COURT OF APPEALS
DECISION
DATED AND FILED

January 17, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3309-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOHN LEE DOLL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: LAURENCE C. GRAM, JR. and ELSA C. LAMELAS, Judges. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. John Lee Doll appeals from a judgment entered after a jury found him guilty of kidnapping, sexual assault while armed, and violation of a domestic abuse injunction, contrary to WIS. STAT. §§ 940.225(1)(b),

940.31(1)(b), 939.63(1)(a)2 and 813.12(8) (1997-98).[1] He also appeals from an order denying his postconviction motions. Doll claims: (1) he was denied his Sixth Amendment right to counsel when the trial court answered questions from the jury without consulting with counsel; (2) the trial court erroneously exercised its discretion when it admitted evidence of prior bad acts; (3) the trial court erroneously exercised its discretion when it admitted statements of a witness under the excited utterance exception to the hearsay rule; (4) we should reverse under WIS. STAT. § 752.35; and (5) the trial court erroneously exercised its sentencing discretion. Because the trial court's reinstruction was harmless error, because the trial court's admission of other bad acts evidence was harmless error, because the trial court did not erroneously exercise its discretion when it admitted the statements under the excited utterance exception to the hearsay rule, because we find no basis to exercise our discretionary reversal authority under § 752.35, and because the trial court did not erroneously exercise its sentencing discretion, we affirm.

I. BACKGROUND

¶2 On November 9, 1997, Doll sexually assaulted his ex-girlfriend at knifepoint in her apartment. He was charged with sexual assault and violation of a domestic abuse injunction. He was also charged with kidnapping his ex-girlfriend, which occurred on July 20, 1997. During opening statements, the prosecutor told the jury that a police officer would testify as to why Doll's fingerprints were not on the knife. However, the prosecutor never presented this evidence during the trial. During deliberations, the jury sent two questions to the judge:

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

1. Why were there no prints on the knife?
2. Where did Mrs. Ramos find the knife when she got to [the victim's] house?

The trial court did not notify the parties about the jury questions, and instead simply instructed the jurors to rely on their collective memory to answer the questions. The jury returned a verdict convicting Doll on all three counts. Doll was sentenced to forty-five years on the kidnapping charge, forty years on the sexual assault charge, which was stayed, and Doll was placed on a consecutive forty-year probation. He was sentenced to six months for violating the injunction. Doll filed postconviction motions, which were denied. He now appeals.

II. DISCUSSION

A. Jury Instruction

¶3 Doll first contends that the trial court erred when it answered the jury's questions without consulting with his counsel. He argues that this violated his due process rights, that he did not waive his rights, and that the instruction to the jury was not harmless. We agree with Doll that the trial court should have consulted with counsel before responding to the jury; however, the record demonstrates that the trial court's action constituted harmless error.

¶4 Unless a defendant waives his right for counsel to be present, it is error for the trial court to answer a question from the jury without notifying counsel. *See* ***May v. State***, 97 Wis. 2d 175, 183-84, 293 N.W.2d 478 (1980). Although there was confusion as to whether or not some agreement was reached among the trial court, defense counsel, and the prosecutor regarding how to respond to jury questions, this was insufficient to establish waiver. Accordingly,

the trial court erred when it answered the jury's questions without consulting with counsel.

¶5 Nevertheless, we conclude that there is no reasonable possibility that the error contributed to the result in the case and, therefore, the trial court's error was harmless. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). The error is harmless because the trial court's response to the jury's questions was correct and did not prejudice Doll. *See* ***May***, 97 Wis. 2d at 184. Here, the trial court instructed the jury to rely on its collective memory to answer the questions. If the jury did so, it would recall that the prosecutor's statement about prints on the knife occurred during opening statement, which the jury was properly instructed does not constitute evidence. The jury would also recall that the prosecutor failed to call the police officer as a witness as promised. Thus, the trial court's response to the jury's questions did not misdirect the jury and was not prejudicial to the defense.

