**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**September 5, 2007**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2006AP2806-CR** **Cir. Ct. No. 2006CF30**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DONALD J. LEWALLEN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Chippewa County: RODERICK A. CAMERON, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 HOOVER, P.J. Donald Lewallen appeals that portion of a judgment convicting him of two counts of second-degree sexual assault, contrary

to WIS. STAT. § 940.225(2)(a).[1] Lewallen argues that because the only evidence against him came in the form of the victim's prior inconsistent statements, there was insufficient evidence to support his conviction. We reject Lewallen's argument and affirm the judgment.

## Background

¶2 Lewallen's conviction arises from an altercation with his girlfriend, Amanda McNamara. According to Lewallen, one evening in January 2006, he and McNamara had a disagreement about a friend Lewallen had brought home. After leaving, Lewallen returned, intoxicated, to their home around 1:20 a.m.

¶3 Lewallen claims he went to bed and engaged McNamara in consensual sexual activities lasting forty-five to sixty minutes. At the end, Lewallen called McNamara by the name of a previous girlfriend, enraging her. McNamara pushed Lewallen off of her, grabbed his testicles, and started screaming at and hitting him. Lewallen struck back, leaving bruises. He also grabbed McNamara's hair to keep her from hitting him. After the altercation, Lewallen passed out. McNamara dressed and called police.

¶4 Stanley police officer Louis Eslinger responded. He found Lewallen asleep on the couch, naked and with no visible injuries. McNamara was crying, upset, and appeared beaten. Based on the call and his observations, Eslinger decided Lewallen should be arrested for domestic disorderly contact. He woke

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Lewallen, and as Lewallen complied with the officer's instructions to dress, he said to Eslinger, "I ought to crack you in the fucking head, too."

¶5 After a sheriff's deputy arrived and transported Lewallen from the scene, Eslinger spoke to McNamara. He described her as scared and shaking. She had difficulty relating what had happened, but she did not appear to be thinking about her answers. McNamara said that when Lewallen came home at 1:20 a.m., he asked her about a missing set of keys. When she told him she did not know where the keys were, Lewallen called her a liar and starting hitting, punching, slapping and kicking McNamara and pulling her hair. He then began to have intercourse with her despite her protests. McNamara told Eslinger of seven instances of intercourse—three vaginal, three anal, and one oral—all completed with force or the threat of force and without her consent. She stated she was too tired to physically resist him. In addition, McNamara stated the intercourse was interspersed with violence, including choking, and Lewallen threatened to choke her to death in the morning. McNamara later completed a written statement.

¶6 Eslinger took McNamara to a hospital to check for injuries. Later, McNamara went to a different hospital for a sexual assault examination. She gave the nurse examiner a condensed version of what she told Eslinger. The nurse reported bruises and swelling on McNamara's arms, face, and head. She had an abrasion on her back. The nurse also testified later that there were marks consistent with strangulation, although she had not recorded that in the file. The report documents that there were no vaginal injuries. There was anal tearing, although that type of injury is consistent with both consensual and nonconsensual anal intercourse. McNamara did complain of soreness in her mouth, although she had recently had an infected growth removed.

¶7 Based on McNamara's statements, Lewallen was charged with seven counts of second-degree sexual assault—one for each of the seven described instances of intercourse—and one count of misdemeanor battery. When McNamara was subpoenaed to the preliminary hearing, she wrote a statement recanting the sexual assault allegations. At trial, McNamara testified that, consistent with Lewallen's account, all the intercourse that evening was consensual and the physical altercation did not occur until afterwards. She testified that she wanted to "get back at" Lewallen for hurting her by using another woman's name.

¶8 The jury convicted McNamara on two counts of sexual assault and the battery charge. McNamara appeals, arguing the evidence is insufficient to support the sexual assault convictions. He concedes the sufficiency of the evidence for the battery conviction and, therefore, does not challenge that portion of the judgment.

**Discussion**

¶9 To convict a defendant of second-degree sexual assault, the State must prove three elements: (1) the defendant had sexual contact or intercourse with the victim; (2) the victim did not consent to the contact or intercourse; and (3) the defendant had the contact or intercourse by using or threatening force or violence. WIS JI—CRIMINAL 1208 (2005). Lewallen stipulated to the fact of intercourse, leaving the State to prove the second and third elements.

¶10 When we review a conviction for sufficiency of the evidence, we will not reverse a conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found

guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We may not substitute our judgment for that of the fact-finder. ***Id.*** "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt," we may not overturn the verdict even if we believe the fact-finder should not have found guilt. ***Id.***

¶11 Lewallen asserts the only evidence of nonconsent and force is found in McNamara's prior inconsistent statements given to Eslinger and the nurse. Lewallen contends that "prior inconsistent statements are not by themselves sufficient to support a guilty verdict." In essence, he claims that without corroboration, McNamara's prior inconsistent statements are insufficient as a matter of law.

