

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

March 19, 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

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No. 95-0920-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FRANCISCO GUERRIDO,

Defendant-Appellant.

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

Before Sullivan, Fine and Schudson, JJ.

SCHUDSON, J. Francisco Guerrero appeals from the judgment of conviction for first-degree reckless injury. He argues that the trial court made several evidentiary rulings that denied him a fair trial. We affirm.

In the early morning hours of June 11, 1991, Theresa Lazu was seriously injured when an assailant stabbed her in the chest with a knife outside her niece's apartment building. When Milwaukee Police Officer James Harpole arrived at the scene within one minute of the dispatch and asked Lazu who had stabbed her, she responded, "Frankie, Frankie." She subsequently told the police at the scene, in the ambulance, and at the hospital that "Frankie" was her ex-boyfriend, Francisco Guerrido.

Lazu testified that on the morning before the attack, she had spoken with Guerrido and told him that she was going to date another man, Barbaro Turcaz. She said that Guerrido told her that "if I wasn't his I wasn't nobody's." Later that day, Lazu and her niece, Micky Cartagena, were driving back to Cartagena's apartment building from a local tavern when Guerrido "jumped in front of the car" and then got in the back seat of their car. Lazu testified that she then took Cartagena home, drove around with Guerrido attempting to purchase cocaine, and then returned to Cartagena's apartment building where she parked the car. Guerrido stayed in the car. After unsuccessfully attempting to gain entry to Cartagena's apartment, Lazu walked outside where Guerrido walked up to her, stabbed her, and ran off. Lazu said she was screaming and "pounding on the door to try to get somebody's attention" when first Turcaz and then Cartagena came to her. Turcaz told Cartagena to call the police and an ambulance.

Other than the victim and the assailant, no witnesses observed the attack. Further, no physical evidence linked Guerrido or anyone else to the crime. Cartagena, however, corroborated Lazu's account of the earlier encounter with Guerrido and testified that "he said he was going to get her before the night was over with." She also described how Turcaz, who lived in the same building, "was kicking the door in and saying she was bleeding and everything, to call the police." She said she asked Lazu who had stabbed her and Lazu said, "Frankie."

Guerrido's theory of defense was that Turcaz stabbed Lazu, and that Lazu falsely accused him (Guerrido) because she was afraid of Turcaz. That theory was supported by several factors including Turcaz's proximity to the crime scene, his violence against Lazu, and, as he expresses it in his reply brief to this court, the "possib[ility] that Turcaz, awakening to find that his girlfriend of some months had been out driving the streets with her former

boyfriend, reacted in an abusive jealous rage when she finally came home well after midnight[.]”¹ Guerrido further supports his theory by pointing to evidence undermining Lazu's credibility including: Lazu's two prior criminal convictions; the fact that Lazu had a .16 blood alcohol content as well as cocaine in her system when treated at the hospital after the assault; the fact that Lazu initially lied to a detective about going with Guerrido to buy cocaine; and testimony from Carmen Fontanez that Lazu told her that Turcaz, not Guerrido, had stabbed her. Guerrido challenges several of the trial court's evidentiary rulings relating primarily to the extent to which he was allowed to impeach Lazu.

As this court recently summarized:

The admission of evidence is a matter within the trial court's discretion. We will not disturb an evidentiary ruling where the trial court has exercised its discretion in accordance with accepted legal standards and the facts of record. Where the trial court fails to adequately explain the reasons for its decision, we will independently review the record to determine whether it provides a reasonable basis for the trial court's discretionary ruling.

State v. Clark, 179 Wis.2d 484, 490, 507 N.W.2d 172, 174 (Ct. App. 1993) (citations omitted).

