COURT OF APPEALS
DECISION
DATED AND FILED

October 13, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2833-CR **Cir. Ct. No. 2007CF457**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MORRIS L. HARRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 FINE, J. Morris L. Harris appeals the judgment entered after a jury found him guilty of battery to a domestic-abuse-injunction petitioner, *see* WIS. STAT. §§ 940.20(1m)(a) & 813.12, and substantial battery with intent to cause bodily harm, *see* WIS. STAT. § 940.19(2), both while armed and as an habitual criminal, *see* WIS. STAT. §§ 939.63 & 939.62. He also appeals the order denying

his motion for postconviction relief. Harris argues that: (1) there were errors in the jury instructions; (2) his lawyer gave him constitutionally deficient representation; (3) the trial court should have recused itself; (4) his trial was unfair because of: alleged prosecutorial vindictiveness, the removal of a black juror from the panel, the failure to remove another juror, and because the trial court would not let his rebuttal witnesses testify; and (5) the trial court erroneously exercised its discretion when it sentenced him. We affirm.

I.

¶2 On January 8, 2007, Harris went to Alexis Lewis's home where she lived with their three-year-old son. The two fought with each other until a neighbor called the police. When the police arrived, Harris fled. Lewis had a fractured rib, head abrasions and jaw pain. Lewis told police that Harris "grab[bed] her by the throat and strangle[d] her, thr[e]w her against the wall causing her to fall onto her back, and kick[ed] her in the stomach," and "struck her in the right side of her chest with an ironing board." Their three-year-old son told police that "Daddy hit mommy with a board."

¶3 At the trial, Harris claimed that he acted in self-defense and that Lewis had started the argument. During *voir dire* of the jury panel, the prosecutor sought to remove a black juror, Andre Dukes, for cause, and told the trial court that he had "two serious concerns:"

> First, he [Dukes] indicated that he had been convicted of a misdemeanor gun charge. He claimed it was carrying a concealed weapon.
>
> In fact, he had been convicted of five, looks like misdemeanor charges, which one would involve a gun, I believe it was a pointing case, endangering safety by use of a dangerous weapon pointing case, not carrying concealed weapon case.

> So, the State was concerned about his candor in that regards and that concerned -- that concern was exacerbated by the fact that Mr. Dukes also indicated that while he believed the prosecution treated him fairly over the course of that case, that he does not believe that the courts had treated him fairly over the course of that case.
>
> So, the State was of the opinion that Mr. Dukes was exhibiting both subjective, as well as objective bias, and moved to strike him for cause for those reasons.

¶4 The court struck Dukes for cause, but noted that the juror who replaced him:

> [I]s also an African-American, so what basically happened here is we struck Mr. Dukes and allowed [the replacement juror] to remain on the panel, and we do have, I believe, two African-American jurors that are on the final panel.
>
> So, in any event, it was a wash. There was no way that we were going to get more than two on this panel, based on the way the people came up from jury management, so there is no Batson issue here.

¶5 Both Lewis and Harris testified at the trial. During the jury-instruction conference, Harris asked the trial court to instruct the jury on the lesser-included offense of simple battery. The trial court, however, found that the evidence did not support the lesser-included offense. As we have seen, the jury found Harris guilty of both charges.

¶6 Before sentencing in this case, Harris pled guilty in a separate substantial-battery case with a different victim. The two cases were joined for a status conference because Harris's lawyer in both cases, Lori A. Kuehn, sought to withdraw. Harris wanted to file a motion to withdraw his guilty plea in the other case. According to Kuehn that "would make it most likely I would be called as a witness [at the plea-withdrawal hearing] and it creates a conflict of interest." The

trial court granted Kuehn's motion to withdraw and *sua sponte* recused itself from the other case:

> THE COURT: [T]he Court is going to recuse itself from hearing the case.
>
> The Court has certain information that may cause the Court to not be as fair as possible in determining the credibility of certain witnesses in this case.
>
> THE CLERK: On both cases?
>
> THE COURT: I'm going to send them both.
>
> [PROSECUTOR]: You are sending even the matter for which this Court heard the trial?
>
> THE COURT: Actually, take it back. I'm going to keep the trial case.

