COURT OF APPEALS
DECISION
DATED AND FILED

November 14, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-3366-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH J. SEELY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: BARBARA H. KEY, Judge. *Affirmed.*

Before Nettesheim, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Kenneth J. Seely appeals from a judgment convicting him of three counts of substantial battery with intent to commit bodily harm, second-degree sexual assault and intimidating a victim and from an order denying his postconviction motion for sentence modification. On appeal, Seely argues that the circuit court erroneously admitted into evidence an excited

utterance of the victim, there was insufficient evidence to convict him of one of the substantial battery counts, and the circuit court misused its sentencing discretion. We reject all of these claims and affirm.

¶2 The charges against Seely arose out of several incidents involving his girlfriend. With regard to one of the three counts of substantial battery, the State sought to admit into evidence the victim's July 15, 1999 statement to a co-worker that Seely had beaten her earlier that day. The victim testified that she and Seely had a fight on July 15, 1999, and that Seely slammed her head against the garage, causing her to bleed profusely. The victim ran to her car and drove to Neenah, where she was employed, where she sat in her car until co-workers found her. She testified that she told her boss that she and Seely had had a fight earlier in the day.

¶3 The State then offered the testimony of one of the victim's co-workers who testified that when he arrived for work at approximately 3:30 p.m., he found the victim sitting in her car in the parking lot. The co-worker observed the victim covered in blood "from head to toe." Upon being asked to relate the victim's statement to him, the defense objected on hearsay grounds. The State argued that the victim's statement was an exception to the hearsay rule as an excited utterance under WIS. STAT. § 908.03(2) (1999-2000). The State then laid the foundation for the excited utterance exception. The co-worker testified that the victim was shaking extremely and crying. The court overruled the objection and permitted the witness to testify about the victim's excited utterance. The

victim told her co-worker that her husband[1] had beaten her and punched her in the nose.

¶4 On appeal, Seely argues that the circuit court erroneously admitted the victim's excited utterance into evidence. The admission of evidence is within the circuit court's discretion and its rulings will not be overturned on appeal unless the court misused its discretion. ***Gonzalez v. City of Franklin***, 137 Wis. 2d 109, 139, 403 N.W.2d 747 (1987). The term "discretion" contemplates a process of reasoning which depends on facts that are of record or reasonably derived by inference from the record and a conclusion based on a logical rationale founded on proper legal standards. ***Christensen v. Econ. Fire & Cas. Co.***, 77 Wis. 2d 50, 55-56, 252 N.W.2d 81 (1977).

¶5 The excited utterance exception to hearsay is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." WIS. STAT. § 908.03(2). Seely concedes on appeal that the victim's statement is to be analyzed as an excited utterance. However, he contends that the circuit court ought to have considered the amount of time between the alleged beating and the victim's statement, indicating that the victim had to travel at least eighteen miles from her home to her employment. Seely contends that given the passage of time, the victim's statement was not made "under the stress of the excitement caused by the event or condition."

[1] This was a reference to Seely even though it does not appear that Seely and the victim were married.

¶6 There are facts of record from which the circuit court could find that the victim was still "under the stress of the excitement caused by the event" when she made her statement. The co-worker testified that the victim was shaking all over and crying. While the passage of time between the startling event and the utterance is relevant, ***State v. Johnson***, 153 Wis. 2d 121, 131 n.8, 449 N.W.2d 845 (1990), "time is measured by the duration of the condition of excitement rather than mere time elapse from the event or condition described." ***Muller v. State***, 94 Wis. 2d 450, 467, 289 N.W.2d 570 (1980). "The significant factor is the stress or nervous shock acting on the declarant at the time of the statement." ***Id.*** (citation omitted). The co-worker's description of the victim's condition was sufficient for the circuit court to find that the victim was still under stress at the time she made her statement. We uphold the circuit court's discretionary decision to admit the victim's excited utterance into evidence.

¶7 Seely next challenges the sufficiency of the evidence to convict him of the substantial battery arising out of the confrontation at the garage. Our review of the sufficiency of the evidence is to determine whether 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. Ray***, 166 Wis. 2d 855, 861, 481 N.W.2d 288 (Ct. App. 1992). It is the jury's function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985).

¶8 Seely was charged with substantial battery contrary to WIS. STAT. § 940.19(2). Seely contends that the evidence demonstrates that the victim was injured while he acted in self-defense. The victim testified that she and Seely had a fight over a key to the garage and that Seely knocked her to the ground, where she

remained. Seely then grabbed her by the hair and slammed her head into the garage, breaking her nose and causing her to bleed profusely. The victim conceded that during their struggle over the key, she scratched Seely with it.

¶9 Seely testified that the victim struck him several times and that he acted in self-defense.

¶10 The jury was instructed on self-defense. It was for the jury to resolve the conflicts in the testimony, and if the jury found the victim's testimony more credible than that of Seely, there was sufficient evidence to convict Seely of battery and to reject his self-defense claim.

¶11 Finally, Seely challenges his thirty-one year sentence. Seely argues that the circuit court improperly considered his refusal to admit guilt and that he perjured himself at trial. In sentencing Seely, the court considered the gravity of the offenses, the nature of the abusive relationship and level of violence perpetrated by Seely on the victim, Seely's significant rehabilitation needs to address his violence, and his denial of the incidents. The court found Seely's trial testimony and version of the events leading up to all of the charged crimes incredible. The court noted a prior conviction in a domestic abuse case. The court found Seely to be extremely dangerous and that his violence was escalating. At the postconviction motion hearing, the court stated that its sentence was not influenced by any concerns about perjury even though the court determined that Seely was not credible.

¶12 Sentencing is left to the circuit court's discretion, and our review is limited to determining whether there was an erroneous exercise of that discretion. ***State v. Rodgers***, 203 Wis. 2d 83, 93, 552 N.W.2d 123 (Ct. App. 1996). To overturn a sentence, a defendant must show some unreasonable or unjustified basis

for the sentence in the record. ***State v. Harris***, 119 Wis. 2d 612, 622-23, 350 N.W.2d 633 (1984).

¶13 The primary factors the circuit court must consider in imposing a sentence are the gravity of the offense, the character of the offender, and the need to protect the public. ***Id.*** at 623. Our review of the sentencing hearing does not support Seely's claims about the defects in the sentencing court's rationale. The court properly considered these factors and did not impermissibly base its sentence on Seely's refusal to admit guilt or a belief that Seely had committed perjury. *See* ***State v. Carrizales***, 191 Wis. 2d 85, 96, 528 N.W.2d 29 (Ct. App. 1995).

By the Court.—Judgment and order affirmed.

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