witness." ***Sonnenberg***, 117 Wis. 2d at 168 (citing 3A WIGMORE ON EVIDENCE § 878, at 647 (Chadbourn rev. ed. 1970)). WISCONSIN STAT. § 906.08(2) prohibits introducing extrinsic evidence showing specific instances of a witness' conduct to attack that witness' credibility. A matter is collateral to the proceedings if "the fact, as to which error is predicated, [could not] have been shown in evidence for any purpose independently of the contradiction[.]" ***Sonnenberg***, 117 Wis. 2d at 169 (citing WIGMORE, *supra*, § 1003, at 961). Lallaman properly cross-examined Megan about the reason she did not attend school on March 11. However, this evidence is not relevant to whether the incident occurred and would not otherwise

> They may, however, subject to s. 972.11(2) [the "rape shield" statute], if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

be introduced at trial. Lallaman is not permitted to introduce extrinsic evidence to impeach Megan's credibility. *See* WIS. STAT. § 906.08(2).

¶29 Alternatively, a matter is irrelevant to the proceedings if it fails to have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01. As discussed above, Lallaman does not have a right to present irrelevant evidence. *See* ***Pulizzano***, 155 Wis. 2d at 646. The trial court did not err when it excluded this evidence.

d. Other Sexual Assault Allegations

¶30 Lallaman also argues that the court improperly precluded Gena from testifying that Megan told her that Lallaman had molested one of Gena's children. Megan denied accusing Lallaman of this molestation. Lallaman sought to introduce this testimony in another attempt to impeach Megan's credibility. The court ruled that the proffered evidence was also collateral and disallowed it.

¶31 Testimony by another witness that a victim in a sexual assault case made a prior false sexual assault allegation is extrinsic evidence and therefore inadmissible. *See* ***State v. Rognrud***, 156 Wis. 2d 783, 787, 457 N.W.2d 573 (Ct. App. 1990). "A matter is collateral if the fact as to which error is predicated could not be shown in evidence for any purpose independently of the contradiction." ***Id.*** (citation omitted). As stated above, the examiner may ask the victim on cross-examination about prior sexual assault allegations, but the examiner is bound by her answers. *See* ***Spraggin***, 71 Wis. 2d at 622.

¶32 Here, Lallaman asked Megan on cross-examination whether she had previously made an allegation that Lallaman sexually molested Megan's niece.

Megan answered "No." Lallaman is bound by that answer. He may not introduce extrinsic testimony to show that she did not truthfully answer a question about collateral issue. The trial court did not err when it excluded the extrinsic testimony.

2. Evidence Properly Included: Impeachment with Silence

¶33 The State asked Lallaman on cross-examination whether the police contacted him to make a statement and whether he refused to give a statement. Lallaman's counsel objected, but the court overruled and allowed the State's questioning, which proceeded as follows:

> Q And as a matter of fact, you were contacted by Sergeant Deviley from the Green Bay Police Department; is that correct?
>
> A Yes.
>
> Q And he invited you to contact him if you wanted to talk to him about this incident; isn't that correct?
>
> A He wanted me to come down to the station to talk to him.
>
> Q And in addition to that, Mr. Lallaman, he said if you wanted to do it some other time, you had his number, you had his card or number, you knew who he was and just give him a call and you could come and talk to him about it; isn't that right?
>
> A When I told him I would not come down there and talk to him because of previous experiences, I would want a lawyer. Right then and there he cut off the conversation [and] says, since you brought in a lawyer, I can't talk to you, and he did leave me his name and number to say get a hold of him if I changed my mind. That was the exact words with our conversation and that was the end of it.
>
> Q And in spite of the fact, Mr. Lallaman, that you have an explanation for virtually every moment that evening, you never bothered to get a hold of him to explain to him how you couldn't have possibly committed this crime?
>
> A Yes, I did.
>
> Q You did?

> A Yes, I did.
>
> Q When did you get a hold of him?
>
> A I didn't get a hold of him. I called down there and talked to the front desk. They said, oh, yeah, he's in. They told me especially after -- call after 3:00 o'clock 'cause that's when his shift begins, and I called him. Thinking I don't need a lawyer to go down there because I didn't do anything. I don't have nothing to hide and to ask about anything, a statement, anything, a lie detector test that would verify all this, stop all this before it even got this far. She comes back on the desk -- on the phone and says, oh, he's away from his desk for a few minutes. He'll call you back. Never did.

