COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0936-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KARL M. GEBHARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Karl M. Gebhard appeals from a judgment of conviction of party to the crime of aggravated battery. He claims that the evidence was insufficient to support a finding that the battery resulted in great bodily harm, that the prosecution should have been dismissed because the prosecutor withheld exculpatory evidence, and that the trial court erroneously exercised its discretion

in not permitting use of a prior inconsistent statement of a witness. We reject his claims and affirm the judgment.

Gebhard, along with his two brothers, Kenneth and Richard, was charged with assaulting James Rogers on February 12, 1994.[1] Rogers had an altercation with Gebhard's brothers around midnight in an Oconomowoc tavern. When Rogers and his wife Julie pulled into their driveway a few hours later, a car pulled in behind them. The three Gebhard brothers exited the second car. Two of the brothers smashed Rogers' window, pulled him out of the car, and repeatedly kicked and punched him as he lay on the ground. Karl held Julie so she could not seek help.

Gebhard first claims that as a matter of law he is not guilty of aggravated battery because there was insufficient proof that Rogers sustained great bodily harm. *See* § 940.19(1m), STATS., 1991-92 ("[w]hoever causes great bodily harm to another by an act done with intent to cause bodily harm" is guilty of aggravated battery).[2] The State must prove each essential element of the crime beyond a reasonable doubt. *See* ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). We may not reverse a conviction on the basis of insufficient evidence "unless 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." ***Id.***

[1] Gebhard was also charged with and convicted of party to the crime of misdemeanor disorderly conduct and criminal damage to property. He does not challenge those convictions on appeal.

[2] Section 940.19, STATS., 1991-92, was repealed and recreated and first applied to offenses occurring on or after May 10, 1994. *See* 1993 Wis. Act 441, § 4.

"Great bodily harm" is defined in § 939.22(14), STATS., as an injury which "creates a substantial risk of death, or which causes serious permanent disfigurement, or which cause a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury." At issue here is whether Rogers sustained "other serious bodily injury." That phrase exhibits the "intentional broadening of the scope of the statute to include bodily injuries which were serious, although not of the same type or category as those recited in the statute." ***La Barge v. State***, 74 Wis.2d 327, 332, 246 N.W.2d 794, 796 (1976).

Gebhard suggests that it can be determined as a matter of law whether serious bodily injury occurred. However, it is not easy as a matter of law to draw the line of demarcation between "great bodily harm" and lesser forms of bodily harm. *See* ***Flores v. State***, 76 Wis.2d 50, 58, 250 N.W.2d 720, 724 (1977), *overruled on other grounds by* ***State v. Richards,*** 123 Wis.2d 1, 365 N.W.2d 7 (1985). For cases which fall in the "twilight zone," that is, the injury is neither relatively minor so that it cannot constitute serious bodily harm nor so severe that there is no doubt that great bodily harm was inflicted, the issue is really a matter for the jury to resolve. *See* ***Flores,*** 76 Wis.2d at 59, 250 N.W.2d at 724; ***State v. Schambow***, 176 Wis.2d 286, 297, 500 N.W.2d 362, 366 (Ct. App. 1993).

This is such a case and we look at the evidence in the light which sustains the jury's verdict. *See* ***Poellinger***, 153 Wis.2d at 501, 451 N.W.2d at 755. Rogers was transported to the hospital by an ambulance. He reported that he had lost consciousness during the assault. Rogers' treating physician testified that Rogers exhibited abrasions and swelling on his right temple area, forehead and right ear. Rogers' mouth was swollen making opening and closing his jaw difficult. There was multiple bruising on Rogers' arm and he had extreme pain in

his chest and stomach area. The physician was first worried about possible lacerations to Rogers' liver and kidney. Rogers was found to have a broken rib, a bruised kidney and a laceration to his liver. The liver injury could have required surgery if uncontrollable bleeding occurred. Rogers was placed on intravenous fluids and remained under observation for three days in the event that surgery was necessary. Although the liver injury resolved itself without further intervention, Rogers did not return to work for six weeks after the assault due to his injuries. The physician testified that the injuries were serious.[3]

The evidence supports the jury's findings that Rogers suffered serious injuries. Rogers was hospitalized for three days and surgery was a possibility due to the liver laceration. The jury's view of the evidence is reasonable and must be followed.

