COURT OF APPEALS
DECISION
DATED AND RELEASED

July 23, 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

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

No. 95-2364-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BARRY HOWARD,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed*.

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

PER CURIAM. Barry Howard appeals from a judgment entered after a jury convicted him of one count of first-degree intentional homicide, while armed, contrary to §§ 940.01, and 939.63, STATS. He also appeals from an order denying his postconviction motions. Howard raises three issues for our consideration: (1) whether the trial court erred in excluding the testimony of two defense witnesses and the partial testimony of a third witness; (2) whether

the trial court erred in admitting the testimony of three rebuttal witnesses; and (3) whether the trial court erred in instructing the jury. Because Howard failed to procure the timely presence of the two defense witnesses whose testimony was excluded and because this testimony was essentially cumulative; because the portion of the third witness's testimony that was excluded was harmless; because any error in admitting the testimony of rebuttal witnesses was harmless; and because the trial court did not erroneously exercise its discretion in submitting the challenged jury instruction, we affirm.

I. BACKGROUND

The facts are based on the testimony adduced from various witnesses at trial. On May 14, 1994, Howard and the victim, Lasonja Walker (who was also Howard's fiancee), engaged in an argument at a tavern. Howard was jealous that Walker was talking to another man. According to Howard, he walked away from Walker, but Walker came over to him and threatened to cut him and said that he might not be as lucky as he was before, a reference to a previous incident when Walker had cut Howard with a knife. Each left the tavern separately.

Later, Howard appeared at Walker's apartment where he came to collect his belongings. Another confrontation ensued. Walker's neighbor, Betty Brown, testified that Walker backed Howard into a closet and was standing in front of him, both hands raised, holding two knives and a hanger. According to Brown, Walker screamed that she was not going to let Howard come up on her again with his gun. Howard denied having his gun, and Brown did not find a gun when she patted him down. Brown attempted to get Walker to give her the knives, but Walker lunged at Howard and said "I'll kill you." Walker thrust the knife down towards Howard, but Brown blocked the thrust and was eventually able to defuse the situation.

Subsequently, Howard was putting his belongings into his car when he heard Walker say "I'll kill you mother fucker." Howard then retrieved his gun from his car and told Walker to stop. She came at him and Howard testified that he thought she had a knife. Howard testified that he fired his gun without aiming. Brown testified that she heard eight to ten shots. Walker was shot six times. Walker died as a result of the gunshots. Howard drove away.

Howard was charged with first-degree intentional homicide while armed. He admitted shooting Walker, but claimed he acted in self-defense. The case was tried to a jury, which convicted him. He filed postconviction motions alleging the same evidentiary errors he asserts in this appeal. The trial court denied the motions. He now appeals.

II. DISCUSSION

A. Exclusion of Two Witnesses and a Portion of One Witness's Testimony.

Howard first claims the trial court erred in excluding the testimony of two of his witnesses, Vera Peterson and Cynthia Parks. He claims both witnesses would have corroborated his testimony that Walker had made threatening remarks to him at the tavern on the evening of the homicide. The trial court excluded these witnesses from testifying because neither witness was produced prior to the close of evidence in the case and because the testimony of each was essentially cumulative.

Whether to admit or exclude evidence rests within the sound discretion of the trial court and the trial court's evidentiary decision will not be disturbed on appeal if the trial court exercised its discretion in accordance with accepted legal standards and the facts of record. ***State v. Mordica***, 168 Wis.2d 593, 602, 484 N.W.2d 352, 356 (Ct. App. 1992). In reviewing the circumstances surrounding the exclusion of these two witnesses, we conclude that the trial court did not erroneously exercise its discretion.

The record documents the following. Howard finished presenting his case, with the exception of these two witnesses, on the morning of October 7. Howard's counsel informed the court that two of his witnesses had not yet shown up, explained to the court the efforts that were made to procure their presence, and asked the court to issue body attachments for these witnesses. The State opposed the request, asserting that the defense was lax in obtaining these witnesses's presence and that their testimony was largely cumulative. The court agreed to adjourn for two hours to allow the defense to produce Peterson, but ruled that Parks would be excluded because her testimony was cumulative.