¶34 The State also asked Lallaman why he failed to contact the police in the seven months since the alleged incident. Lallaman answered, "I didn't have to get in contact with him anymore once I went to my lawyer. My lawyer is handling everything …. In fact, the following week I received … a letter in the mail saying to come to court, I'm being charged. There was no time for me to talk to him or anything."

¶35 Lallaman contends that the trial court improperly allowed the State to impeach him on cross-examination and in closing argument with both his pre- and post-arrest silence. He claims that he never opened the door to impeachment on cross-examination. Lallaman maintains that his case should be governed by those cases where a defendant may not be impeached by silence following ***Miranda***[7] warnings or a request for counsel, such as ***Doyle v. Ohio***, 426 U.S. 610 (1976),[8] and Justice Bablitch's concurrence in ***State v. Sorenson***, 143 Wis. 2d 226,

[7] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[8] In ***Doyle v. Ohio***, 426 U.S. 610, 619 (1976), the United States Supreme Court held that using a defendant's post-***Miranda*** silence for impeachment purposes violated the due process clause of the Fourteenth Amendment. The ***Doyle*** Court concluded that post-arrest silence is "insolubly ambiguous" because of what the defendant must be advised under ***Miranda*** and stated:

(continued)

265-273, 421 N.W.2d 77 (1988).[9] Indeed, Lallaman complains that he has paid a penalty for simply advising the police that he would prefer to talk to his attorney before speaking to the police about the accusation of a serious crime.

¶36 In reviewing the trial court's evidentiary rulings, we must determine whether the court exercised its discretion in accordance with the facts in the record and accepted legal standards. *See* ***Sorenson***, 143 Wis. 2d at 240. If the trial court had reasonable basis for its rulings, then this court will not find an erroneous exercise of discretion. *See* ***id.***

¶37 The right against compelled self-incrimination is protected by the Fifth Amendment to the United States Constitution and art. I, § 8, of the Wisconsin Constitution. The state constitutional provision is no broader than the federal provision. *See* ***id.*** at 260. In ***Doyle***, the Supreme Court observed that the State's comment during a trial regarding a defendant's silence implicates the accused's Fifth Amendment right. *See* ***id.*** at 617-18. The State concedes that a defendant's silence before ***Miranda*** warnings are given cannot be used in the

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> [W]hile it is true that the ***Miranda*** warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Doyle, 426 U.S. at 618 (footnote omitted); *accord* ***State v. Fencl***, 109 Wis. 2d 224, 233-234, 325 N.W.2d 703 (1982).

[9] We do not address this latter argument because a concurrence is not binding authority. *See* ***Setagord***, 211 Wis. 2d 397, 409 n.6, 565 N.W.2d 506 (1997).

State's case-in-chief. *See* ***State v. Brecht***, 143 Wis. 2d 297, 314, 421 N.W.2d 96 (1988); ***State v. Fencl***, 109 Wis. 2d 224, 236, 325 N.W.2d 703 (1982).[10]

¶38 Wisconsin courts, however, have held that art. I, § 8, of the Wisconsin Constitution does not protect post-arrest, pre-***Miranda*** silence when a defendant testifies at trial. *See* ***Sorenson***, 143 Wis. 2d at 260, n.12; ***Brecht***, 143 Wis. 2d at 314 (prosecutor could impeach defendant on cross-examination with pre-arrest ***Miranda*** silence). In holding that pre-***Miranda*** silence may be used to impeach a testifying defendant, the ***Sorenson*** court stated:

> [O]nce a defendant elects to take the stand, any comment by the prosecution regarding defendant's pre-***Miranda*** silence may be explored and explained by defendant's own counsel on redirect. This protection more than adequately shields against any potentially misleading inference which might be drawn from the prosecution's references.

Id. at 258.