On the second day of trial, Gebhard moved to dismiss on the grounds that the prosecution had violated its duty to disclose exculpatory evidence as set forth in ***Brady v. Maryland***, 373 U.S. 83 (1963).[4] Gebhard claimed that the prosecution had withheld statements that his brothers had made to the prosecutor.

[3] Gebhard argues that the treating physician was improperly allowed to invade the province of the trial court and jury by stating his opinion that Rogers' injuries constituted statutory serious bodily injury. No objection was made to the testimony. We further note that the physician's opinion was not in legal terms but only constituted a medical opinion that the injuries were serious. Expert testimony on the seriousness and consequences of injuries is properly admitted on the issue of great bodily harm. *See* ***State v. Verdone***, 195 Wis.2d 476, 483-84, 536 N.W.2d 172, 175 (Ct. App. 1995).

[4] Based on ***Brady v. Maryland***, 373 U.S. 83 (1963), the prosecution has an affirmative duty to disclose to the defendant or his or her counsel any material or information within its possession or control which tends to negate the guilt of the defendant. *See* ***Nelson v. State***, 59 Wis.2d 474, 479, 208 N.W.2d 410, 412 (1973).

Gebhard claims that the statements indicate that he was not with his brothers on the night of the assault.[5]

The prosecution's duty to disclose covers only evidence within its exclusive possession. *See* ***State v. Armstrong***, 110 Wis.2d 555, 580, 329 N.W.2d 386, 398 (1983). The trial court found that the brothers' statements were not within the exclusive possession of the prosecution. This is a factual question. *See* ***State v. Calhoun***, 67 Wis.2d 204, 215, 226 N.W.2d 504, 509 (1975). We will sustain the trial court's factual findings unless clearly erroneous. *See* ***State v. Turner***, 136 Wis.2d 333, 343-44, 401 N.W.2d 827, 832 (1987).

Gebhard's assertion that his trial attorney did not know about the statements is belied by the record. Gebhard's attorney stated at trial that he was "reliably advised" by Gebhard's brothers that they had made the statements. Early in the prosecution Gebhard's attorney represented all three brothers. By the terms of a letter dated January 4, 1995, Gebhard's attorney negotiated a plea agreement for the two brothers which required that each make a detailed statement about the offense. The brothers entered their guilty pleas pursuant to the plea agreement on February 7, 1995. At that time the brothers were represented by Gebhard's attorney.[6] Kenneth's statement was attached to his sentencing memorandum submitted on June 27, 1995. Richard's statement was in his court file.

The situation here is similar to that in ***Calhoun.*** There the court held that statements supportive of the theory of defense made to the police by the

[5] Although produced during the trial, the statements are not part of the record on appeal.

[6] Gebhard's attorney withdrew from representation of the two brothers after entry of their pleas.

defendant's sons and niece were not within the exclusive control of the prosecution because the witnesses were known and completely available for inquiry about the statements given. *See* ***Calhoun***, 67 Wis.2d at 216, 226 N.W.2d at 510. Here, not only did Gebhard's attorney have initial contact and a professional relationship with the brothers who made the statements, he was aware of the requirement that the statements be given to the prosecution. Additionally, Gebhard and his attorney were able to consult with the brothers regarding the statements given and their version of the offense.

