

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 30, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP2494-CR

Cir. Ct. No. 2012CF1119

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MORRIS RASH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JONATHAN D. WATTS, Judge. *Affirmed.*

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 BRASH, J. Morris Rash appeals from a judgment of conviction, entered on a jury's verdict, and an order denying his postconviction motion for a new trial. Rash was convicted of substantial battery and of being a felon in possession of a firearm. In this appeal, Rash asserts that he is unable to make a

meaningful appeal based on an adequate record due to missing trial exhibits. The file has been reconstructed, and the trial court ruled that the reconstruction was sufficient for Rash to proceed with his appeal. We affirm.

BACKGROUND

¶2 The charges against Rash stemmed from an incident that occurred on February 22, 2012, at 2162 North 41st Street in Milwaukee between Rash and two women, M.R. and S.A. M.R. told police that she saw Rash hit S.A. in the face with his open hand after S.A. had stepped between Rash and M.R. to break up an argument. S.A. fell to the ground and was knocked unconscious. Rash then pulled a semi-automatic 9mm handgun from his waistband and fired six to seven shots in the air before fleeing the scene.

¶3 S.A. was transported to the hospital and treated for a head injury. She also suffered a sprained ankle and swelling to her face as a result of the incident. Additionally, a police officer recovered six 9mm shell casings from the scene. Rash was charged with substantial battery, as well as possession of a firearm by a felon.

¶4 The case went to trial in January 2013. Included in the exhibits that were admitted into evidence were four photographs of the injuries suffered by S.A., as well as injuries to M.R., taken by police during their investigation of the incident. These photographs were requested by, and provided to, the jury during deliberations.

¶5 The jury found Rash guilty of both counts.¹ He was sentenced in March 2013 to a total of five years and six months of initial confinement and five years of extended supervision.

¶6 In January 2014, appellate counsel for Rash filed a Notice of No-Merit Appeal. Upon review, this court noted that the record was missing the trial exhibits, and that they could not be located at the circuit court. We directed Rash's appellate counsel to obtain the missing exhibits and review them with Rash. However, appellate counsel was unable to locate the missing exhibits. We therefore rejected the no-merit report and dismissed the appeal without prejudice on November 16, 2015.

¶7 Rash then filed a motion for postconviction relief in July 2016, asserting that he was unable to effect a meaningful appeal due to the missing exhibits, specifically photos labeled as Exhibits 3, 4, 13, and 14 that depicted the injuries suffered by S.A. and M.R. He asserted that those four photos are crucial to the issues that he wishes to raise on appeal: that the photos were unfairly prejudicial, and that the photos of M.R. were improperly admitted because Rash was not charged with causing injuries to M.R.

¶8 In response, the State provided a disc containing all of the images taken by police during the investigation of this case. The trial court reviewed the images on the disc, comparing them to descriptions of the missing photos made on the record. The court also considered an affidavit submitted by the prosecutor

¹ The trial was originally scheduled for October 2012 but was adjourned at Rash's request. Both the trial and the postconviction motion were before the Honorable Jonathan D. Watts.

who tried the case, who had also reviewed the disc images. Based on the review of the disc images by the trial court and prosecutor, as well as the court's own recollection of the trial, the court was satisfied that the four missing photos were among the images on the disc. As a result, the court found that the record had been "sufficiently cured for the defendant to proceed with his appeal," and therefore denied Rash's motion to vacate the judgment of conviction and grant a new trial. This appeal follows.

DISCUSSION

¶9 On appeal, Rash argues that he is being denied his right to a meaningful appeal because the record has not been reconstructed beyond a reasonable doubt. Furthermore, he contends that there is insufficient evidence to demonstrate that reconstruction is possible, and therefore a new trial is warranted.

¶10 "As a matter of Wisconsin constitutional law, the right to an appeal is absolute." *State v. Perry*, 136 Wis. 2d 92, 98, 401 N.W.2d 748 (1987); *see also* WIS. CONST. art. I, § 21(1). Furthermore, the appeal must be "meaningful," that is, the record provided to the appellate court must "portray[] in a way that is meaningful to the particular appeal exactly what happened in the course of trial." *Perry*, 136 Wis. 2d at 99. If there cannot be a meaningful appeal due to a deficiency in the record, the usual remedy is to grant a new trial. *Id.*

¶11 However, not all deficiencies in the record require a new trial. *Id.* at 100. Accordingly, the defendant must first demonstrate a "colorable need," that is, "an error which, were there evidence of it revealed in the [record], might lend color to a claim of prejudicial error." *Id.* at 101 (citation and one set of quotation marks omitted). If such a need is demonstrated by the defendant, the trial court must then determine whether the missing portion of the record can be

reconstructed. *State v. Raflik*, 2001 WI 129, ¶35, 248 Wis. 2d 593, 636 N.W.2d 690. If the trial court determines that reconstruction should be attempted, the appellant should provide an affidavit that includes statements relating to the missing evidence as presented at trial. *State v. DeLeon*, 127 Wis. 2d 74, 81, 377 N.W.2d 635 (Ct. App. 1985). The respondent may then approve the appellant’s submission, propose amendments, or file an objection. *Id.*

