COURT OF APPEALS
DECISION
DATED AND FILED

August 2, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2016AP1368-CR
2016AP1369-CR

Cir. Ct. Nos. 2013CF4368
2014CF1456

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROY KENNARD WEATHERALL,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Roy Kennard Weatherall ran a prostitution ring of mainly minors. He appeals a judgment convicting him of three counts of second-degree sexual assault of a child; two counts of physical abuse of a child—intentionally causing bodily harm; two counts of trafficking of a child; two counts of soliciting prostitutes; and one count each of soliciting a child for prostitution, pandering/pimping, second-degree recklessly endangering safety by use of a dangerous weapon, and intimidation of a witness/person charged with felony. On appeal, he contends the trial court erroneously admitted the testimony of one of his "girls," victim LG, as prior inconsistent statements. We disagree and affirm the judgment of conviction and the order denying his motion for postconviction relief.

¶2 Weatherall targeted vulnerable young women and girls, groomed them, had sex with them, and drove them to strip clubs around the state to dance and prostitute themselves, demanding that they turn over their earnings and recruit others for his "stable." If they brought in too little money or tried to leave, he beat them with his fists and a steel pole, telling them he "owned" them, often threatening to kill them. After two years and more than thirty beatings, one of the girls, a minor, went to police. Weatherall was charged with twenty counts in two separate cases involving four victims.[1] The cases were joined for trial.[2]

¶3 According to LG's testimony,[3] Weatherall told her he "like[d] to take girls out of town to get money" and would get a hotel room and "set up a

[1] Two counts of soliciting a child for prostitution and one count each of child trafficking, soliciting a prostitute, child abuse-intentionally causing harm, and conspiracy to intimidate a witness were dismissed on the prosecutor's motion.

[2] This court consolidated Weatherall's two separate appeals for briefing and disposition.

[3] All four victims testified at trial. Only LG's testimony is at issue on appeal.

[page on] Backpage[.com]." The girls then would "sell they [sic] body for money," which they had to give to Weatherall. He also told her he wanted her to "be in charge of the girls." LG said that at first she thought "in charge" meant "just … to be there for the girls," but soon "understood that he was a pimp," although she testified more than once that "[h]e never said he was a pimp. He said he was a manager." LG testified that when Weatherall asked her to be "in charge of the girls," he "never got [so] far" as to say if she would be "doing any of the things that these other girls were doing." LG also testified she did not recall telling law enforcement that Weatherall said he would put her in charge *if* she joined his group of girls. Conversely, she testified that she did recall telling them that Weatherall asked her if she wanted to "join his group of girls and talk[ed] to [her] about stripping," but when asked if those things were true when she told that to law enforcement, LG answered, "No. I, I don't remember."

¶4 Defense counsel objected on grounds that LG's statements to law enforcement were hearsay and were neither prior inconsistent statements nor a correct way to refresh her recollection. The court overruled the objection, stating that "[a]t the moment" the statements were inconsistent, as she also had testified that "none of these things occurred" and because of her inability to remember. LG clarified that she did not *recall* telling law enforcement that Weatherall would put her in charge if she joined his group of prostitutes, not that she did not *say* it. The defense was granted a continuing objection to the form of the questions and freely cross-examined LG without objection by the State.

¶5 After a nine-day trial, the jury found Weatherall guilty on all counts except for one count of false imprisonment. The court denied his postconviction motion seeking a new trial on grounds that the court erroneously exercised its

discretion when it admitted LG's trial testimony as prior inconsistent statements. Weatherall renews his argument on appeal.

¶6 Trial courts have "broad discretion to admit or exclude evidence[,] … [and] we will upset their decisions only where they have erroneously exercised that discretion." ***State v. Nelis***, 2007 WI 58, ¶26, 300 Wis. 2d 415, 733 N.W.2d 619 (citation omitted; alteration in original). We will find an erroneous exercise of discretion if the record shows that the trial court failed to exercise its discretion, the facts fail to support its decision, or if the trial court applied the wrong legal standard. ***State v. Roou***, 2007 WI App 193, ¶14, 305 Wis. 2d 164, 738 N.W.2d 173.

¶7 Weatherall complains that the State was allowed to ask LG questions on direct that improperly presented evidence to the jury. He contends that, by framing its questions in the form of, "Do you recall telling the police that ___," the jury heard inadmissible hearsay. Weatherall claims that through that technique, the State was able to impart objectionable information such as that he said he was a pimp; he asked LG to join his group of "girls" and brought up her stripping; he told LG he took girls out of town to prostitute themselves; he told LG he would put her in charge of all the girls if she joined them; LG overheard him tell another girl, Tasha,[4] he was going to "beat her ass"; and she later observed Tasha with a black eye after being with Weatherall, although LG earlier had testified that she noticed nothing unusual about Tasha's appearance. Weatherall challenges the court's overruling of his counsel's continuing objection to LG's testimony as

[4] Tasha is not one of the four victims named in the complaints.

inadmissible hearsay and argues that allowing the jury to hear this back-door hearsay testimony contributed to his convictions.

¶8 We disagree that the testimony to which Weatherall objects is inadmissible hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3) (2015-16).[5] Prior inconsistent statements are not hearsay and are admissible if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony. Sec. 908.01(4)(a)1.; *see also* ***Nelis***, 300 Wis. 2d 415, ¶28. Thus, the prior statements made by LG, who testified at trial and who was subject to cross-examination about them and which were inconsistent with her "I don't remember" testimony were not hearsay. Other statements relating things LG personally heard Weatherall say, *see* WIS. STAT. § 908.01(4)(b)1. (admission of party opponent), or personally observed also were not hearsay.

¶9 Weatherall cites ***State v. Lenarchick***, 74 Wis. 2d 425, 247 N.W.2d 80 (1976), for the proposition that a trial court may declare a witness's testimony denying recollection of an event to be inconsistent with a prior statement—if the court has reason to doubt the good faith of the denial. *See* ***id.*** at 436 ("[W]here a witness denies recollection of a prior statement, and where the trial judge has reason to doubt the good faith of such denial, he [or she] may in his [or her] discretion declare such testimony inconsistent and permit the prior statement's admission into evidence."). In other words, an insincere disavowal of recall at

[5] All references to the Wisconsin Statutes are to the 2015-16 version unless noted.

trial may be seen as a repudiation of the earlier statement, making the two statements inconsistent. *See* ***id.*** at 435.

¶10 We are not persuaded that ***Lenarchick*** must be read so restrictively. The ***Lenarchick*** court did not hold that a finding of bad faith is necessary or is the only circumstance in which such testimony may be deemed inconsistent with a prior out-of-court statement. The focus of the inquiry, it seems to us, is whether, in context, the asserted lack of recall can fairly be understood as a disclaimer of the prior statement.

¶11 LG well knew of Weatherall's appetite for exploitation and domination of vulnerable young women, and that he controlled through violence and death threats the "girls" he claimed to "own." Face-to-face with Weatherall in court, LG testified that she was "really scared and nervous." While the trial court did not spell out its full thought process, it was within its discretion to implicitly conclude that LG claimed that she did not recall what she told law enforcement conceivably so as to distance herself from her earlier incriminatory statements against Weatherall, and thus were prior inconsistent statements. Accordingly, they were properly used as substantive evidence. *See* ***Vogel v. State***, 96 Wis. 2d 372, 384, 291 N.W.2d 838 (1980).

By the Court.—Judgment and order affirmed.

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