

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

FEBRUARY 4, 1997

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(1), 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. 96-2246-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TIMOTHY ROY MINER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Douglas County:
MICHAEL T. LUCCI, Judge. *Affirmed.*

LaROCQUE, J. Timothy Roy Miner appeals his conviction for battery. He asserts that the trial court erred by allowing the State to impeach his testimony by eliciting the fact he had twelve prior criminal convictions. He also asserts that it was error to refuse his request for the Wisconsin jury instruction on mistake. This court rejects his arguments and affirms.

In 1995 Miner was involved in a physical confrontation with Phillip and Patricia Runser. As a result, Miner was charged with battery, contrary to § 940.19(1), STATS., trespass to dwelling, § 943.14, STATS., and disorderly conduct, § 947.01, STATS. Miner testified in his own defense at trial.

On cross-examination, the State attempted to impeach Miner's credibility by questioning him as to his prior criminal convictions.

Miner objected, arguing that it would be unduly prejudicial to his defense to admit to fourteen prior convictions.¹ After hearing argument from both sides, the court allowed the State to ask Miner if he had ever been convicted of a crime and, if so, how many times. However, the court also ruled that Miner did not have to admit to the two convictions that occurred before 1990. Accordingly, Miner testified that he had twelve prior criminal convictions.

At the close of the evidence, Miner requested the Wisconsin jury instruction on mistake, arguing that he was under the mistaken impression that Phillip Runser was physically abusing Patricia Runser when he approached the couple in an effort to protect her. This request was denied by the court. A jury found Miner guilty of battery but not guilty on the other charges. Miner now appeals, asserting that his defense was prejudiced by the introduction of the fact of his twelve prior convictions. Miner also appeals the trial court's decision not to submit the mistake instruction to the jury.

Under Wisconsin law, a prior criminal conviction on any crime is relevant to the credibility of a witness's testimony. *State v. Kruzycki*, 192 Wis.2d 509, 524, 531 N.W.2d 429, 435 (Ct. App. 1995). Wisconsin law presumes that a person who has been convicted of a crime is less likely to be a truthful witness than a person who has not been convicted. *Id.* Section 906.09, STATS., states as follows:

(1) ... GENERAL RULE. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is admissible. The party

¹ The record reveals that Miner had 14 prior criminal convictions: a 1986 conviction for burglary; a 1988 conviction for criminal damage to property; 1990 convictions for theft, attempted car theft, endangering safety with reckless use of a weapon, battery, two counts of entry into a locked vehicle, two more counts of theft, and criminal damage to property; and 1991 convictions for two counts of delivery of marijuana and one count of criminal damage to property.

cross-examining the witness is not concluded by the witness's answer.

- (2) EXCLUSION. Evidence of a conviction of a crime may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

Our supreme court has interpreted this provision to allow the State to ask a witness whether he or she has ever been convicted of a crime and, if so, how many times. *Nicholas v. State*, 49 Wis.2d 683, 688, 183 N.W.2d 11, 14 (1971).

However, under § 906.09(2), STATS., the trial court must determine whether the prejudicial effect of the witness's prior convictions would substantially outweigh their probative value. This determination is left solely to the discretion of the trial court. *Kruzycki*, 192 Wis.2d at 525, 531 N.W.2d at 435.

When this court reviews a discretionary decision, it considers only whether the trial court properly exercised its discretion, regardless whether this court would have made the same ruling. *Id.* A court properly exercises its discretion when it correctly applies accepted legal standards to the facts of record and uses a rational process to reach a reasonable conclusion. *Id.* This court concludes that the trial court properly exercised its discretion in this case.

Before trial, the court correctly stated the law regarding admission of prior convictions:

But if a defendant does provide testimony, a defendant ... can be asked whether they've ever been convicted of a crime before. That's allowable. And the defendant ... can be asked whether--how many times. And if that is stated correctly, if the responses to those questions are correct, that's as far as it goes. The impeachment cannot go any further.

The court concluded that Miner's prior convictions would be admissible under this standard.

Miner raised the issue again during trial, asserting that to require him to admit to numerous prior criminal convictions would be unduly prejudicial to his defense. Specifically, Miner argued that the prejudicial effect of admitting numerous prior convictions outweighed whatever probative value they might have regarding his truthfulness. The record reflects that the trial court clearly understood Miner's argument:

I do not agree with your assessment or your position that because of the number of prior convictions, that the state ought to be precluded from asking the question at all, from any impeachment on prior convictions. However, you may have a point that the actual number of convictions is so high that the potential prejudice could be quite severe.

After further argument, the court made the following ruling:

I've considered the arguments, and I--I'm going to deny the motion, request of the defense to preclude the state from asking or inquiring as to whether he's been convicted of a crime before and the number of times. Under all the circumstances as I see it I don't think that this is a situation which is contemplated by the case that was cited here. Again I think the factors that are at play here are simply ... this defendant has been convicted a number of times [and] it would appear that all of the convictions appear to be within [a] relatively recent period of time. I think that for purposes of keeping it even within a greater proximity to the present time that I'll limit it to convictions from 1990 on.

The parties subsequently agreed that Miner had twelve convictions since 1990 and, when asked on cross-examination, Miner admitted as such.

The above passage demonstrates that the trial court properly exercised its discretion in this case. The court permitted extensive argument from both parties, understood the issues raised and applied the proper legal

standard. Under such conditions, this court will not overturn the trial court's decision.

This court disagrees with Miner's contention that the trial court erred when it refused to give the Wisconsin jury instruction on mistake, WIS JI—CRIMINAL 770. This court will review the trial court's decision whether to issue a particular jury instruction to determine if a reasonable construction of the evidence will support the issuance of the instruction. *State v. Bougneit*, 97 Wis.2d 687, 690, 294 N.W.2d 675, 677 (Ct. App. 1980). This court concludes that the evidence of record does not support the issuance of the mistake instruction on the battery charge.²

The mistake instruction states that if an honest error of fact results in a person not having the intent or knowledge required for a crime, the person cannot be found guilty of that crime. In this case, intent is an element of the battery charge.

Although Miner testified that he did not intend to harm Phillip, Miner asserted that he was under the mistaken impression that Phillip was physically abusing or was about to abuse Patricia when he approached the couple in an effort to protect her. Miner further testified that he approached Phillip, "grabbed him by one arm, and he shoved me, and then we started fighting." This theory, if believed, concedes that Miner intended to cause physical harm to Phillip, either because he believed he needed to protect Patricia or because he believed he needed to defend himself. A reasonable view of this testimony does not support the assertion that Miner did not intend to abuse Phillip.

Furthermore, the trial court correctly ruled that if the jury were to believe Miner's testimony that he acted under the mistaken impression that he needed to protect Patricia, the appropriate instruction was the "defense of others" instruction. *See* WIS JI—CRIMINAL 825. This defense states in part that the defendant is allowed to act in defense of others only if the defendant reasonably believed there was an actual or imminent unlawful interference with a third person who was entitled to use force in self-defense. The "mistake"

² Because Miner was convicted on the battery charge only, this court reviews the trial court's failure to issue the mistake instruction on that charge only.

made by Miner in believing Patricia was in danger would then be material to whether Miner's belief in her dangerous situation was reasonable under the circumstances. Because this instruction was given, the jury was properly instructed regarding Miner's defense theory.

By the Court. – Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.