¶39 In ***Brecht***, the defendant contended that the State's repeated references to his pre-***Miranda*** silence during cross-examination and closing argument infringed on his right to silence. *See* ***Brecht***, 143 Wis. 2d at 314. The court held that based on its decision in ***Sorenson***, once a defendant elects to

[10] In ***Fencl***, the State violated Fencl's constitutional rights by referring to his pre-arrest, pre-***Miranda*** silence in its case-in-chief. The supreme court concluded:

> Any time an individual is questioned by the police, that individual is compelled to do one of two things—either speak or remain silent. If both a person's pre-arrest speech and silence may be used against that person, as the state suggests, that person has no choice that will prevent self-incrimination. This is a veritable "Catch-22." ... We hold that a person is entitled to the protection of the Fifth Amendment even prior to arrest or a custodial interrogation.

Fencl, 109 Wis. 2d at 237.

testify, such references do not violate the "right to silence" under art. I, § 8, of the Wisconsin Constitution. *See* ***id.*** According to ***Brecht***, ***Sorenson*** held that a testifying defendant may be impeached with his pre-***Miranda*** silence. *See* ***Brecht***, 143 Wis. 2d at 314. ***Brecht*** also relied upon ***Jenkins v. Anderson***, 447 U.S. 231 (1980), in which the United States Supreme Court also held that the Fifth Amendment is not violated when a testifying defendant is impeached with his pre-arrest silence.

¶40 Further, in ***State v. Wulff***, 200 Wis. 2d 318, 334-43, 546 N.W.2d 522 (Ct. App. 1996), this court held that a prosecutor may respond with evidence of the defendant's silence to impeach a defendant's claim of cooperation with the police. ***Wulff*** explained that ***Doyle*** "does not apply to cross-examination that merely inquires into [the defendant's] prior inconsistent statements." ***Id.*** at 339-40. Where a defendant has testified that to an effort to assist police, silence may be used to challenge the credibility of that statement. *See* ***id.*** at 342-43.

¶41 Although he does not dispute that no ***Miranda*** warning was given to him, he contends that ***Brecht***, ***Sorenson*** and ***Wulff*** are distinguishable. He asserts that unlike this case, in ***Brecht*** and ***Sorenson***, the police did not initiate the attempt to question the suspects, whereas here the officer contacted Lallaman, who indicated that he did not want to speak to the police until he contacted his attorney. He also argues that the prosecutor attempted to impeach him on his initial decision to speak with an attorney. Finally, he claims that unlike the circumstances in ***Wulff***, he never testified that he cooperated with the police.

¶42 Considering his last contention first, the record does not support Lallaman's premise. Rather, he testified that he had attempted to contact the police to make a statement and that he wanted to talk to the police to "stop all this

before it even got this far." He further indicated that when he attempted to contact an officer to give a statement, he was informed that a detective was not available. Lallaman testified that his call was not returned. The State's cross-examination of Lallaman, inquiring why during the seven months until trial he did not offer any explanation of the events, was permissible impeachment under ***Wulff***.

¶43 Lallaman's attempt to distinguish ***Sorenson*** and ***Brecht*** is equally without merit. He does not convince us that the factual distinction he raises is significant when considering the cases' core holdings. Neither case suggests that the rule propounded in ***Sorenson*** was dependent upon who initiated the police contact.

¶44 Finally, and contrary to Lallaman's characterization, the prosecutor did not attempt to impeach him with his decision to speak with an attorney rather than submit to an initial interview. While this was the explanation Lallaman offered in his testimony, the record demonstrates that the prosecutor did not refer to this explanation during cross-examination and, indeed, during closing argument, affirmed Lallaman's right to consult an attorney. We are therefore satisfied that the trial court did not err by permitting the State to present evidence of Lallaman's pre-arrest, pre-***Miranda*** silence.

