COURT OF APPEALS
DECISION
DATED AND FILED

January 17, 2007

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2990 **Cir. Ct. No. 1994CF944218**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SEVERAN LARON LEE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge.[1] *Affirmed*.

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

[1] The Honorable Maxine A. White presided over Severan Laron Lee's trial and entered the judgment of conviction. The Honorable Elsa C. Lamelas issued the order denying Lee's WIS. STAT. § 974.06 motion.

¶1 PER CURIAM. Severan Laron Lee appeals *pro se* from an order denying his WIS. STAT. § 974.06 motion for postconviction relief. He claims that the trial court erred when it denied his ineffective-assistance-of-counsel claims without a hearing under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). We affirm.

I.

¶2 Lee was charged with sexually assaulting, kidnapping, and battering his ex-girlfriend, Teresa S., on October 22 and 23, 1994. He pled not guilty and went to trial. At Lee's trial, Teresa S. testified that she had been dating Lee on and off for five to six years and that they had three children. According to Teresa S., she ended the relationship in early October of 1994. Teresa S. told the jury that on the morning of October 21, 1994, she found him in front of her house, and testified that Lee "dragged me out [of] my house all the way to Washington Park, trying to talk to me and convince me to take him back."

¶3 Teresa S. testified that the next night, October 22, 1994, she was leaving Tapp I, a nightclub, with her friend Anitra Gosa when Lee ran up to them and "snatched" the keys to her car. Teresa S. told the jury that Lee pushed her into the car and Gosa got into the back seat. According to Teresa S., Lee then drove to Gosa's house and told Gosa that she had better get out of the car or she would have a long walk home. Teresa S. testified that she tried to get out of the car when Gosa did, but that Lee grabbed her arm and drove away with her door partly open. According to Teresa S., as Lee drove off, he hit her legs, and told her that he hated her and was going to kill her.

¶4 Teresa S. testified that Lee drove to Washington Park, where he "grabbed" her out of the car, "slammed [her] down in the grass," and punched her

eighteen to twenty times. Teresa S. told the jury that Lee then pulled her by her hair into the car, and drove to the house of one of his friends. According to Teresa S., when they got to Lee's friend's house, she and Lee sat on a couch, where, without her consent, Lee twice had sexual intercourse with her and burned her leg with what she described as a "red hot" knife. Teresa S. testified that she did not try to leave because she was "scared" that Lee would "catch [her] and do something worse."

¶5 Gosa testified that she and Teresa S. were leaving a nightclub when Lee ran up, grabbed Teresa S.'s keys, and pushed Teresa S. into her car. According to Gosa, she then got into the car because she didn't know where Lee was going to take Teresa S., and Lee drove away. Gosa told the jury that Lee then drove to the street that she lived on and told her to get out of the car. Gosa testified that she jumped out of the car as it was moving, and that Teresa S. also tried to jump out, but that Lee grabbed Teresa S. and drove away. According to Gosa, as Lee drove away, he was shaking and hitting Teresa S.

¶6 Lee testified and disputed the women's accounts. He told the jury that on October 22, he was going to a nightclub when he saw Teresa S. walking to her car with Gosa. He testified that he asked for her keys because he smelled liquor on her breath, and that she gave them to him voluntarily. According to Lee, he then drove Gosa home and took Teresa S. to a friend's house to talk. Lee testified that they sat on a couch and talked. He told the jury that he and Teresa S. then "made up," engaged in two "sex act[s]," and eventually fell asleep on the couch. Lee claimed that he had "no idea" how Teresa S. burned her leg.

¶7 The jury found Lee guilty of two counts of first-degree sexual assault, *see* WIS. STAT. § 940.225(1)(b) (1993–94), one count of kidnapping, *see*

WIS. STAT. § 940.31(1)(a) (1993–94), and one count of substantial battery, *see* WIS. STAT. § 940.19(2) (1993–94).

¶8 Lee filed a WIS. STAT. § 809.30 motion for postconviction relief in 1997. The trial court denied Lee's motion and Lee appealed. We affirmed, *see* ***State v. Lee***, No. 97-2436-CR, unpublished slip op. (Wis. Ct. App. Sept. 29, 1998), and the Wisconsin Supreme Court denied Lee's petition for review on December 15, 1998.

¶9 Lee then filed this WIS. STAT. § 974.06 motion, claiming that his trial and appellate lawyers were ineffective. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 678–680, 556 N.W.2d 136, 137–139 (Ct. App. 1996) (ineffective assistance of appellate counsel may be a sufficient reason for failing to have previously raised the issues). The trial court denied the motion without a ***Machner*** hearing.

II.

