

**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. 97-3258-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CALVIN T. MORRISON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed.*

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

PER CURIAM. Calvin Morrison appeals a judgment convicting him of aggravated battery. He argues that the State presented insufficient evidence to prove that he intended to cause substantial bodily harm when he seriously injured Greg Loomis while Loomis was “moshing” (slam dancing). He also requests a new trial in the interest of justice because the real controversy was

not tried due to the jury's alleged failure to understand the concept of moshing. We reject these arguments and affirm the judgment of conviction and the order denying a new trial.

Loomis and another eyewitness testified that Morrison ran into Loomis's chest with his forearm and shoulder causing Loomis to fly several feet into a wall where he struck his head, causing severe brain injuries. A medical doctor testified that a simple fall could not have caused such serious injuries. Loomis struck the wall with force comparable to a fall from a rooftop or a traffic accident. Loomis's brother and a friend confronted Morrison immediately after the incident and Morrison asked them if they wanted to fight too. A witness testified that Morrison said he attacked Loomis because Loomis was getting wild and had "flipped him off" when Morrison told Loomis to "mellow out." Morrison told the witness that Loomis "had it coming."

Morrison's defense was that Loomis was the aggressor who kept bumping into Morrison and challenging him even though Morrison was not dancing. The defense argued that Morrison merely pushed Loomis away and Loomis lost his footing and struck his head.

The State presented sufficient evidence to support the conviction. We must sustain the verdict "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *See State v. Poellinger*, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757 (1990). The medical evidence regarding the force necessary to sustain Loomis's injury, the witnesses' description of the shove and Morrison's words after the incident are sufficient to support the finding that Morrison had the mental purpose to cause

Loomis substantial bodily harm or was aware that his conduct was practically certain to cause substantial bodily harm.

Morrison argues that the real controversy was not fully tried because the jury was not adequately informed about moshing. Several witnesses described moshing. The witnesses Morrison called at the postconviction hearing would have further described the chaotic atmosphere in the “mosh pit,” but would not have provided additional perspective upon which the jury could base its finding on Morrison’s intent. Morrison never suggested that Loomis’s injuries were caused by moshing. To the extent he is attempting to change his defense at this time, a discretionary reversal in the interest of justice should not be used to enable a defendant to present an alternative defense simply because the defense offered at trial did not succeed. *See State v. Hubanks*, 173 Wis.2d 1, 29, 496 N.W.2d 96, 106 (Ct. App. 1992).

One postconviction witness, Joe Spannbauer, testified that Loomis left the “moshing circle” and slammed into Morrison who had his back to the dancers. He testified that Morrison simply pushed Loomis away with his hands. This evidence was cumulative to that of another defense witness. It would not carry much weight because Spannbauer did not actually see Loomis fall and hit his head because he was sixty feet away and his view was obstructed by the bar. Any suggestion that the injury was caused merely by falling after a push is inconsistent with the medical evidence. We conclude that the issue of Morrison’s intent was fully and fairly tried and there is no basis for reversal in the interest of justice.

By the Court.—Judgment and order affirmed.

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