3. Closing Arguments Ruling

a. Standard of Review

¶45 The trial court has discretion to determine the propriety of closing arguments. *See* ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979). Attorneys should be allowed considerable latitude. *See* ***id.*** A challenge to closing arguments must be timely made. *See* ***State v. Holt***, 128 Wis. 2d 110, 124, 382

N.W.2d 679 (Ct. App. 1985). On appeal, this court affirms a trial court's ruling unless it erroneously exercised its discretion and has likely prejudiced the defendant. *See* ***State v. Camacho***, 176 Wis. 2d 860, 886, 501 N.W.2d 380 (1993). Whether the alleged error has prejudiced the defendant is determined by examining the statements in the context of the entire record. *See* ***State v. Perry***, 136 Wis. 2d 92, 105, 401 N.W.2d 748 (1987).

b. References to Lallaman's Silence

¶46 As indicated above, the State may comment on a defendant's post-arrest, pre-***Miranda*** silence, if he or she testifies. *See* ***Sorenson***, 143 Wis. 2d at 258. If a defendant makes statements that "invite reply," the State may make a reasonable response. *See* ***Wulff***, 200 Wis. 2d at 341. Here, the State maintains that it did not criticize Lallaman for exercising his constitutional rights, but was merely pointing out that his silence was inconsistent with his trial testimony. In its closing argument, it explained as much:

> That's my only point, ladies and gentlemen, not that he didn't have a right to talk to an attorney, and he did have a right not to say anything to anybody. But don't stand in front of you and say he wanted in the worst way to put an end to this. He wants to put an end to it but not by telling the truth, not by giving anyone an opportunity to investigate his story and find out whether it has even the slightest element of the truth.

As discussed above, the State did not improperly refer to Lallaman's silence on cross-examination. Rather, we agree that the prosecutor properly argued that Lallaman's silence contradicted his testimony that he wanted to cooperate with the police and tell them what actually happened. Reference to the evidence introduced during trial is proper during closing arguments. *See* ***Draize***, 88 Wis. 2d

at 454. Therefore, the State's arguments did not violate Lallaman's constitutional right to silence.

c. References to Other Acts

¶47 Lallaman complains that the State improperly referred to the March 11 incident in its closing argument to prove that he had committed the crime charged. Lallaman highlights the State's argument:

> It is demonstration of the defendant's intent. The fact that two days later he does a very similar act under very similar circumstances, he comes into her room as she's sleeping. He lies in the bed with her. He's not trying to wake her up, he's lying in bed with her, and he's rubbing her thigh. Again, I think clearly, a very clear interpretation would be that perhaps he's trying to do the same thing in this particular occasion … I think clearly indicates that his intent is to be sexually aroused or gratified, and it is to accomplish a touching of a private area, the vagina of this child.

¶48 We do not share Lallaman's interpretation of the State's comments. Rather, the prosecutor properly argued that the March 11 incident supported a reasonable inference concerning Lallaman's intent when he placed his hand inside Megan's shorts on March 9.

¶49 Lallaman further complains that the State suggested in its closing argument that Lallaman may have sexually assaulted one of Gena's children. The State responds that it did not suggest that Lallaman had actually assaulted one of Gena's children. It was only demonstrating Gena's bias for Lallaman:

> There also is a very strong personal motivation that she must have. You know, a lot of times people like to believe what they want to believe. And for whatever reason, she has chosen to have a significant relationship with this man. She has small children, one of whom is a five- or six-year-old daughter. I'm sure that she would prefer to believe that

> Donald Lallaman is not someone who is likely to sexually abuse her small child. The easiest course of action for her to take is the ostrich approach and bury her head in the sand and ignore the reality and that's a choice that apparently she's made in this case.

¶50 This court again fails to see how the quoted material could be construed as accusing Lallaman of sexually assaulting other children. The State's argument only suggests that Gena would "prefer to believe that Donald Lallaman is not someone who is likely to sexually abuse her small child." The jury heard no evidence that Lallaman abused Gena's daughter, and Megan denied accusing him of this. The jury could only reasonably construe the State's argument to mean that Gena did not want to believe that Lallaman had attempted to sexually assault a child.

d. Other Alleged Improprieties During Closing Argument

¶51 Lallaman asserts that the prosecutor acted improperly when he referred to his own beliefs about how sex offenders act, when he commented about the truthfulness of certain testimony, and when he called Lallaman names ("a sneak in the night"). He also complains that the court handled the objections unevenly during closing arguments when it overruled Lallaman's and sustained the State's.