¶10 Lee claims that the trial court erred when it denied his ineffective-assistance-of-counsel claims without a ***Machner*** hearing. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (defendant claiming ineffective assistance must establish that: (1) the lawyer gave deficient performance, and (2) the defendant suffered prejudice as a result). We disagree.

¶11 A trial court must hold a ***Machner*** hearing if the defendant alleges facts that, if true, would entitle the defendant to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 576, 682 N.W.2d 433, 437. Whether a motion alleges facts that, if true, would entitle a defendant to relief is a question of law that we review *de novo*. ***Ibid.*** If, however, "the motion does not raise facts sufficient to

entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." ***Ibid.*** Lee was not entitled to a ***Machner*** hearing on his ineffective-assistance claims because those claims are, as a matter of law, without merit.[2]

¶12 First, Lee claims that his appellate lawyer was ineffective because the appellate lawyer did not argue on appeal that Lee's trial lawyer should have moved for a judgment of acquittal because the evidence was insufficient to prove that Lee kidnapped Teresa S. This claim has no merit.

¶13 The elements of kidnapping are: (1) the defendant transported the victim from one place to another; (2) the defendant transported the victim without her consent; (3) the defendant transported the victim from one place to another forcibly; and (4) the defendant transported the victim from one place to another with intent that the victim be held to service against her will. WIS. STAT. § 940.31(1)(a); *see also* WIS JI—CRIMINAL 1280. As we have seen, Teresa S.'s and Anitra Gosa's testimony at the trial was sufficient to prove beyond a reasonable doubt that Lee forcibly moved Teresa S. from one place to another without her consent and to sexually assault her. *See* ***State v. Koller***, 87 Wis. 2d 253, 266, 274 N.W.2d 651, 658 (1979) (test for sufficiency of the evidence is whether the evidence adduced, believed, and rationally considered by the jury was sufficient to prove the defendant's guilt beyond a reasonable doubt); ***State v.***

[2] Any sub-issue mentioned by Lee in his briefs and not discussed in this opinion was inadequately briefed. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147, 151 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal."); ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (appellate court may "decline to review issues inadequately briefed").

Clement, 153 Wis. 2d 287, 292–295, 450 N.W.2d 789, 790–792 (Ct. App. 1989) (sexual assault within the scope of "service against her will"). The jury was free to accept Teresa S.'s and Gosa's testimony and find Lee guilty of kidnapping.

¶14 Second, Lee contends that his appellate lawyer should have argued on appeal that the trial court erred when it admitted other-acts evidence under WIS. STAT. RULE 904.04(2).[3] Before Lee's trial, the State moved *in limine* to admit evidence of three earlier times when Lee had physically assaulted Teresa S. Lee's trial lawyer opposed the State's motion, claiming that the evidence was inadmissible because it was irrelevant and its "prejudicial effect outweigh[ed] its probative value."

¶15 The trial court admitted the evidence to show motive, intent, and context. The following evidence was thus presented at Lee's trial:

- On July 19, 1991, after Teresa S. broke up with Lee, he came to her mother's house to look for her. Teresa S. ran into a bathroom and locked the door. Lee broke the door open and punched Teresa S. in the head until she was unconscious. Lee then got a crowbar, flattened Teresa S.'s car tires, broke all the car windows, and hurled the crowbar at Teresa S.'s mother, breaking a window on the house.

[3] WISCONSIN STAT. RULE 904.04(2) provides, as material:

> **(2)** OTHER CRIMES, WRONGS, OR ACTS. (a) Except as provided in par. (b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

- As a result of the July 19, 1991, incident, Lee was charged with battery and criminal damage to property. He was allowed, however, to plead guilty to an amended charge of disorderly conduct.

- On July 3, 1993, while Teresa S. was dating Lee, she went to his house to get a necklace. When she left, Lee got angry and followed her in his car. Lee rammed his car into the driver's side of Teresa S.'s car, smashed her windshield, and got into Teresa S.'s car and hit her arms and face.

- As a result of the July 3, 1993, incident, Lee was charged with first-degree recklessly endangering safety. He was allowed to plead guilty to battery and criminal damage to property.

- On May 25, 1994, Teresa S. and Lee got into a fight during which Lee pulled out clumps of Teresa S.'s hair. Lee was not charged.

¶16 The admissibility of other-acts evidence is determined by using a three-step test: (1) whether the evidence is offered for a permissible purpose under WIS. STAT. RULE 904.04(2); whether the evidence is relevant under WIS. STAT. RULE 904.01; and (3) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the jury, or needless delay under WIS. STAT. RULE 904.03. ***State v. Sullivan***, 216 Wis. 2d 768, 772–773, 576 N.W.2d 30, 32–33 (1998). Lee's appellate brief focuses on the relevance aspect of the test, claiming that the evidence was not relevant because, among other things, it did not "shed any light" on whether Teresa S. consented to have sexual intercourse with him. We disagree.

