COURT OF APPEALS DECISION DATED AND RELEASED

April 9, 1997

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.

NOTICE

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

No. 96-1448-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KELVIN GIBSON,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

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

PER CURIAM. Kelvin Gibson appeals from a judgment of conviction for battery by a prisoner as a habitual offender. He raises three evidentiary issues. We conclude that no prejudicial error occurred and affirm the judgment.

Gibson was charged with committing a battery upon Edward Beavers when he and Beavers were inmates at the Kenosha County jail. Gibson argues that a doctor's testimony should have been stricken, that he should have been allowed to introduce surrebuttal testimony that the victim was regarded as a racist, and that the entire statement of a witness should have been admitted. A circuit court's decision to admit or exclude evidence is a discretionary determination that will be upheld on appeal absent a misuse of discretion. *See* ***State v. Whittemore***, 166 Wis.2d 127, 136, 479 N.W.2d 566, 571 (Ct. App. 1991). We will not find an erroneous exercise of discretion if any reasonable basis exists for the decision. *See* ***State v. Lindh***, 161 Wis.2d 324, 361 n.14, 468 N.W.2d 168, 181 (1991).

At trial, an emergency room physician testified about his observation of Beavers' injuries. The doctor was asked whether certain injuries were consistent with Beavers having been choked or thrown against steel bars. His response was that they "could be." He also opined that Beavers was subjected to at least three blows because three different areas of the body were affected. After the doctor's testimony, Gibson moved to strike the doctor's opinions because the doctor did not testify that he held his opinions to a reasonable degree of medical certainty. The trial court denied the motion to strike.

We conclude that the failure of the doctor to indicate that his opinions were to a reasonable degree of medical certainty, if error, was harmless.[1] An evidentiary error requires reversal or a new trial only where the improper admission of evidence has affected the substantial rights of the party seeking relief on appeal. *See* ***State v. Britt***, 203 Wis.2d 25, 41, 553 N.W.2d 528, 534 (Ct. App. 1996). "[W]e will reverse only where there

[1] It is not necessary to address whether the motion to strike constituted a timely objection. We assume arguendo that a timely objection was made.

is a reasonable possibility that the error contributed to the final result. In making this determination, we weigh the effect of the inadmissible evidence against the totality of the credible evidence supporting the verdict." ***Id.*** (citations omitted).

The doctor's opinions as to whether the injuries were consistent with an attempted choking or a person being slammed against bars were not directly relevant to whether the crime had been committed. The pertinent portion of the doctor's testimony was the observation of the injuries. The doctor gave that testimony as a fact witness and not as an expert. Additionally, ample evidence was admitted that Beavers suffered injuries. A jail guard observed the injury to Beavers' eye. There were also pictures of Beavers' injuries.

We recognize that the doctor's testimony as to the possible cause of Beavers' injuries might have served to corroborate Beavers' version of the assault. Yet other evidence also corroborated Beavers' testimony. Inmate Michael Green testified that he saw Gibson kick and then attempt to choke Beavers. He also saw Gibson strike Beavers in the eye. Gibson admitted that he held Beavers up against the steel bars and that although he did not try to choke Beavers, his "thumbs might have come up a couple of times and touched his throat." In light of the totality of the evidence, the admission of the doctor's opinions was harmless.

In rebuttal, the prosecution asked Green if at any time when he was in jail with Beavers he heard Beavers use the terms "nigger," "tree jumper" or "coon." Green testified that he had not heard Beavers use such terms and that Beavers did not use them

during the assault by Gibson. In surrebuttal Gibson wanted to call a jail guard to testify that he believed that Beavers is a racist.[2]

The trial court denied Gibson's request to call the witness on the grounds that an opinion that someone is a racist or has used racist remarks was remote to the issues. "We review the decision to disallow rebuttal in light of the court's duty to exercise its discretion reasonably on the basis of the circumstances and the facts of record. Rebuttal is appropriate only when the defense injects a new matter or new facts." ***Pophal v. Siverhus***, 168 Wis.2d 533, 554-55, 484 N.W.2d 555, 563 (Ct. App. 1992) (citations omitted).

Gibson argues that through Green's testimony the prosecution introduced character evidence concerning Beavers. Green's testimony did not bring in a new matter. It was offered to rebut Gibson's testimony that Beavers had used racist remarks in the past and during the assault.[3] This was proper rebuttal testimony and did not give rise to a right to present the proposed surrebuttal testimony.

As part of Gibson's defense, Calvin Collier testified that he witnessed the fight and did not observe any injuries to Beavers. On cross-examination, the prosecution used a prior statement Collier gave to an investigating officer in which Collier had said that Beavers' one cheek and eye "was messed up." When the prosecution moved to

[2] Gibson's attorney was unable to identify the jail guard and only knew him as "one of the heavier ones." Counsel could not be sure that the guard would be willing to testify. The offer of proof was very weak because it failed to carry at least some assurance that the testimony would in fact be given. Yet the substance of the proposed surrebuttal testimony was self-evident. *See* § 901.03(1)(b), STATS.

[3] While the parties waited for the arrival of the last defense witness, Calvin Collier, the prosecution's rebuttal case was presented. After Green's testimony, Collier, who was also a jail inmate at the time of the assault, testified that he heard Beavers use racial epithets on a daily basis. Thus, it turned out that Green's rebuttal testimony was also in response to Collier's testimony on behalf of the defense.

admit into evidence that portion of Collier's written statement that constituted a prior inconsistent statement, Gibson sought a ruling to admit the entire document The trial court refused to admit the entire statement.

Gibson argues that he had the right to introduce the entire written statement under the rule of completeness. *See* ***State v. Sharp***, 180 Wis.2d 640, 653-54, 511 N.W.2d 316, 322 (Ct. App. 1993). The rule requires that a statement be admitted in its entirety "'when this is necessary to explain the admitted portion, to place it in context, or to avoid misleading the trier of fact, or to ensure a fair and impartial understanding of the admitted portion.'" ***Id.*** (quoted source omitted).

The statement is not part of the record before us and by necessity the issue is not preserved for review.[4] *See* ***State v. Dietzen***, 164 Wis.2d 205, 212, 474 N.W.2d 753, 755-56 (Ct. App. 1991) (we cannot review what is not before us), *aff'd*, 200 Wis.2d 492, 546 N.W.2d 886 (1996). Notwithstanding the absence of an adequate record, we conclude that the trial court properly exercised its discretion in excluding the entire statement. The trial court gave Gibson adequate opportunity to explain why admission of a single line from Collier's statement would tend to mislead the jury. The single sentence dealt only with Collier's observation of Beavers' injuries and was easily isolated in the statement. The admission of one inconsistent sentence "does not carry with it, like some evidentiary Trojan Horse, the entire regiment of other out-of-court statements that might have been made contemporaneously." ***Wikrent v. Toys "R" Us, Inc.***, 179 Wis.2d 297, 309-10, 507 N.W.2d 130, 135 (Ct. App. 1993). Fairness did not require the admission of Collier's entire statement.

[4] Gibson's appendix includes the statement in its entirety and as admitted at trial. The inclusion in the appendix of documents that are not in the record is improper. *See* RULE 809.19(2), STATS., 1993-94.

By the Court.—Judgment affirmed.

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