¶52 Lallaman claims further that the conduct complained of violates the standards set forth in the ABA Standards for Criminal Justice–Prosecution Function, Standard 3-5.8 (3d ed. 1993), pertaining to arguments to the jury. "While [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones. [I]mproper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." ***Berger v. United States***, 295 U.S. 78, 88 (1935). "It is

improper for a prosecutor to express his personal opinion on the merits of a case." ***Phelps v. Duckworth***, 757 F.2d 811, 824 (7th Cir. 1985) (citation omitted). In ***Phelps***, the court affirmed a writ of habeas corpus, concluding, "This case is not one where there has been merely an isolated instance of prosecutorial indiscretion. Rather, the prosecutor in this case engaged in repeated egregious misconduct which, considering the record as a whole, denied the petitioner due process." ***Id.*** Lallaman contends that this is such a case.

¶53 The State concedes that "[t]he prosecutor did frequently preface his remarks to the jury with expressions of personal belief like 'I choose to believe' or 'I actually believe.'" The State asserts, however, that the prosecutor never suggested to the jury that his opinion was based on anything other than the evidence introduced at trial. It further contends that it is proper to express opinions if they are based solely on the evidence presented during the trial. Finally, the State points out that Lallaman only objected once to the prosecutor's closing argument and the court overruled the objection.[11] The defense failed to further object, request that any portion of the closing argument be struck, or request that the jury be given a curative instruction. Defense counsel also failed to move for a mistrial. The State argues that Lallaman has therefore waived his right to complain of error in the closing argument.

[11] The prosecutor stated to the jury that he believed "that there is sanctity in the oath to tell the truth." Lallaman objected on the grounds that it was improper for the prosecutor to express his personal beliefs.

Lallaman argues that the court unevenly addressed the parties' objections. The defense failed to object more than once during closing argument. Where the court was not asked to exercise its discretion, Lallaman cannot then contend that the court unfairly exercised its discretion. *See* ***State v. Alsteen***, 108 Wis. 2d 723, 727-28, 324 N.W.2d 426 (1982).

¶54 A claim that the prosecutor has engaged in improper closing argument must be joined with a motion for mistrial. *See* ***Camacho***, 176 Wis. 2d at 886. On review, we will affirm the trial court's ruling unless an erroneous exercise of discretion likely affected the jury's verdict. *See* ***State v. Bjerkaas***, 163 Wis. 2d 949, 963, 472 N.W.2d 615 (Ct. App. 1991). Where the trial court was not asked to exercise its discretion, there is nothing for this court to review under the appropriate standard. Because Lallaman failed to move for a mistrial, he has failed to preserve the issue of prosecutorial misconduct for appeal.

¶55 Moreover, we agree from a review of the record that the prosecutor never suggested during his closing argument that his opinion was based on anything other than the evidence introduced at trial. In ***State v. Johnson***, 153 Wis. 2d 121, 449 N.W.2d 845 (1990), the supreme court held that counsel may express an opinion if it is clear to the jury that the opinion is based solely on the evidence. *See* ***id.*** at 133 n.11. "The prosecutor may 'comment on the evidence, detail the evidence, argue from it to a conclusion and state that the evidence convinces him and should convince the jurors.'" ***Draize***, 88 Wis. 2d at 454 (citation omitted). We are satisfied that the prosecutor's comments were within the parameters of these rules.

4. In the Interest of Justice

¶56 WISCONSIN STAT. § 752.35 provides for discretionary reversal by the court of appeals.[12] A new trial in the interest of justice will be granted only in

[12] WISCONSIN STAT. § 752.35 provides:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of

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limited cases. *See* ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983). If the defendant should not have been found guilty and it is substantially probable that a new trial will produce a different result, then the appellate court may grant a new trial. *See* ***State v. Larsen***, 141 Wis. 2d 412, 423, 415 N.W.2d 535 (Ct. App. 1987). A new trial may be granted if the controversy is not fully tried, such as where the jury is improperly prevented from hearing important testimony. *See* ***State v. Ambuehl***, 145 Wis. 2d 343, 366, 425 N.W.2d 649 (Ct. App. 1988).