Neither Peterson nor Parks appeared by 1:30 p.m. The trial court refused to grant another adjournment and the defense rested its case.

After the State presented its rebuttal case, the defense informed the trial court that Peterson was located and available to testify. Peterson was voir dired under oath regarding the defense efforts to contact her. She testified that the defense never contacted her after a subpoena was served on her in mid-September. She explained that she was playing Bingo in Green Bay at the time she should have been in court and was unable to return to Milwaukee because of car trouble. After the voir dire, the trial court denied Howard's motion to reopen the case and/or to introduce Peterson's testimony in surrebuttal to the State's case. The court denied the motion based on the inadequate effort of both the defense and the witness to ensure that she be in court in a timely fashion and because her testimony was only cumulative to testimony already received. Parks, however, never appeared.

Based on the record, we cannot say that the trial court's decision to exclude Parks's and Peterson's testimony was an erroneous exercise of discretion. Parks was never available to testify for the defense and, accordingly, the trial court's decision to exclude her testimony is moot. With regard to Peterson, the record already contained evidence regarding the fight at the tavern on the evening of the homicide and evidence regarding the mutual threats Howard and Walker exchanged. Given these facts, coupled with Peterson's failure to make a timely appearance, we conclude that the trial court's decision to exclude her as a witness was not an erroneous exercise of discretion.

Howard also claims the trial court erred in refusing to allow Denise Peterson to testify that Howard had told Denise two weeks before the homicide that he was breaking off his relationship with Walker, and that when Denise told Walker this, Walker said "He ain't going nowhere." He claims that this statement was admissible under § 908.03(3), STATS., which is the existing mental or emotional condition exception to the hearsay rule. Section 908.03(3) allows the introduction of: "A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered." We agree with Howard that these statements fall within § 908.03(3)'s exception to the hearsay rule as an out-of-court statement of intent. Nonetheless, we conclude that the trial court's

error in excluding these statements was harmless, ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231 (1985), because the testimony was clearly cumulative. Moreover, because of the cumulative nature of the testimony, the trial court could have properly excluded these statements pursuant to § 904.03, STATS. Therefore, we uphold the trial court's ruling. *See* ***Kolpin v. Pioneer Power & Light Co.***, 162 Wis.2d 1, 30, 469 N.W.2d 595, 606 (1991) (appellate court will uphold decision vested in trial court's discretion if there are any facts of record that support it); ***State v. Holt***, 128 Wis.2d 110, 124, 382 N.W.2d 679, 687 (Ct. App. 1985) (we will affirm if trial court reaches proper result, albeit for the wrong reason).

B. Rebuttal Witnesses.

Howard claims the trial court erred in allowing the State to introduce three rebuttal witnesses: Ermia Redmond, Christine Steilen and Diane Ellis. Howard contends that each witness's testimony was inadmissible hearsay and that in calling these witnesses, the prosecutor breached an agreement not to elicit certain testimony from these witnesses.

Redmond testified that between September 1991, and June 1992, Walker came to work with a bruised face and she told Redmond that Howard had jumped on her and had beaten her, and because of this, Walker was late for work. The trial court admitted the statement under § 908.03(1) or (2), STATS., the present sense impression or excited utterance exception to the hearsay rule. We conclude that any error committed in admitting this evidence was harmless. ***Dyess***, 124 Wis.2d at 543, 370 N.W.2d at 231. It was undisputed at trial that Howard and Walker carried on a mutually abusive relationship for years. Numerous witnesses provided testimony with respect to threats made by both parties. Therefore, admitting this witness's testimony that Walker had related one abusive incident to a co-worker years prior to the homicide was harmless beyond a reasonable doubt.