¶6 In addition, there was evidence that Doll was often in the victim's apartment—he used to live there. Therefore, the presence or absence of his fingerprints on a kitchen knife would not necessarily have established guilt or innocence. Accordingly, we conclude any error in answering the jury's questions without consulting with counsel was harmless.

B. Other Acts Evidence

¶7 Doll next argues that the trial court erroneously exercised its discretion when it allowed the victim to testify regarding prior incidents of abuse, which occurred over the course of their relationship. The State proffered the evidence on the basis that it was admitted to show "intent and motive to dominate and brutalize." The State argues that the evidence was designed to show motive

and context for the present offenses, to rebut the defense theory of consent, and to explain why the victim did not fight harder to resist. We conclude that the evidence was improperly admitted to show propensity; nonetheless, the erroneous admission was harmless.

¶8 We review the trial court's decision under the erroneous exercise of discretion standard. *See* ***State v. Pharr***, 115 Wis. 2d 334, 342, 349 N.W.2d 498 (1983). The admissibility of other acts evidence is addressed by using a three-step analysis:

> (1) Is the other acts evidence offered for an acceptable purpose under Wis. Stat. § (Rule) 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?
>
> (2) Is the other acts evidence relevant, considering the two facets of relevance set forth in Wis. Stat. § (Rule) 904.01? …
>
> (3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence?

State v. Sullivan, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). If the other acts evidence was erroneously admitted in this case, we then address whether the error was harmless or prejudicial. *See* ***id.*** at 773.

¶9 The other acts evidence presented here involved the victim's testimony about Doll hitting and pushing her. The victim also testified about other incidents where Doll forced her to have sex with him at knifepoint. This evidence was admitted to show motive and intent. Motive was defined as "whether the defendant has a reason to desire the result of the crime." We conclude that the other acts evidence here was not admissible to show motive. Rather, the evidence

admitted clearly demonstrates that Doll had a propensity to abuse the victim, including forcing her to have sex at knifepoint. Accordingly, it was error to admit the evidence.

¶10 However, the error in admitting this evidence does not require reversal on the judgment. Here, the trial court gave proper cautionary instructions,[2] and the record contains overwhelming evidence to convict Doll of the crimes charged.

¶11 The victim reported the incident to her friend, Latisha R., immediately after Doll left. Latisha indicated that the victim was shaking and crying. Doll then phoned the victim while Latisha was present; Latisha heard the victim tell Doll that she would not tell Latisha what happened. Latisha testified that during this phone call, the victim was trembling and turned white. This evidence defeats Doll's contention that Latisha consented to have sex with him. In addition, there was physical evidence to support the victim's testimony.

¶12 Accordingly, although we conclude that the prior bad acts seem to be evidence of propensity, the overwhelming evidence of Doll's guilt, combined with the cautionary instructions, render the erroneous admission harmless.

C. Latisha's Testimony

¶13 Doll next argues that the trial court erroneously exercised its discretion when it admitted Latisha's testimony pursuant to the excited utterance exception to the hearsay rule. Doll contends that the conversation with Latisha

[2] Doll argues that the trial court inadvertently instructed on "knowledge" rather than on "plan." Nevertheless, when this was brought to the trial court's attention, Doll's counsel declined the trial court's invitation to re-instruct and, therefore, Doll waived this issue.

cannot constitute an excited utterance because after the assault, Doll and the victim had a ten-to-fifteen minute calm conversation about whether the victim was going to tell anyone about the assault. We cannot conclude that the trial court's admission here constituted an erroneous exercise of discretion.

¶14 Whether to admit an out-of-court statement under a particular hearsay exception is within the trial court's discretion. *See* ***State v. Moats***, 156 Wis. 2d 74, 96, 457 N.W.2d 299 (1990). If the trial court's decision is based on the pertinent facts, the correct legal principles, and is reasonable, we will not disturb its decision. *See* ***In re Shawn B.N.***, 173 Wis. 2d 343, 367, 497 N.W.2d 141 (Ct. App. 1992). Here, the trial court lawfully exercised discretion.