¶17 Evidence is relevant if it has "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. RULE 904.01. The earlier physical assaults were relevant because they put Lee's attacks and assault in their proper context for the jury. *See* ***State v. Shillcutt***, 116 Wis. 2d 227, 236, 341 N.W.2d 716, 720 (Ct. App. 1983) (other-acts evidence permissible to show the context of the crime and provide an explanation of the case). Further, the trial court instructed the jury that the evidence was not to be used "to conclude that the defendant is a bad person and for that reason is guilty of the offense charged." These instructions "went far to cure any adverse effect attendant with the admission of the [other-acts] evidence." ***State v. Fishnick***, 127 Wis. 2d 247, 262, 378 N.W.2d 272, 280 (1985). Accordingly, Lee has not shown that if his appellate lawyer had raised this issue on his direct appeal, he would have prevailed. Thus, he fails to show "prejudice" under ***Strickland***.

¶18 Third, Lee contends that his appellate lawyer should have argued on appeal that the trial judge was not impartial. *See* WIS. STAT. § 757.19(2). In analyzing whether a judge is impartial:

> We begin with a presumption that the judge is free of bias and prejudice and the burden is on the party asserting judicial bias to show by a preponderance of the evidence that the judge is biased or prejudiced. In determining the question, we apply both a subjective and an objective test. We first look to the challenged judge's own determination of whether the judge will be able to act impartially. Next, we look to whether there are objective facts demonstrating that the judge was actually biased. This requires that the judge actually treated the defendant unfairly.

State v. Neuaone, 2005 WI App 124, ¶16, 284 Wis. 2d 473, 485, 700 N.W.2d 298, 304 (citations omitted). First, we assume that, by presiding, Lee's trial judge believed that she was impartial. *See* ***State v. Carprue***, 2004 WI 111, ¶62, 274 Wis. 2d 656, 684, 683 N.W.2d 31, 45. We thus turn to whether there are objective facts demonstrating that the trial judge was actually biased.

¶19 Lee claims that "perhaps" the trial judge had "a pre-conceived notion regarding" him because the judge had presided over two prior hearings involving domestic violence between Lee and Teresa S. This allegation does not show that the trial judge was actually biased. Lee does not point to any evidence, but merely speculates that the trial judge actually treated him unfairly because she had presided over two of Lee's prior hearings. *See* ***Liteky v. United States***, 510 U.S. 540, 551 (1994) ("[O]pinions held by judges as a result of what they learned in earlier proceedings" do not equal "bias" or "prejudice."); *see also* ***State v. O'Neill***, 2003 WI App 73, ¶12, 261 Wis. 2d 534, 544, 663 N.W.2d 292, 297 ("[i]t is not sufficient to show that … the circumstance might lead one to speculate that the judge is biased").

¶20 Lee also contends that the trial judge displayed her alleged bias by admitting the other-acts evidence. As we have seen, however, the other-acts evidence was properly admitted.

¶21 Lee also claims that the trial judge erred by not letting him call his former lawyer to testify that Teresa S. "on at least one prior occasion fabricated her claim of being attacked" by Lee. This issue was raised by Lee on his direct appeal where we held that the trial court did not erroneously exercise its discretion when it denied Lee's motion to admit his former lawyer's testimony. *See* ***Lee***, No. 97-2436-CR, unpublished slip op. at 10–12. We will not address it again. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512, 514 (Ct. App. 1991) (appellant may not relitigate issues previously decided no matter how artfully rephrased).

¶22 Lee further contends that the trial judge "allowed the prosecution to improperly introduce evidence regarding the alleged victim's prior consistent

statement, while excluding inconsistent prior statements by the same witness." Lee does not, however, identify the statements and does not allege how the admission or exclusion of these alleged statements would have rendered the outcome of his trial unreliable or fundamentally unfair. *See* ***Lockhart v. Fretwell***, 506 U.S. 364, 372 (1993) (prejudice component of ***Strickland*** "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair").

¶23 Additionally, Lee claims that the trial judge was biased because she imposed consecutive rather than concurrent sentences. A trial judge has the discretion to impose consecutive sentences. ***State v. Johnson***, 178 Wis. 2d 42, 52, 503 N.W.2d 575, 578 (Ct. App. 1993). We presume that the trial judge acted reasonably and the defendant must show an unreasonable or unjustified basis for the sentence. ***Id.***, 178 Wis. 2d at 53, 503 N.W.2d at 578. Lee does not allege, let alone show, why consecutive sentences were unreasonable or unjustified.