¶7 Ultimately, the trial court sentenced Harris to seven years on the battery-to-an-injunction-petitioner count (five years' initial confinement, followed by two years of extended supervision). The trial court sentenced Harris on the substantial battery count to seven years (five years' initial confinement followed by two years of extended supervision). The sentences on both counts were ordered to be consecutive to one another. We address Harris's many contentions on appeal in turn.

II.

A. *Jury Instructions.*

¶8 Harris claims that the trial court erred: (1) by refusing to give the lesser-included instruction of simple battery, *see* WIS. STAT. § 940.19(1); (2) by giving the self-defense instruction allegedly only in connection with the substantial-battery count; and (3) by giving the "while armed" instruction without also giving a "nexus" instruction. Each contention is without merit.

1. Lesser-included instruction

¶9 A trial court has broad discretion as to how to instruct the jury, but whether the evidence permits a lesser-included-offense instruction is a legal question that we review independently. ***State v. Kramar***, 149 Wis. 2d 767, 792, 440 N.W.2d 317, 327 (1989). Submission of a lesser-included offense instruction is proper only "when there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense." ***Ibid.*** As the trial court recognized, that was not the case here.

¶10 Harris's basis for requesting an instruction on simple battery was that, he claims, the medical reports were ambiguous as to whether the fractured rib was caused by Harris during the fight or was an old fracture. He points to one comment in Lewis's medical records which said the rib fracture "could be old." The trial court rejected Harris's request, finding that: "There is really no clear evidence here that would allow a jury, a reasonable jury, to … conclu[de] … that this fracture was not a result of [Harris's] actions. We agree.

¶11 Lewis testified:

- Harris "grabbed the ironing board, and stood over me with it and rammed it into my side."
- An ambulance took her for medical treatment and the doctor "told me, that I had a fracture, and she gave me the rib brace and told me to come back in a few weeks."
- Lewis was never told that the rib fracture was old; and she never had any problems with her ribs before the fight with Harris that was the basis for the charges.

¶12 The medical records consistently refer to Lewis suffering a fractured rib, and document that she was treated for a fractured rib. One notation even refers to the injury as "[n]ew right lateral 7th rib fracture." The medical records also describe Lewis's presentation as having "tenderness to palpation of rt ribs from 4th to 9th ribs" and "[f]eels something popping when takes a deep breath and has pain with deep breathing."

¶13 We agree with the trial court that no reasonable jury could have both acquitted Harris of substantial battery and convicted him of simple battery.

2. Self-defense

¶14 Harris's next complaint is that the trial court read the self-defense instruction to the jury allegedly only in connection with the instruction on the substantial battery and not also in connection with the battery-to-an-injunction-petitioner charge. It did not.

¶15 A trial court's instructions to the jury must be read as a whole: "If the overall meaning is a correct statement of the law, then any erroneous part of the instruction is harmless and not grounds for reversal." ***State v. Petrone***, 161 Wis. 2d 530, 561, 468 N.W.2d 676, 688 (1991), *cert. denied*, 502 U.S. 925. The sequence here was that the trial court instructed the jury on battery to an injunction petitioner, then instructed the jury on substantial battery, and then gave the self-defense instruction. The self-defense instruction was not limited to one crime or the other. Rather, the instruction broadly stated: "Self-defense is an issue in this case," and then went on to instruct the jury on self-defense. Thus, the overall meaning of the instructions were correct; the self-defense instruction applied to both charges. Contrary to Harris's contention, there was no chance that the jury was confused by the placement of the self-defense instruction, which, as noted,

told the jury that self-defense was "an issue" in the case. Further, the trial court explained in its order denying Harris's motion for postconviction relief that: "when you have multiple battery cases, I only instruct the jury once on the self-defense issue."

3. "While armed"

¶16 Harris also argues that the trial court erred in giving the standard "while armed" jury instruction without also giving a required ***State v. Peete***, 185 Wis. 2d 4, 517 N.W.2d 149 (1994), "nexus" instruction to link the weapon to the crime.