¶57 Lallaman argues that the case has not been fully tried because of the evidence that he claims was improperly excluded or included. Lallaman has presented no other reason for this court to grant a new trial in the interest of justice. Because we have already resolved that the trial court committed no prejudicial error in its evidentiary rulings, Lallaman is not entitled to a new trial in the interest of justice.

ORDER TO PROVIDE DNA SAMPLES

¶58 WISCONSIN STAT. § 973.047(1)[13] authorizes a court to order a DNA sample in two types of cases. Under this statute, a court is required to order a

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> whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

[13] WISCONSIN STAT. § 973.047(1) provides in part:

> **Deoxyribonucleic acid analysis requirements.** (1)(a) If a court imposes a sentence or places a person on probation for a violation of s. 940.225, 948.02(1) or (2) or 948.025, the court shall require the person to provide a biological specimen to the state crime laboratories for deoxyribonucleic acid analysis.

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defendant to provide a DNA sample for a conviction under certain statutes, but has discretion to order a sample for a conviction under certain other statutes. *See* WIS. STAT. § 973.047(1)(a) and (b). Lallaman was convicted for attempting to violate WIS. STAT. § 948.02(1), a statute enumerated in § 973.047(1)(a). Conviction under § 948.02(1) would require the court to order a defendant to produce a DNA sample. However, Lallaman was only convicted of attempting to violate this statute. He argues that § 973.047 was not intended to apply to "attempts."

¶59 Interpretation of a statute is a question of law that we review de novo. *See* ***State v. Setagord***, 211 Wis. 2d 397, 405-06, 565 N.W.2d 506 (1997). We interpret the statute to discern the legislature's intent. *See* ***id.*** at 406. We first read the plain language of the statute. *See* ***id.*** If the language unambiguously and clearly sets forth the legislative intent, we apply the statute to the facts and do not look beyond the plain language. *See* ***id.*** We consider the statute to be ambiguous if it is "capable of being understood in two or more different senses by reasonably well-informed persons." ***Id.*** Our job is not to rewrite unambiguous statutes. *See* ***Johnson v. City of Edgerton***, 207 Wis.2d 343, 351, 558 N.W.2d 653 (Ct. App. 1996) "We presume, of course, that the legislature chose its terms carefully and with precision to express its meaning." ***Id.*** (citation omitted).

¶60 The State does not dispute that WIS. STAT. § 973.048, concerning sex offender reporting requirements, parallels WIS. STAT. § 973.047. Section

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> (b) Except as provided in par. (a), if a court imposes a sentence or places a person on probation for any violation under ch. 940, 944 or 948 or ss. 943.01 to 943.15, the court may require the person to provide a biological specimen to the state crime laboratories for deoxyribonucleic acid analysis.

973.048[14] specifically states that it applies to attempt convictions. However, § 973.047 does not. The legislature would have written § 973.047 to include

[14] WISCONSIN STAT. § 973.048 sets forth in part:

> **Sex offender reporting requirements.** (1m) Except as provided in sub. (2m), if a court imposes a sentence or places a person on probation for any violation, or for the solicitation, conspiracy *or attempt to commit any violation*, under ch. 940, 944 or 948 or ss. 943.01 to 943.15, the court may require the person to comply with the reporting requirements under s. 301.45 if the court determines that the underlying conduct was sexually motivated, as defined in s. 980.01 (5), and that it would be in the interest of public protection to have the person report under s. 301.45.
>
> (2m) If a court imposes a sentence or places a person on probation for a violation, or for the solicitation, *conspiracy or attempt to commit a violation*, of s. 940.22 (2), 940.225 (1), (2) or (3), 944.06, 948.02 (1) or (2), 948.025, 948.05, 948.055, 948.06, 948.07, 948.08, 948.11 or 948.30, or of s. 940.30 or 940.31 if the victim was a minor and the person was not the victim's parent, the court shall require the person to comply with the reporting requirements under s. 301.45 unless the court

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attempts if it intended to do so. *See* ***Johnson***, 207 Wis. 2d at 351. It did not, so the trial court was without authority to order the DNA sample. Accordingly, we reverse the trial court's order.

By the Court.—Judgment affirmed; order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

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determines, after a hearing on a motion made by the person, that the person is not required to comply under s. 301.45 (1m). (Emphasis added.)