¶15 A statement may be admitted as an excited utterance when three conditions are met: (1) there must be a startling event or condition; (2) the statement must relate to the startling event or condition; and (3) the statement must be made while the declarant is under the stress or excitement caused by the event or condition. *See* WIS. STAT. § 908.03(2). The trial court determined that all three conditions were met. That was not an erroneous exercise of discretion. Certainly, Doll's visit and conduct constituted a startling event. He burst into the victim's home in violation of an injunction, forced the victim to have sex at knifepoint, threatened her not to tell anyone before he left and, after he left, threatened her by telephone again. The statement related to the event. Latisha came to the victim's home immediately after Doll left. She observed the victim, indicating that the victim was crying and appeared "hysterical." This supports the trial court's finding that the victim was still under the stress of the startling event. Latisha indicated that she could barely understand the victim because she was sobbing and

gasping for air. The trial court's decision to admit Latisha's testimony was not erroneous.[3]

D. Section 752.35

¶16 Next, Doll argues we should reverse his conviction under WIS. STAT. § 752.35 because the prosecutor's statements implying that the trial court ordered the victim to disclose the prior bad acts constituted a "miscarriage of justice." We are not persuaded.

¶17 Doll refers to two statements by the prosecutor. The first was a question to the victim: "And you provided these [diaries] when I advised you that the court, actually not this particular judge, but the court had directed us to obtain [from] you anything that related to any writings about any prior acts of violence; is that correct?" The second was during closing argument. The prosecutor argued: "She never knew in '94, '95, and 1997 that there would come a day when a court would require her as part of the [] evidence to show what she wrote down on this. I think that that gives her enhanced credibility." Doll argues this misled the jury into believing that the other bad acts were offered at the direction of the trial court when, in fact, the evidence was offered because the State successfully moved for its admission.

¶18 We see no need to exercise our discretionary reversal authority pursuant to WIS. STAT. § 752.35. The prosecutor's statements were technically

[3] Doll's suggestion that the ten-to-fifteen minute conversation where he sat with the victim threatening her not to tell anyone what had happened somehow negates the excited utterance exception is without merit. The event did not end until after he left the apartment.

accurate, and Doll did not object to the statements. Therefore, there is no reason to reverse on this ground.

E. Sentencing

¶19 Finally, Doll challenges his sentence. He argues both that the trial court failed to properly discuss the three primary factors when imposing sentence, and that the sentence was unduly harsh. We are not persuaded.

¶20 There is a consistent and strong policy against interference with the discretion of the trial court in passing sentence. *See* ***State v. Paske***, 163 Wis. 2d 52, 61-62, 471 N.W.2d 55 (1991). This policy is based on the great advantage the trial court has in considering the relevant factors and the demeanor of the defendant. *See* ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). A trial court's sentence is reviewed for an erroneous exercise of discretion. *See* ***Paske***, 163 Wis. 2d at 70.

¶21 The trial court must consider three primary factors in passing sentence. Those factors are the gravity of the offense, the character and rehabilitative needs of the defendant, and the need to protect the public. *See* ***id.*** at 62. The weight to be given to each of the factors however, is a determination particularly within the discretion of the trial court. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶22 However, even if the trial court fails to adequately set forth its reasons for imposing a particular sentence, the reviewing court will not set aside the sentence for that reason. The reviewing court is obliged to search the record to determine whether, in the exercise of proper discretion, the sentence imposed can

be sustained. *See* ***McCleary v. State***, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971).

¶23 Finally, the length of the sentence imposed by a trial court will be disturbed on appeal 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. *See* ***Ocanas***, 70 Wis. 2d at 185.

¶24 Here, the record reflects that the trial court did not erroneously exercise its sentencing discretion. Doll had a juvenile record for second-degree sexual assault of a child and resisting an officer. He was also on probation for battery against another woman when he was sentenced for the crimes committed in this case. Although the sentencing court addressed some of the criteria in an abbreviated fashion, the primary factors were considered.

¶25 Further, we cannot say that the sentence imposed was unduly harsh. The crime here was extremely serious and, coupled with Doll's past criminal history, certainly does not "shock" public sentiment.

By the Court.—Judgment and order affirmed.

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