¶17 First, he did not raise this issue during the jury instruction conference and thus forfeited his right to challenge it, except in an ineffective-assistance-of-counsel context. *See* WIS. STAT. § 805.13(3) ("Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict.") Second, and more significant, this case is not like ***Peete***, where the defendant had a loaded gun under a mattress in another room, but did not necessarily use it in connection with the drug crime with which he was charged. ***Peete***, 185 Wis. 2d at 18, 517 N.W.2d at 154 (while armed penalty enhancer applies only when defendant "possessed the weapon to facilitate commission of the predicate offense").

¶18 Here, Harris was charged with using the ironing board as *the* dangerous weapon in committing the charged crimes. Thus, the nexus between the weapon and the crime was automatically present. *See* ***id.*** Moreover, the model instruction given here asked the jury to determine whether Harris committed "this crime while using a dangerous weapon." Any contention that

there was error with respect to the ironing board and its nexus to the battery is wholly without merit.

B. *Alleged Ineffective Assistance of Harris's Trial Lawyer.*

¶19 Harris claims his trial lawyer gave him constitutionally deficient representation because she: (1) did not object to the testimonial references to his criminal history; (2) did not investigate Lewis's violent temper and reputation for untruthfulness; (3) did not seek to dismiss the battery-to-injunction-petitioner count because there was a mistake in the date on the petition for the injunction; (4) did not put into evidence that Harris lived with Lewis on the fight's date; and (5) did not put in evidence that was sufficient to support the request for the simple-battery instruction.

¶20 To establish ineffective assistance of counsel, a defendant must show that the lawyer's representation was deficient and that the defendant was prejudiced as a result. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient representation, a defendant must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.***, 466 U.S. at 690. To prove prejudice, a defendant must demonstrate that the lawyer's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.***, 466 U.S. at 689. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***, 466 U.S. at 694. This is not, however, "an outcome-determinative test. In decisions following ***Strickland***, the Supreme Court has reaffirmed that the

touchstone of the prejudice component is 'whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.'" ***State v. Smith***, 207 Wis. 2d 258, 276, 558 N.W.2d 379, 386 (1997) (citations and quoted source omitted).

¶21 Further, we need not address both aspects of the ***Strickland*** test if the defendant does not make a sufficient showing on either one. *See* ***Strickland***, 466 U.S. at 697. Our review of an ineffective-assistance-of-counsel claim presents mixed questions of law and fact. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990). A circuit court's findings of fact will not be disturbed unless they are clearly erroneous. ***Ibid.*** Its legal conclusions whether the lawyer's performance was deficient and, if so, prejudicial, are questions of law that we review *de novo*. ***Id.***, 153 Wis. 2d at 128, 449 N.W.2d at 848.

¶22 Finally, a trial court must hold an evidentiary hearing on a defendant's ineffective-assistance claim if the defendant alleges facts that, if true, would entitle the defendant to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309, 548 N.W.2d 50, 53 (1996). "Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review *de novo*." ***Id.***, 201 Wis. 2d at 310, 548 N.W.2d at 53. If, however:

> "[T]he defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing."

Id., 201 Wis. 2d at 309–310, 548 N.W.2d at 53 (quoted source omitted). Under these standards, all of Harris's contentions fail because he did not prove any prejudice.

1. References to Harris's criminal history

¶23 Harris claims his lawyer should have moved *in limine* to prevent any references to his criminal history and should have objected during the following references set out by italics:

- When asked whether Harris was "present at [the injunction] hearing to defend himself," Lewis answered: "No, he was, I believe, at the *House of Correction* then."
- When asked whether Harris "even kn[e]w about the injunction," Lewis answered: "They told me that it was active and then something happened another time and *I had contacted the police*."
- When asked whether Harris "ever [did] house arrest time" at her home, Lewis responded: "He ended up *getting revocated*, or something."
- When asked if she was a "controlling" person, she said: "No, but *I have been beaten before*."
- The prosecutor asked Harris if he had "open *criminal cases*," and he responded: "Absolutely."