Guerrido first argues that the trial court erroneously exercised its discretion when, despite allowing defense counsel to cross-examine Lazu about Turcaz's violent acts against her, it did not allow the defense to elicit testimony from police officers to impeach her responses. Specifically, Guerrido sought to

¹ The theory of defense was plausible. We reject the State's argument that Guerrido failed to lay an adequate foundation to show that a third party committed the offense. In *State v. Denny*, 120 Wis.2d 614, 357 N.W.2d 12 (Ct. App. 1984), we required that a defendant establish motive, opportunity, and a direct connection between the third party and the offense charged in order to offer a third party defense. *Id.* at 624, 357 N.W.2d at 17. Here, Guerrido did provide an adequate theory supporting motive, opportunity, and a direct connection between Guerrido and the stabbing.

ask Lazu about events after the stabbing—in July 1991 and October 1991, in which Turcaz allegedly abused her. The trial court denied the State's motion *in limine* to exclude such evidence and permitted defense counsel to cross-examine Lazu about Turcaz's alleged violence against her.² Guerrido argues, however, that although “defense counsel was allowed to cross-examine Lazu about her violent relationship with Turcaz,” defense counsel “was prohibited from calling a police officer to verify that certain of these assaults had occurred, or at least that Lazu had made sworn statements to the police that they had occurred.”³

Under cross-examination, Lazu acknowledged that “probably” she had wanted to stay with Fontanez at one time because Turcaz “was beating [her] up.” At no point, however, did defense counsel question Lazu about statements she gave police regarding any alleged incident. Trial counsel stated that he wanted to call police officers because “I think she testified that there were no other acts of violence against her when in fact she reports to the officers that there is a history of abuse, and I think that that is if not prior inconsistent statement it can go in as substantive evidence in this case.” Before making its ruling, the trial court had the court reporter locate Lazu's trial testimony and reviewed it. The trial court then correctly concluded that the alleged inconsistency was not present; that is, that Lazu had not testified “that there

² Guerrido takes exception to the trial court's comment that Lazu's “answer must be accepted as given in the record.” This comment, however, must be placed in context. Defense counsel had stated that he had police officers to testify only about the alleged October incident, not the July incident. Regarding the July incident, defense counsel had stated, “I would simply inquire into that on cross-examination and would have to take whatever answer she gave me regarding that.” The trial court's comment specifically related to the July incident. The trial court went on, however, with additional remarks about the October incident for which trial counsel stated he had police officers who could provide testimony. The trial court stated:

On October 14, 1991, there was an incident that involved Ms. Lazu and Turcaz. That may likewise may be inquired into and her answers must be accepted, and if there is any rebuttal to her testimony about those incidents, then you will have to call the appropriate witnesses or have certified records to establish any further point.

Thus, we do not view the trial court rulings as ones that improperly foreclosed the defense from challenging Lazu's answers.

³ Contrary to appellate counsel's implication, trial counsel never represented that any of Lazu's statements to the police were sworn statements.

were no other acts of violence against her,” as defense counsel had maintained. The trial court then stated:

[Y]ou could have done anything you wanted on 10/91 with Lazu to put in the character of Barbaro but you can't do it independently with a police witness. That is a collateral attack in this Court's view and I'll deny the admission of it under 904.04 in the means that you are offering at this point through the police witness given the state of the record.

Had defense counsel confronted Lazu with questions regarding whether she had made statements to the police about Turcaz's alleged assaults, then nothing under § 904.04, STATS., would have precluded the police testimony. In this case, however, when Lazu denied that “a short time after [she] got out of the hospital [Turcaz] hit [her] with a baseball bat and threw [her] down the stairs,” and failed to recall details of the October 1991 incident, the defense failed to ask her about any statements she allegedly made to the police.⁴ Under § 908.01(4)(a)1, STATS., before introducing Lazu's alleged statements to the police to impeach her, the defense would have had to have cross-examined her “concerning the statement,” not merely concerning the alleged incident. Thus, we conclude that the trial court properly allowed Guerrido to impeach Lazu by exposing Turcaz's alleged violence against her, but also properly disallowed introduction of police testimony regarding Lazu's alleged statements about which she had not been cross-examined.