¶24 Fourth, Lee argues that his appellate lawyer should have claimed on appeal that his trial lawyer was ineffective because the trial lawyer did not object to two sets of allegedly inadmissible hearsay statements made by State witnesses at the trial. We disagree.

¶25 The first statement to which Lee objects was from Anitra Gosa. On direct-examination, Gosa testified that after Lee drove to her house and she jumped out of Teresa S.'s car, she ran to Teresa S.'s mother's house and told her that Lee "got Teresa again." According to Gosa's cross-examination testimony, after Teresa S.'s mother called the police from Gosa's house, two police officers came to Gosa's house. On redirect-examination, Gosa testified:

> Q About what time was it that the two police officers came to your house in response to Teresa's mom's phone call?
>
> A It was twenty minutes to half an hour, like half an hour, twenty minutes.
>
> Q So really early in the morning?
>
> A Yes.
>
> Q And at that point, did you know where Teresa was?
>
> A No. But I told them to check Washington Park.
>
> Q Were you-- I guess I don't understand this. Were you aware that the day before you went out with Teresa that she ended up at Washington Park with Mr. Lee?
>
> A Yes.
>
> Q Okay. Did she tell you on the day that it happened or did she tell you on the day that you went out?
>
> A The day that it happened.
>
> Q Okay. What did she tell you about how that all came about?
>
> A She was in her house, and I don't know if he was there or not, I don't remember, but I know he brought her out through the alley.
>
> Q And did she tell you what went on when they were in Washington Park on that day before you went out?
>
> A Yes.
>
> Q What did she tell you?
>
> A *That he was saying that he hate her mother and her brothers, and that he was slamming her and hitting her.*

(Emphasis added.) This statement was not hearsay. Gosa's statement, that Lee "was saying that he hate her mother and her brothers, and that he was slamming her and hitting her," was not offered for its truth, but rather to explain Gosa's perception of what was happening and why she told the police to look for Teresa

S. at Washington Park, because she was afraid that he might hurt Teresa S. more. *See* WIS. STAT. RULE 908.01(3) (Hearsay is an out-of court statement "offered in evidence to prove the truth of the matter asserted.").

¶26 The second statement to which Lee objects was from Gosa's sister, Charlitta Miller, who lived in a duplex below Teresa S. On direct-examination, Miller testified:

> Q At some point in time, did Ms. S[] move to her mother's house with her children from this residence on North 37th Street?
>
> A Yes.
>
> Q When did that happen?
>
> A Um -- about three months after he moved in.
>
> Q Was that the beginning of October of 1994?
>
> A Yes.
>
> Q And what is your understanding of why she moved to her mother's house?
>
> A *They was having problems. She said she started getting scared of him.*

(Emphasis added.) Miller also testified that on Friday, October 21, Teresa S. came back to the duplex to get a microwave. Miller told the jury that she looked out her window and saw Lee "holding [Teresa S.] and pulling her out the back fence."

¶27 On cross-examination, Lee's lawyer asked Miller whether she reported this incident to the police and Miller responded: "No … [b]ecause [her statement to the police] wasn't about that." On redirect-examination, Miller testified:

> Q Ms. Miller, were you asked by the police to describe what you saw several days before the incident that we are here about today?
>
> A No, I wasn't.
>
> Q What is it that you were asked about that?
>
> A About what happened. What she told me about what had happened.
>
> Q And so the information you provided to the police related to what you had learned from Teresa about what happened on October 23rd?
>
> A Yes.
>
> Q What did you tell the police?
>
> A *She told me that they -- what she had told me about how he came to the club, Tapp I, and grabbed her and my sister and put them -- they got in the car, he drove off and -- um -- they was riding around for awhile and he -- my sister told me that he was telling her she has to get out of the car while she can, while she was over by my home, and she said she jumped out the car. Teresa told me how they went to the park and he beat her up. She said he slammed her on the ground, was beating her up and saying he was going to kill her and stuff.*
>
> Q Did you tell the police anything else?
>
> A Yes. *How she said that they went to his [friend]'s house and he put a hot knife on her leg, and he had sex with her when she didn't want to unwillingly.*

(Emphasis added.) Miller's statements about what Teresa S. told her were admissible under WIS. STAT. RULE 908.01(4)(a)2 (pre-trial statement of witness admissible "to rebut an express or implied charge against the declarant of recent fabrication") to rebut Lee's attack on Teresa S.'s credibility. Lee's related claim that his trial lawyer did not effectively cross-examine Gosa and Miller regarding the truth of their testimony also fails. He has not pointed to anything that the

lawyer should have asked that, because the lawyer did not ask was "prejudice" under ***Strickland***.