Then there was the following exchange between the prosecutor and Harris:

> Q And at the time, you know this because *you have been through this a few times*, you know that as a condition –
>
> A I haven't been through this a few times.
>
> Q -- as a condition for *all your criminal cases*, you would inquire --

> [DEFENSE COUNSEL]: I am going to object, I have an objection.

¶24 Harris also claims that the prosecutor improperly questioned him using court documents from earlier criminal matters where he had to keep his current address on file with the court. The prosecutor's only questions from these documents were about Harris's addresses and change of addresses used to rebut Harris's claim that he lived with Lewis during the fight that underlies this appeal. Although Harris complains on this appeal that his lawyer did not object, the lawyer did object repeatedly during this questioning, but the trial court overruled the objections every time.

¶25 Harris also complains that the prosecutor asked him whether he had "been around a lot of law enforcement officers." Here again, Harris's lawyer objected, but trial court overruled the objection.[1]

¶26 When Harris testified, he said that he had eight prior criminal convictions. *See* WIS. STAT. RULE 906.09 (a witness's convictions may be considered by the fact-finder in assessing the witness's credibility). The trial court told the jury that "a criminal conviction at some previous time is not proof of guilt of the offense now charged." The references in paragraph 24 of this opinion about which Harris now complains are consistent with that history and were either not

[1] Harris also argues that his lawyer should have objected when the State introduced before and after photos of Harris to show that he did not have any injuries to disprove his claim that Lewis was the aggressor and Harris was simply defending himself. Harris, however, did not raise this issue in his postconviction motion and so has forfeited his right to have us consider it. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501, 505 (1997). Further, the pictures are not in the Record, and therefore, we must assume they support the conviction. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992). Although Harris does attach the pictures to his appellate brief, that does not put them in the Record. *See* ***Jenkins v. Sabourin***, 104 Wis. 2d 309, 313–314, 311 N.W.2d 600, 603 (1981).

prejudicial under ***Strickland*** in connection with those matters to which Harris's trial lawyer did not object, or they were harmless beyond a reasonable doubt as to those matters to which Harris's lawyer did object but was overruled (and thus we do not have to determine whether the trial court should have sustained the objections). *See* ***State v. Edwardsen***, 146 Wis. 2d 198, 210, 430 N.W.2d 604, 609 (Ct. App. 1988) (limiting instructions cure any prejudice); ***State v. Johnston***, 184 Wis. 2d 794, 822, 518 N.W.2d 759, 768 (1994) (juries are presumed to follow instructions); ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222, 231–232 (1985) (An error is harmless when "there is no reasonable possibility that the error contributed to the conviction.").

2. Lewis's violent temperament

¶27 Harris claims his lawyer was constitutionally deficient because she failed to investigate Lewis's violent temperament, including one earlier incident where Lewis hit Harris so hard that he lost a tooth. The jury, however, heard about Lewis's violent temperament directly from her:

- "I was hitting him, … he wasn't hitting me then, but I was hitting him … [i]n the face."
- After Harris locked himself in the bathroom, she "was ramming the bathroom door with the ironing board."
- "I threw some big candles [at him] … and a curler, a cup, I think, I think some other stuff."
- "I threw a cup … I threw a lot of things [at him]."

¶28 Harris has not shown ***Strickland*** prejudice.

3. Injunction petition

¶29 Harris contends his lawyer was deficient for not seeking dismissal of the battery-to-an-injunction-petitioner count. He claims that the underlying petition was defective because the notary wrote the wrong year on the petition in support of the injunction. Relying on ***Laluzerne v. Stange***, 200 Wis. 2d 179, 546 N.W.2d 182 (Ct. App. 1996), Harris argues that the battery-to-an-injunction-petitioner charge should have thus been dismissed because a valid petition is a prerequisite of a valid injunction. The trial court rejected this argument:

> The defendant does not argue that there is anything wrong with the actual injunction, only that it is based on an invalid petition which renders the injunction invalid. He argues that because both the victim and the notary dated their signatures 2008 on the petition (when it was really 2005), the injunction became invalid, citing ***Laluzerne v. Stange***, 200 Wis. 2d 179 (Ct. App. 1996), for the proposition that a valid petition is a prerequisite of a valid injunction. ***Laluzerne*** does not support the defendant's argument. That case holds that an injunction may be granted only if the petitioner files a petition alleging the necessary elements. No petition had been filed in that case, and so the injunction was not valid. Here, a petition had been filed, and it had been accepted by the clerk of court's office on February 23, 2005 when it was filestamped. Although it is unknown why one or both (notary and petitioner) used a 2008 year (it is not clear if the petitioner wrote 2008 or 2005), its receipt by the clerk of court's office on February 23, 2005 would have constituted sufficient evidence to conclude that the petition had been prepared and filed in 2005. Trial counsel would not have been successful in arguing that the injunction was invalid.

¶30 We agree with the trial court's analysis. The scrivener's error in the petition does not go to the merits of whether the injunction was valid. *See* WIS. STAT. RULE 805.18. There was no ***Strickland*** prejudice.

4. Co-habitation evidence

¶31 Next, Harris complains that his trial lawyer did not present evidence that he lived with Lewis at the time of the fight. Lewis testified that she and Harris had lived together in the past and that around the time of this fight he occasionally stayed at her home. First, whether Harris lived with Lewis on the date of the fight is largely irrelevant as to whether he battered her. Second, the jury had the evidence Harris complains his lawyer did not elicit. Harris has not shown ***Strickland*** prejudice.

5. Evidence to support lesser-included instruction

¶32 Finally, Harris claims his trial lawyer was constitutionally deficient for not presenting more evidence to show that Lewis's rib fracture was old. The trial court rejected this claim ruling that even with that additional evidence, it would not have given the simple-battery instruction because: "[t]he medical records are replete with references to rib fractures" and:

> Not only was the court not in a position to rule out a rib fracture suffered by the victim, but the victim had multiple other injuries stemming from this altercation; and even assuming the medical reports about the rib fracture were ambiguous, there was other evidence of injury to the victim that would have precluded the court from giving the lesser included instruction as requested by the defense.

¶33 We agree. Again, Harris has not shown ***Strickland*** prejudice.

C. *Recusal.*

¶34 Harris argues that the trial court should have recused itself from this case. As we have seen, the trial court *sua sponte* recused itself from the other, earlier, case because it "ha[d] certain information that" it determined might

"cause" it "to not be as fair as possible in determining the credibility of certain witnesses" in connection with that case. We reject Harris's argument that the trial court should have recused itself from this case as well.

¶35 First, Harris did not request recusal, and thus, has forfeited this claim. *See* ***City of Edgerton v. General Cas. Co. of Wis.***, 190 Wis. 2d 510, 519, 527 N.W.2d 305, 308 (1995) (party forfeits recusal claim if not timely raised). Second, there is no merit to Harris's claim that the trial court should have also *sua sponte* recused itself from this case, especially when the case had already been fully tried and all that remained was sentencing.

¶36 A court must recuse itself when it "determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." WIS. STAT. § 757.19(2)(g). This is a subjective determination. *See* ***State v. American TV & Appliance of Madison, Inc.***, 151 Wis. 2d 175, 183, 433 N.W.2d 662, 665, (1989) ("[T]he determination of the existence of a judge's actual or apparent inability to act impartially in a case is for the judge to make."). Here, the trial court found that it *could be fair* in this case. Harris has pointed to nothing that even hints that this subjective determination was fraudulent.

D. *Allegations of Unfair Trial.*

¶37 Harris claims "a variety of other issues combined" to make his trial unfair. Each is without merit.

1. Prosecutorial vindictiveness

¶38 Harris contends the prosecutor was vindictive because he had refused to plead guilty and testify against alleged co-conspirators in gang-related cocaine cases, and because he avoided conviction in the drug matters. He says the

prosecutor overcharged the domestic violence cases as a result. He claims the trial court erred in refusing to grant a hearing on this claim.