Guerrido next argues that the trial court improperly prohibited the defense from further impeaching Lazu by questioning her about hospitalizations for mental illness and alcohol and drug abuse that allegedly occurred five years and two years before the assault in this case. Defense counsel made an offer of proof that: Lazu had staged a suicide attempt in 1986 and had been admitted to the Milwaukee County Mental Health Complex; she again was admitted to the Mental Health Complex for a real suicide attempt in 1989; and on both occasions she had cocaine and alcohol in her system. Counsel

⁴ Referring specifically to the October incident, defense counsel only asked, “In fact you called the police after he did that, didn't you.” Lazu responded, “I don't remember that.”

argued that her mental health and alcohol/drug use were relevant to Lazu's credibility.

The trial court, however, concluded that the 1986 and 1989 events were "remote in time" and "not related to the fact pattern" of the stabbing and, "on the basis of relevance and prejudice," the evidence would not be allowed. On appeal, Guerrido offers a limited, imprecise argument:

[A]ppellate counsel does not know if defense counsel (or even GUERRIDO) sought to introduce evidence of Lazu's past staged suicide attempts in an effort to infer [sic] that she might have knifed herself or, in some other manner, staged this injury. The nature of the wounds was such—as was the corroborating testimony—that this inference would strain credulity. However, it was certainly a fair issue to present to the jury in terms of the victim's state of mind and mental stability at the time of the attack, as it relates to identity and motive.

... [I]t is clear that Lazu was "high" on both alcohol and cocaine at the time of the stabbing.... The fact that her proclivity to intoxication (by drugs and/or alcohol) was accompanied by mental imbalance (whether as cause or effect is irrelevant) is a fair issue for the jury to consider.

Guerrido has offered nothing to establish any error in the trial court ruling. There was no claim that the stabbing was a suicide attempt; the issue was whether Guerrido or Turcaz stabbed Lazu. Although Lazu's credibility clearly was crucial to resolution of that issue, Guerrido offered nothing to connect her mental health hospitalizations of 1986 and 1989 to her credibility in 1991. True, as Guerrido argues, the evidence could have shown Lazu's "proclivity to intoxication (by drugs and/or alcohol)," but that would have added nothing given the undisputed evidence that Lazu was under the influence of alcohol and cocaine at the time of the assault.

Finally, Guerrido argues that the trial court improperly excluded portions of the videotaped testimony of Carmen Fontanez.⁵ Fontanez stated that Lazú told her that Turcaz was the assailant. When Lazú testified at trial, she acknowledged talking to Fontanez about the stabbing, but denied that she had told her that Turcaz, not Guerrido, had committed the assault.

On appeal, Guerrido cites several portions of Fontanez's deposition testimony that, he maintains, were improperly excluded. He offers no specific argument in support of his contentions, however, except to "maintain[] that each of the decisions to excise testimony by Ms. Fontanez was error, which deprived the jury of valuable character evidence about the victim." Despite Guerrido's failure to adequately argue the basis for these claims of trial court error, we have carefully reviewed the deposition, compared the admitted and excluded portions, and evaluated the propriety of the trial court's rulings.

For the most part, the excluded deposition testimony told of Fontanez's understanding of the length of time Lazú and Turcaz had been living together and of Turcaz's violent acts against Lazú. The duration of the Lazú/Turcaz relationship was the subject of testimony by other witnesses, giving rise to uncertainty about the exact duration of their time living together. Further, as we have noted, Turcaz's violence to Lazú, at least in general terms, was not disputed. Fontanez's excluded testimony on these points added little and included nothing to establish the basis for her understanding.

By contrast, however, the trial court also excluded the following from the Fontanez deposition:

Q:How do you know [Lazú] stayed with Barbaro?

A:Because a couple of weeks later he beat her up with a bat and threw her down the stairs because she said she didn't want to come to court.

⁵ Fontanez had been deposed because of her unavailability for trial, due to her incarceration in another state.