¶12 Any remaining disputes between the parties regarding the substitutions to the record are to be determined by the trial court. *Raflik*, 248 Wis. 2d 593, ¶36. The court may “rely on its own recollection and notes or materials from the parties as an aid to reconstruction” as well as “conduct hearings or consult with counsel” in making its determination. *Id.* It may not, however, “speculate about what the testimony probably was or might have been.” *DeLeon*, 127 Wis. 2d at 81. Rather, the court’s “duty is to establish what the testimony was.” *Id.*

¶13 Furthermore, in making this determination, the trial court “must be satisfied to the same level of proof as required during the trial stage. In other words, in a criminal matter, the trial court must be satisfied beyond a reasonable doubt that the missing testimony has been properly reconstructed.” *Id.* at 82 (emphasis omitted). Additionally, “[e]very step of this procedure is reviewable on appeal.” *Raflik*, 248 Wis. 2d 593, ¶36. We will uphold the trial court’s determination unless it is clearly erroneous. *See id.*

¶14 Rash asserts that he has a colorable need for the missing photo exhibits to be included in the record because they are essential to his arguments on appeal. Specifically, he intends to argue that the photos were unfairly prejudicial, that the photos of M.R. were improperly admitted because Rash was not charged

with causing injuries to M.R., and that his trial counsel provided ineffective assistance by introducing the photos into evidence. The State concedes that Rash has demonstrated a colorable need for the photos.

¶15 The trial court, pursuant to the procedures set forth in *DeLeon* and *Raflik*, determined that reconstruction of the record was possible. This reconstruction entailed the State submitting the disc with all of the photos from the police investigation. The court then reviewed the images on the disc to determine whether the missing exhibits could be obtained from it to supplement the record.

¶16 The trial court determined that all of the missing exhibits were included on the disc. In fact, it was able to find a “perfect match” for Exhibit 4, which was a photo of S.A.’s lower calf, ankle, and foot, based on the description of the exhibit the court had made for the record during trial. The court identified two other photos as Exhibits 13 and 14, which were of M.R.’s face showing a neutral expression with a dark background, through a process of elimination by comparing that description from the record with images on the disc.

¶17 As for Exhibit 3, which showed S.A.’s head, neck, and upper torso as she laid on a hospital gurney, the trial court narrowed it down to two images on the disc, but was unable to say definitively which image had been admitted as Exhibit 3. Nevertheless, the court declared that was not necessary, because the only difference between the two images on the disc was that they were taken from different angles. The court indicated that this difference was immaterial, and therefore supplementing the record with either image would be sufficient for reconstruction purposes.

¶18 Rash argues that the reconstruction was improperly based on speculation by the trial court. We disagree. In the first place, the court noted that

the photo disc was submitted by the prosecutor who prepared the State's response to Rash's postconviction motion, and the court "accept[ed] the prosecutor's statement as an officer of the court." The prosecutor who tried the case also submitted an affidavit with her recollection of the photos that were admitted as exhibits. The court further relied on the description of the photos made on the record as they were admitted during the trial, as well as the court's own recollection, all of which is appropriate pursuant to *Raflik*. *Id.*, 248 Wis. 2d 593, ¶36. Rash contends that the trial court should have held a hearing regarding the reconstruction, but that is not required. *See id.* ("[t]he trial court is also *allowed* to conduct hearings") (emphasis added); *see also DeLeon*, 127 Wis. 2d at 82 (the trial court "*may* conduct hearings") (emphasis added).

¶19 Furthermore, the photo disc images used to supplement the record will not impede Rash from making a meaningful appeal. For example, Rash indicates that his unfair prejudice argument would be based on Exhibit 3, the picture of S.A. when she was in the hospital lying on a gurney in a neck brace being treated for her injuries. The trial court was unable to definitively declare which image from the disc was Exhibit 3, but narrowed it down to two images, both of which depicted S.A. on the hospital gurney. Thus, either photo used to supplement the record would not undermine Rash's argument relating to unfair prejudice.

¶20 Likewise, Rash's argument challenging the admission of the photos of M.R. would not be impeded either. Both of the disc images that the trial court indicated were Exhibits 13 and 14 depicted injuries to M.R.'s face, and matched the description of the photos that were admitted during the trial. The supplemented photos of M.R.'s injuries can be used to support Rash's argument—that the photos were inadmissible because he had not been charged with a crime

relating to M.R.'s injuries—in the same way the original exhibits could have been. For the same reason, Rash's ineffective assistance of counsel argument would not be undermined either.

¶21 Therefore, after reviewing the entire procedure upon which the trial court embarked, we find that the trial court properly followed the procedures for reconstructing the record. See *Raflik*, 248 Wis. 2d 593, ¶36; *DeLeon*, 127 Wis. 2d at 81. There is nothing the trial court did in this reconstruction that could be deemed clearly erroneous.² See *Raflik*, 248 Wis. 2d 593, ¶36. Accordingly, we affirm the trial court's denial of Rash's postconviction motion.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

² The State also argues that any error by the trial court in reconstructing the record was harmless error. Because we do not find any error in the procedure followed by the trial court, we do not reach this argument.