¶39 The trial court found "no prosecutorial vindictiveness on the part of the State based on the allegations set forth in the defendant's motion," noting that it presided over "the trial and did not perceive the prosecutor's conduct as the defendant has alleged." Although we review *de novo* the trial court's legal analysis as to whether a prosecutor was "vindictive," *see* ***United States v. Contreras***, 108 F.3d 1255, 1262 (10th Cir. 1997), Harris has not developed his vindictiveness argument, and, therefore, we decline to consider it. *See* ***Pettit***, 171 Wis. 2d at 646, 517 N.W.2d at 642. Certainly, a prosecutor in Wisconsin may charge all crimes that he or she fairly believes a defendant committed. *See* ***Sears v. State***, 94 Wis. 2d 128, 133–134, 287 N.W.2d 785, 787–788 (1980).

2. Removal of black juror

¶40 Next, Harris contends that the removal of Dukes from the jury for cause was racially motivated and violates ***Batson v. Kentucky***, 476 U.S. 79 (1986). As we have seen, the prosecutor had a legitimate non-race related reason for removing Dukes from the panel, and, indeed, Dukes was replaced by a juror who was also black. Further, Dukes was removed for cause, which is not covered by ***Batson***. *See* ***id.***, 476 U.S. at 96 (applies when prosecutor used peremptory challenge to exclude juror of the defendant's race).

3. Failure to remove juror

¶41 Harris complains that Jeremy Bose should have been removed from the jury because, on the second day of trial, Bose expressed concern that he lived near one of the addresses linked to the defendant and would have to drive past the address to get home. The trial court explained:

> By the way, on the record, I received a note, I think this is from you April, one of the jurors, Juror No. 23, Mr. Bose [had] concerns earlier today, because he stays four blocks away from one of the addresses the defendant is believed to reside at. Deputy Johnson told him that the defendant, no one in the courtroom, including her, knows his address that meaning the jurors [*sic*] address, wherever it may be. He voiced his concerns. He has to drive by the address to get home. I don't know that that's an issue. I told him to avoid the area and not to investigate the case on your own. He may have to drive by the scene, and he was advising us he had no other choice of doing that.

¶42 The trial court asked if either side had a problem with that and both the prosecutor and Harris's lawyer responded "No." Thus, the claim can only be considered in the context of an ineffective-assistance-of-counsel contention. *See* ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 678, 683 N.W.2d 31, 41–42 ("The absence of any objection warrants that we follow 'the normal procedure in criminal cases,' which 'is to address waiver within the rubric of the ineffective assistance of counsel.'") (citations omitted). Harris has not shown that leaving Bose on the jury was ***Strickland*** prejudice.

4. Rebuttal witnesses

¶43 Harris also claims that the trial court erroneously exercised its discretion when it refused to let him call rebuttal witnesses to testify that he was living with Lewis at the time of the fight. The trial court denied the request because:

> [M]y recollection of the testimony yesterday, was that he was there on-and-off, he did not reside there necessarily full-time, but that he would come-and-go.
>
> And to have these witnesses come in and testify that Mr. Harris supposedly told them that he had lived there from time-to-time, is really useless, it is a waste of time, there is nothing that is to be gained by any of this.

¶44 A trial court's decision to admit or exclude evidence is discretionary, and we will not reverse if it was "'in accordance with accepted legal standards and in accordance with the facts of record.'" ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498, 501 (1983) (quoted source omitted). Here, the trial court gave valid reasons under WIS. STAT. RULE 904.03, and found that the evidence would be cumulative and a waste of time. The trial court did not erroneously exercise its discretion in excluding Harris's rebuttal witnesses.

E. *Sentencing.*

¶45 Harris claims the trial court erroneously exercised its discretion when it sentenced him by: (1) allegedly relying on an improper factor—that he fathered many children with different women; (2) allegedly failing to adequately explain its reason for imposing a consecutive sentence; and (3) considering Harris's past arrests even though he was not convicted.