....

Q:How do you know that, Ms. Fontanez?

A:Because she had told me when she talked to me at the bar when I told her that why was she – she had Frankie in jail? She says, “Don't worry about it, I just won't show up in court.”

Clearly, this testimony was relevant and admissible. It provided a specific alleged statement by Lazu connecting the assault to Turcaz's violence, and further connecting the alleged false allegation against Guerrido to whether Lazu would ultimately testify against him. We agree with Guerrido that the trial court erred in excluding this testimony.

We also agree with the State, however, that this error was harmless. An error in the exclusion of evidence is harmless unless “there is a reasonable possibility that the error contributed to the conviction,” *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-232 (1985). The error in excluding this evidence was harmless primarily because the excluded testimony was cumulative. First, it corresponded to admitted testimony from Fontanez's deposition that also informed the jury that Lazu allegedly had told Fontanez that she had falsely accused Guerrido.⁶ Second, it merely added to the admitted testimony that, in combination with other evidence, provided ample basis on

⁶ The trial court admitted testimony from the deposition that included Fontanez's statement:

A:... [Lazu] told me, she says, “The next time this mother fucker is going to kill me.” I said, “What do you mean, next time?” She said, “Well, you don't think that Frankie did this to me, do you?” And I says, “He didn't?” I said, “Who did it?” She said, “Barbaro did.” I said, “Why did you say it was Frankie then? You got him in jail. That's bad.” She told me, she said, “Barbaro told me to say it was he.”

Q:Okay.... Did she tell you when Barbaro told her to say it was Frankie?

A:After he stabbed her she told me that he told her that he was supposed to say that it was Frankie.

which the jury could have doubted Lazu's credibility had it chosen to do so. The admitted evidence included not only the other reference to Lazu's alleged admission to Fontanez, but also Lazu's two prior convictions, her cocaine and alcohol abuse, her lie to police about trying to buy cocaine with Guerrido, and her dubious inability to recall Turcaz's violence against her.

We also conclude that the error was harmless because, while there were no independent witnesses to the assault, the State's evidence was strong. As the State argues:

[T]he victim was on the verge of dying, citizens and police had responded to aid the victim, and she must have known it was safe for her to tell those present who actually stabbed her. Moreover, the defense theory makes no sense when one takes into account the fact that Turcaz not only responded to the victim's screams, but was alongside the victim pounding on the door of Micky Cartagena (the victim's niece) calling for help seconds after the stabbing. Presumably, if Turcaz were the assailant, he would have fled the scene

The victim's immediate and unequivocal identification of the appellant as her assailant seconds after he plunged a knife into her serves as powerful proof that Turcaz was not the assailant. Had she not blurted out the appellant's name immediately after the stabbing, the defense theory might have some substance. The victim's excited utterances, however, eliminate even the barest of possibilities that anyone other than the appellant stabbed her.

Therefore, although this portion of the excluded evidence should have been admitted, we see no “reasonable possibility that the error contributed to the conviction.”⁷

By the Court. – Judgment affirmed.

Not recommended for publication in the official reports.

⁷ Guerrido also argues that the trial court erred in the way it admitted the deposition. Instead of showing the videotape to the jury, the trial court had surrogates read the deposition transcript. It did so, apparently, to more easily assure the separation of the admissible and inadmissible portions and, possibly, to prevent the jury from observing Fontanez's “jail garb.” Although Guerrido correctly contends that showing a videotape offers a jury the opportunity to observe the demeanor of a witness, in this case the defense did not object to the trial court's surrogate/reading procedure. Thus, Guerrido waived this issue.

Guerrido also contends that the trial court erred in allowing the prosecutor to interpose objections to some of the deposition questions for the first time at trial. Clearly, however, the law allows for certain objections either at the deposition or at the trial. *See* § 804.07(2) & (3)(c)1, STATS. Further, Guerrido has failed to indicate which objections by the prosecutor were otherwise waived. *See id.*