COURT OF APPEALS
DECISION
DATED AND RELEASED

August 29, 1996

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

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No. 96-1778-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CONNELL MARSHALL,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Reversed*.

EICH, C.J.[1] Connell Marshall appeals from a judgment finding him guilty of misdemeanor battery and disorderly conduct, and from an order denying his motion for a new trial on grounds of newly discovered evidence.

The offense with which Marshall was charged was committed against his wife, the original complainant in the case. His challenge to the

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

judgment is based on an argument that the trial court erred in allowing the prosecutor to argue to the jury—without supporting evidence in the record—that the victim recanted her accusations because she was a victim of domestic violence. We conclude this was error and reverse the judgment and order.

Prior to trial—and after the deadline for naming witnesses expired—the State sought permission to call an expert witness, explaining to the court that Marshall's wife had at some point recanted her initial accusations against him. The prosecutor stated that, in her experience, "[neither] the general population [n]or the jury would ... know without an expert ... why it is that domestic [abuse] victims recant almost all the time ... so I would like to call an expert to explain the dynamics of relationships like this and why it is that victims would recant ...." The trial court, noting that expert testimony on the subject might be appropriate, denied the request as untimely.

The trial proceeded without such evidence, and in her closing argument to the jury the prosecutor stated:

> For whatever reason victims of abuse ... are not able to make the decision themselves to leave. We know, however, they go back into the situation and I can't explain now why that is, but we know it happens all the time. We know it happens after ... an incident of violence that the victim recants the incident, says it didn't happen, minimizes incidents that more often than that in most of these cases they do not want it to go forward, and I wish I could explain that dynamic to you. The fact is that when a victim reports an incident of abuse at that time she is scared, she is afraid, she is upset with the conduct that has occurred, and when the police respond ... she is ready to give them the information .... [B]ut unfortunately when she moves away from the situation and is no longer in the heat of it that changes....
>
> ....

> ... I would like to be able to explain to you why that is. You don't have the experience and I don't have the experience to understand it, but a victim of a situation like that down the road needs the person for whatever reason.

It is these comments to which Marshall objects.

In ***State v. Bednarz***, 179 Wis.2d 460, 507 N.W.2d 168 (Ct. App. 1993), we considered a challenge to expert testimony on the same subject: the tendency for victims of domestic abuse to recant initial accusations against their husbands or companions. Specifically, the expert testified on the "cycle of violence," a three-stage syndrome involving: a "`tension building' stage in which the victim seeks to please the perpetrator; an "`explosion' stage" when the battery occurs; and finally, a "`honeymoon' stage," when the victim, feeling guilty and at fault for what happened, "may change her story in an attempt to exonerate the abuser." ***Id***. at 463-64, 507 N.W.2d at 170.

Holding such testimony proper because it did not violate the rule against expert testimony on the truthfulness of the victim's accusations and, further, because it was an appropriate subject for expert testimony, we have specifically stated our disagreement with the defendant's assertions that the victim's recantation could be explained without expert testimony:

We disagree with Bednarz that the reasons behind [the victim's] recantation must be determined solely by use of common sense inquiry on the part of untrained lay people.... An untrained lay person does not know that recantation can be suggestive of posttraumatic stress in the form of the battered woman's syndrome. The expert opinion was thus permissible to enlighten the jury and allow it to intelligently consider the syndrome as one possible explanation for [the victim's] behavior.

> ... It may be common knowledge that parties to a relationship may say things about the other party which are untrue, especially in the heat of a domestic

> quarrel, only to tell the truth later. *Yet, it is not common knowledge that one reason for a recantation may be the existence of battered woman's syndrome.*

Bednarz, 179 Wis.2d at 467-68, 507 N.W.2d at 172 (emphasis added) (citations omitted).

We are sympathetic with the trial court's view that we may soon approach the time when psychological interrelationships and reactions such as those argued by the prosecutor in this case (and as testified to by the expert witness in ***Bednarz***) may be so commonly known and accepted that they become a subject of lay testimony, but as ***Bednarz*** suggests quite strongly, that time is not yet upon us. Moreover, the State has not pointed us to any testimony in the record on the subject, lay or expert. It appears the prosecutor simply sought to establish the fact—in the State's own words, "to provide the jury with reasons why [the victim] changed her story"—in her closing argument to the jury.

In effect, the prosecutor was offering her own testimony, based on her own experience in prosecuting similar cases, that in fact, women in abusive relationships, for reasons she herself could not explain (as she conceded), often recant accusations of abuse. And while it is possible that such testimony by an experienced prosecutor might be admissible on the subject under certain conditions—a point we do not here decide—the State has not persuaded us that the fact could be established in counsel's closing argument in the manner in which it was done in this case.

By the Court.—Judgment and order reversed.

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