¶46 Sentencing is within the trial court's discretion, and our review is limited to determining whether it erroneously exercised that discretion. ***McCleary v. State***, 49 Wis. 2d 263, 277–278, 182 N.W.2d 512, 519–520, (1971); *see also* ***State v. Gallion***, 2004 WI 42, ¶68, 270 Wis. 2d 535, 569, 678 N.W.2d 197, 212 ("circuit court possesses wide discretion in determining what factors are relevant to its sentencing decision"). A trial court erroneously exercises its sentencing discretion "only where the sentence is so excessive and unusual and so

disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975).

¶47 The three primary factors a sentencing court must consider are the gravity of the offense, the defendant's character, and the need to protect the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633, 639 (1984). The sentencing court may also consider a variety of secondary factors listed in ***Harris***. *See* ***id.***, 119 Wis. 2d at 623–624, 350 N.W.2d at 639.

1. Alleged improper factor

¶48 The trial court analyzed each of the primary sentencing factors: it noted that the crimes were very serious, that Harris had a long criminal record, and that incarceration was needed to protect the community. Harris, however, objects to the part of the sentencing where the trial court discussed information in the presentence-investigation report:

> The next paragraph says that you enjoy having these women fighting over you. You seem to be proud of the fact that you have three three-year-old children by different women, and that these women are all falling all over each other to put money in your account.
>
> ….
>
> I have no doubt that whenever you're released, you will get involved in additional relationships and probably multiple relationships, have more kids, by those women, and victimize those women in the same way that you victimized the people involved in those two cases; that would be Ms. A[] and Ms. Lewis. Because it appears to me that you just don't get it. Talking about the fact that the victims did more to you than you did to them, I'm not really sure that that justifies burning somebody in the face

> with a curling iron on purpose, or stopping somebody with an ironing board and breaking their ribs.

¶49 We disagree with Harris's contention that the trial court's reference to him fathering other children was improper because it is clear from the context that these comments were part of background facts and the nature of his character to hurt women with whom he had children. There is nothing in the trial court's remarks that indicate that Harris was being punished for fathering children, but, rather, he was being punished because he battered the mothers of his children, and had done so in the past. The trial court did not erroneously exercise its sentencing discretion.

2. Concurrent versus consecutive

¶50 Harris also contends that his sentences should have been concurrent instead of consecutive, and the trial court failed to adequately explain why a consecutive sentence was imposed. We disagree.

¶51 The trial court fully explained why it imposed consecutive sentences:

> The Court believes that consecutive time is appropriate under all of the circumstances; again, due to the seriousness of the overall offenses and the fact that even though they arose out of this same set of allegations as in Count 1 in this matter, that there were two separate and distinct concerns and violations of the law; the first one being not only that there was a battery committed, but there was a violation of an injunction, and I was concerned about that. With regard to Count 2, the fact that there was substantial bodily harm that was caused to the victim.

3. Harris's criminal history

¶52 Finally, Harris claims the trial court improperly considered past arrests, which did not result in convictions and on what the trial court considered a

"pattern" of behavior, which Harris says was based on false information. Again, we disagree.

¶53 In sentencing Harris, the trial court explained:

> [T]hat there are a number of cases [against Harris] that were dismissed over the course of the years and I can take that into account. I am not giving that great weight here, but I am looking at that as an overall pattern of conduct that you put yourself in a position at least to be arrested for those type of offenses. That's all I'm going to look at those for. I'm not certainly viewing them in the same light as convictions and not even close; I'm not giving them anywhere near that weight.

¶54 Harris acknowledges that a sentencing court may consider unproved and uncharged crimes, *see* ***State v. Hubert***, 181 Wis. 2d 333, 346, 510 N.W.2d 799, 804 (Ct. App. 1993); ***Elias v. State***, 93 Wis. 2d 278, 284, 286 N.W.2d 559, 562 (1980) (sentencing court "can consider other unproven offenses, since those other offenses are evidence of a pattern of behavior which is an index of the defendant's character, a critical factor in sentencing."), but claims the pattern relied on was "false." Harris, however, had an opportunity to rebut or clarify any "false" information during the sentencing. Further, he does not tell us what part of the history on which the trial court partly relied is false. Thus, he does not develop his contention. Accordingly, we reject it. *See* ***Pettit***, 171 Wis. 2d at 646, 517 N.W.2d at 642.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.