

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

April 21, 1998

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**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 § 808.10 and RULE 809.62, STATS.

**No. 97-3139-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DUSTIN F. TELLER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Brown County: VIVI L. DILWEG, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Dustin Teller appeals his conviction for aggravated battery, as a party to the crime, after a trial by jury. Teller severely kicked the victim in the head several times while he lay on the sidewalk unconscious outside a tavern. On appeal, Teller argues that the trial court should have submitted the lesser-included offenses of battery and substantial battery to the jury, in addition to

the offense of aggravated battery. He seeks a new trial on this ground. Teller did not have an automatic right to lesser-included offense instructions. He deserved lesser-included offenses only if there were reasonable grounds for acquittal on the greater charge and conviction on the lesser charge. *See State v. Wilson*, 149 Wis.2d 878, 898, 440 N.W.2d 534, 542 (1989). We reject his argument and therefore affirm his conviction.

The evidence did not meet the standard for a lesser-included offense instruction. Teller viciously kicked the victim in the head from four to seven times and fought off a bystander's attempts to stop it. Teller's kicks created a "mush" sound to an observer across the street and drew blood that stained Teller's tennis shoe. Teller bragged about his accomplishment, and the victim suffered severe and permanent brain damage, remaining in a coma until the start of the trial. Under these circumstances, no reasonable juror would have convicted Teller of a lesser form of battery and acquitted him of aggravated battery. The evidence showed beyond a reasonable doubt that Teller intended to cause great bodily harm and that he realized this intent within the meaning of § 940.19(5), STATS., the aggravated battery statute. The trial court properly declined to submit such instructions or to grant a new trial.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published.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