¶12 Previously, prior inconsistent statements were admissible only as impeachment evidence. ***Vogel v. State***, 96 Wis. 2d 372, 379, 291 N.W.2d 838 (1980). This is no longer the case. *See* ***id.*** at 378-86. Prior inconsistent statements are, by definition, not hearsay and are therefore generally admissible. WIS. STAT. § 908.01(4)(a)1. Prior inconsistent statements may be offered as substantive evidence if the declarant is available for cross-examination. ***State v. Horenberger***, 119 Wis. 2d 237, 247, 349 N.W.2d 692 (1984). Moreover, despite Lewallen's protestations to the contrary, a "jury may convict on the basis of uncorroborated testimony unless [the] testimony is patently or inherently incredible." ***Kohlhoff v. State***, 85 Wis. 2d 148, 153-54, 270 N.W.2d 63 (1978) (citations omitted); *see also* ***Kutchera v. State***, 69 Wis. 2d 534, 549, 230 N.W.2d 750 (1975) (uncorroborated accomplice testimony sufficient if fact finder considers it credible).

¶13 Lewallen's basic premise on appeal is that because McNamara gave two vastly differing accounts, she is incredible as a matter of law and, therefore, the prior inconsistent statement used against him is insufficient to sustain the conviction as a matter of law. However, even when such glaring discrepancies exist, "that fact in itself does not result in concluding as a matter of law that the witness is wholly incredible." ***Ruiz v. State***, 75 Wis. 2d 230, 232, 249 N.W.2d 277 (1977). Rather, the question becomes one of witness credibility, wholly within the purview of the fact finder. ***Id.*** The jury may choose to believe some, all, or none of the witness's testimony. ***Penister v. State***, 74 Wis. 2d 94, 103, 246 N.W.2d 115 (1976).

¶14 Lewallen urges us to apply a test devised by the Seventh Circuit, *see* ***Vogel v. Percy***, 691 F.2d 843, 846-47 (7th Cir 1982), because that test requires corroboration of the prior inconsistent statement's reliability. This is contrary to Wisconsin precedent. *See* ***Kohlhoff***, 85 Wis. 2d at 153-54. Moreover, even applying the ***Percy*** test, we conclude there was sufficient corroboration of the prior statement.

¶15 McNamara's documented injuries—anal tearing and mouth pain—were not inconsistent with sexual assault injuries, and Lewallen was convicted for one count related to anal intercourse and one count related to oral intercourse. He was not convicted for any of the three counts relating to vaginal intercourse; the nurse reported no vaginal injuries. The nurse observed marks on McNamara's neck, consistent with her original statement to Eslinger. In addition, Lewallen had no visible marks on him and complained of no injuries, supporting an inference that McNamara never attacked him.

¶16 McNamara's mental state and actions at the scene, as observed by Eslinger, also tend to corroborate her initial statements. Eslinger described her as scared and shaking, and when Eslinger went to confront the sleeping Lewallen, McNamara "ran to a utility room that was near the hallway, shut the door, and locked it." A jury could infer this to be the behavior of a sexual assault victim frightened of her attacker, rather than an angry lover intent on revenge.

¶17 McNamara's initial statement to Eslinger did not appear to him to be rehearsed, planned, or thought out. She later prepared a written statement and gave a shortened statement to the nurse examiner. The details were consistent among each of these statements.

¶18 Finally, Lewallen was belligerent toward and uncooperative with police when they arrived. While some of this behavior undoubtedly extends from his state of intoxication, it also permits an inference that Lewallen was in an aggressive mode and was therefore more likely to have attacked McNamara, rather than in a defensive stance, having defended against her physical attack.

¶19 While Lewallen argues that McNamara was not pressured to recant her initial statement—thereby suggesting that her recantation should be considered more reliable—we note that pressure need not be verbal. McNamara indicated to the nurse examiner that she was concerned about both her financial dependence on Lewallen and the impact his incarceration might have on their children, particularly their son. In light of that information, the jury could have inferred that McNamara's initial statements to Eslinger and the nurse examiner represented the correct accounting, while her recantation was merely an attempt to salvage her family. Nothing about McNamara's initial statements is patently incredible so that no jury could have believed it. Rather, the jury here was confronted with a

question of McNamara's credibility and chose to believe her initial statements over her recantation and subsequent trial testimony. Those initial statements, accepted by the jury as true, sufficiently prove the second and third elements—nonconsent and violence—of the sexual assault charges.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.