Redmond also testified that Walker told her about an incident in February 1994, involving an altercation at a bar where Howard was angry about Walker's interactions with another man. Redmond testified that after the incident, Howard showed up at Walker's apartment, they argued some more, and Howard fired a shot with his gun through Walker's bedroom door. The

trial court admitted the statement under § 908.03(1) or (2), STATS. We again conclude that any error committed in admitting this evidence was harmless. *See* ***Dyess***, 124 Wis.2d at 543, 370 N.W.2d at 231. When Howard testified, he related the events relevant to the February 1994 event, including the fact that he was angry about Walker dancing with another man, that he and Walker argued, and that he fired a shot from his gun into the floor at Walker's apartment. Howard's admission, together with the undisputed evidence that Howard and Walker's relationship was one of mutual abuse, renders the admission of Redmond's testimony harmless error beyond a reasonable doubt.

Steilen offered three areas of testimony that Howard claims should not have been admitted: (1) she testified that Walker came to work one day in the fall of 1993 with a bump over her eye, which was covered heavily with makeup; (2) she testified that in February 1994, Walker came to work upset and crying over a fight with Howard, that Howard had taken all her money, held Walker down on the floor, and pulled the phone out of the wall; and (3) she testified that Walker told her that Walker was tired of the abuse and wanted to leave Howard. The trial court admitted Steilen's testimony under the same hearsay exceptions as noted above. We again conclude that any error committed in admitting Steilen's testimony was harmless. *See* ***Dyess***, 124 Wis.2d at 543, 370 N.W.2d at 231. The record is replete with admissible evidence as to the turbulent nature of Howard and Walker's relationship and the mutual abuse. The challenged portions of Steilen's testimony simply provide additional evidence of an abusive relationship. Accordingly, admitting Steilen's testimony was harmless beyond a reasonable doubt.[1]

Ellis testified regarding contact she had with Walker in the early morning hours of May 15, 1994, shortly before the homicide took place. Ellis said that Walker told her that Howard had started an argument at another tavern over another man and that Howard is "like Jekyll and Hyde." Ellis testified that although Walker was hysterical at first, she calmed down and did not make any threats against Howard. The trial court admitted this testimony under the same two hearsay objections as the other rebuttal witnesses's testimony. We agree with the trial court that this evidence was admissible under the excited utterance exception to the hearsay rule, *see* § 908.03(2), STATS.,

[1] Because we conclude that these witnesses's testimony constituted harmless error, we need not address Howard's argument that he was "sandbagged" by the presentation of these witnesses.

because the statement relates to a startling event—the argument that just occurred, Walker was under the stress of excitement—apparently hysterical. Accordingly, we reject Howard's claims with respect to each of the rebuttal witnesses.

C. Jury Instruction.

Finally, Howard objects to the court charging the jury with WIS J I—CRIMINAL 815. He claims this instruction should not have been given because there was no evidence that he did anything unlawful to provoke the victim and that giving the instruction impaired his theory of self-defense. This instruction provides in pertinent part: "You should also consider whether the defendant provoked the attack. A person who engages in unlawful conduct of a type likely to provoke others to attack, and who does provoke an attack, is not allowed to use or threaten force in self-defense against that attack."

In reviewing claimed instructional errors, we note that a trial court has wide discretion as to instructions. ***State v. Lenarchick***, 74 Wis.2d 425, 455, 247 N.W.2d 80, 96 (1976). In reviewing the record, we conclude that even if the trial court erred in giving this instruction, it was harmless error. *See* ***Dyess***, 124 Wis.2d at 543, 370 N.W.2d at 231. The jury was free to disregard the instruction on the basis that Howard did not provoke an attack. Further, there is overwhelming evidence of intent in the record, including the fact that Howard shot Walker six times, reloaded his gun after he discharged the round, pushed her body aside, and left the scene without calling for help. We conclude, therefore, that even if it was error to give WIS J I—CRIMINAL 815, there is no reasonable possibility that the error contributed to the result in this case. *See* ***Dyess***, 124 Wis.2d at 543, 370 N.W.2d at 231.

By the Court.—Judgment and order affirmed.

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