¶28 Fifth, Lee claims that his appellate lawyer should have argued on appeal that his trial lawyer was ineffective because the trial lawyer did not object when the prosecutor made allegedly improper comments during closing arguments. Lee does not, however, provide us with a Record citation for the allegedly improper comments and the Record shows that the "closing arguments of counsel were not requested or transcribed." "[O]ur review is limited to the record, and … it is up to the appellant[] to ensure that the record contains facts supporting their arguments for reversal." ***Shoreline Park Pres., Inc. v. Wisconsin Dep't of Admin.***, 195 Wis. 2d 750, 769 n.8, 537 N.W.2d 388, 394 n.8 (Ct. App. 1995) (citation omitted); *see* ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219, 225 (Ct. App. 1986) (burden on appellant to ensure that Record is sufficient to address issues raised on appeal).

¶29 Sixth, Lee argues that his trial lawyer did not adequately investigate his case. He claims that his trial lawyer "failed to offer any witnesses to rebut the prosecution's presentation of bad acts evidence." According to Lee, "[h]ad counsel bothered to conduct a pre-trial investigation, counsel would have discovered [a] witness who could have told the proper version on at least 1 of the prior bad acts issues." This claim is conclusory and undeveloped. Lee does not point to any evidentiary material, by affidavit or otherwise, that identifies the witness or what the witness would have said if he or she would have been called to testify. *See* ***Allen***, 2004 WI 106, ¶24, 274 Wis. 2d at 586, 682 N.W.2d at 442 (postconviction motion must contain sufficient material facts, that is, the name of the witness, the reason the witness is important, and the facts that can be proven).

¶30 Lee also claims that his trial lawyer did not "explor[e]" Teresa S.'s alleged motive for accusing him and testifying against him. He contends that had the lawyer investigated, the lawyer would have discovered that Teresa S. started to date another man before his arrest and used his arrest as an "excuse and opportunity" to move in with the man. This claim is also conclusory and undeveloped. Lee does not identify whom Teresa S. was dating or when and where she moved to after Lee's arrest. *See* ***ibid.***

¶31 Lee further contends that his trial lawyer never shared "the totality of discovery" with him. He claims that a second discovery packet, which he never saw, contained medical reports of Teresa S.'s injuries and a complete witness list. Lee does not, however, specify what information in the allegedly withheld discovery was material or how it would have made the outcome of his trial unreliable or fundamentally unfair. *See* ***Lockhart***, 506 U.S. at 372.

¶32 Finally, Lee claims that the prosecution did not comply with the rules of discovery, *see* WIS. STAT. RULE 971.23, because the prosecution did not disclose that it was going to use an expert witness on battered women's syndrome.[4] The Record shows, however, that the prosecution did disclose this

[4] WISCONSIN STAT. RULE 971.23 provides, as material:

> **(1)** WHAT A DISTRICT ATTORNEY MUST DISCLOSE TO A DEFENDANT. Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney and permit the defendant or his or her attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody or control of the state:
>
> ….
>
> (d) A list of all witnesses and their addresses whom the district attorney intends to call at the trial. This paragraph does

(continued)

witness. The State included on its witness list an "Expert on Battered Women" and filed a motion *in limine* "to introduce, via the testimony of an expert, the dynamics of the 'battered women's syndrome.'"

¶33 Lee also contends in a one-sentence argument that the prosecution did not disclose until the first day of trial "the photographic chart used by witnesses to identify the victim's alleged injuries and statements of the nurse who examined [Teresa] S[] following the alleged violence at issue." This claim is conclusory and undeveloped. Lee does not provide when and how the photographic chart or the nurse's "statements" were used at trial, and he does not allege how the chart or the "statements," if used at trial, rendered it unreliable or fundamentally unfair. *See* ***Lockhart***, 506 U.S. at 372. Accordingly Lee has failed to show that his trial or appellate lawyer was ineffective for not raising these issues.

> not apply to rebuttal witnesses or those called for impeachment only.
>
> (e) Any relevant written or recorded statements of a witness named on a list under par. (d), including any audiovisual recording of an oral statement of a child under s. 908.08, any reports or statements of experts made in connection with the case or, if an expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of his or her testimony, and the results of any physical or mental examination, scientific test, experiment or comparison that the district attorney intends to offer in evidence at trial.
>
> ….
>
> (g) Any physical evidence that the district attorney intends to offer in evidence at the trial.

By the Court.—Order affirmed.

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