Gebhard's trial was conducted on June 25 and 26, 1996. The trial court's finding that Gebhard's attorney was aware more than a year before trial that the statements had been made is not clearly erroneous. Additionally, the statements were available as part of a public court file. Because Gebhard's attorney was aware that the statements were required, it was not an "intolerable burden on the defense" to search the public records or ask the brothers' new attorneys for copies of the statements. *See* ***State v. Randall***, 197 Wis.2d 29, 38, 539 N.W.2d 708, 712 (Ct. App. 1995). This is not a case such as ***Randall*** which held that the prosecution bears the burden of providing updated information about pending criminal charges its witnesses face because it would be an intolerable burden on the defense to continually comb the public records to see if any of the witnesses have been charged with crimes. *See* ***id.***

The trial court's finding that the prosecution was not in exclusive possession of the statements is not clearly erroneous. When alternative sources for the statements existed, counsel could not lay in the weeds and then make a claim that timely disclosure had not been made. Even if disclosure were required, dismissal of the prosecution is not required. Rather, "[t]he penalty for breach of disclosure should fit the nature of the proffered evidence and remove any harmful

effect on the defendant." ***Wold v. State***, 57 Wis.2d 344, 351, 204 N.W.2d 482, 488 (1973). The granting of a continuance to meet the newly discovered evidence is the favored remedy. *See* ***Tucker v. State***, 84 Wis.2d 630, 640-41, 267 N.W.2d 630, 636 (1978). Here, Gebhard was provided with the statements at the start of the second day of trial. His attorney expressed knowledge of the potential relevance of the statements to the theory of defense and did not express surprise at their content. Gebhard's attorney admitted that he had not intended to call Gebhard's brothers as witnesses because of the obvious bias but that he had anticipated using the statements. Yet Gebhard did not use the statements in his defense. There was no prejudice requiring dismissal of the case.

The final issue is whether Gebhard was properly barred from introducing through a police officer a prior statement made by Julie Rogers. Julie testified as part of the prosecution's case. As part of the defense, Gebhard questioned the police officer who had taken a written statement from Julie. Julie had written the statement out herself. Gebhard wanted to ask the officer about certain identifications made in the statement. The officer could not recall what was written in the statement. When Gebhard asked the officer to read aloud certain sentences in the statement, a hearsay objection was made and sustained.

> While the admissibility of evidence is generally a question addressed to the trial court's discretion, a trial court abuses it[s] discretion if it makes an error of law. The application of the hearsay rules embodied in secs. 908.01 and 908.03, Stats., to the undisputed facts before us is a question of law.

State v. Peters, 166 Wis.2d 168, 175, 479 N.W.2d 198, 200-01 (Ct. App. 1991) (citations omitted).

Gebhard argues that Julie's prior written statement was not hearsay because it was inconsistent with her trial testimony about the identity of the man

who restrained her while her husband was assaulted.[7] The trial court ruled that the statement was inadmissible because Julie had not been cross-examined regarding the statement and its inconsistency with her trial testimony. We need not decide whether it was necessary to cross-examine Julie about the inconsistency in order to lay a proper foundation for admission of her written statement.

We conclude that Gebhard was not prejudiced by the exclusion of the written statement because the essence of the inconsistency was brought out through the police officer's testimony. The officer testified that Julie had said that one of the two Gebhard brothers whom she identified shortly after the assault, neither of whom was Karl, had been the man who held her against the garage while her husband was assaulted. The inconsistency of this statement with Julie's trial testimony that Karl restrained her was there for the jury to consider. There is no reasonable possibility that the failure to admit the written statement itself, if error, contributed to the conviction. *See* ***State v. Patricia A. M.***, 176 Wis.2d 542, 556, 500 N.W.2d 289, 295 (1993).

By the Court.—Judgment affirmed.

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

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[7] The written statement is not part of the record and has improperly been included in the appendix to the appellant's brief. *See* ***State v. Smith***, 55 Wis.2d 451, 459, 198 N.W.2d 588, 593 (1972) (it is the appellant's duty to see that evidence material to the appeal is in the record). Usually we would penalize appellate counsel for including a document in the appendix which is not part of the record. However, the record makes clear that the statement was filed with the trial court for the purpose of making an appropriate record.

On appeal, Gebhard misrepresents that Julie wrote that only two Gebhards had been at her house. The written statement explains that three people were involved in the assault. Julie's statement indicates that the Gebhard brother who restrained her was one whom she identified shortly after the incident. Karl was not present when Julie made the identification. Julie testified at trial that Karl was the brother who restrained her.