

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 20, 2001

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-3517-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WALTER W. LOCKHART,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Clark County: DUANE POLIVKA, Judge. *Affirmed.*

Before Dykman, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Walter Lockhart appeals a judgment convicting him of substantial battery, as a repeater. He also appeals the order denying him postconviction relief. The issues are whether the trial court erroneously excluded testimony at his jury trial and whether cumulative error occurred in the proceedings such that we should grant a discretionary reversal in the interest of

justice. We affirm the circuit court's judgment and order and deny Lockhart's request for a new trial.

¶2 During a disagreement between Lockhart and his brother, Paul Lockhart, Walter struck Paul numerous times with a hatchet. The State subsequently charged Paul with attempted first-degree homicide and substantial battery.

¶3 Walter discharged three appointed counsels during the proceedings and elected to represent himself at his jury trial, with the court's approval. The court appointed standby counsel to assist the court, if necessary.

¶4 At trial, Paul testified that Walter became angry and attacked him without provocation or warning. Walter offered a self-defense theory, and testified that he struck several restrained blows with the hatchet only because Paul first hit him with a spatula and then threatened him with a knife. A cousin of both brothers witnessed the incident and corroborated Paul's version of events. He added that he was so concerned for Paul's safety that he briefly contemplated shooting Walter with a rifle Walter had on the premises. Three defense witnesses, all members of the Lockhart family, testified that Paul was not credible, was intensely jealous of and angry with Walter, had a bad temper and often had a threatening demeanor.

¶5 Two witnesses were prepared to testify that three days before the incident Paul had put a finger to his head and said that Walter "need[s] a bullet." The trial court excluded this testimony as irrelevant to Walter's self-defense theory because Walter was not aware of the statement at the time he struck Paul. The court also excluded testimony concerning certain violent acts Paul allegedly committed in years past, because they were too remote in time.

¶6 Walter failed to object when the prosecutor asked him if he had posted a sign threatening to shoot trespassers, on property that he used. Walter also did not object to a series of questions asked of a police officer about whether the rifle Walter had on the premises was loaded and whether Walter had cartridges for it on his person or nearby. The testifying officer could not answer those questions, but Walter later elicited testimony from another officer that the gun was loaded.

¶7 The jury found Walter guilty of substantial battery and not guilty of attempted homicide. The trial court entered judgment on the verdict and denied postconviction relief, resulting in this appeal.

¶8 Walter first argues that it was reversible error to exclude Paul's statement that Walter needed a bullet. Even though Walter did not learn of the statement until after the incident, he contends that it was relevant and admissible as evidence of Walter's reputation for violence. However, while the victim's reputation for violence is relevant, a defendant may establish this through evidence of specific instances of the victim's violent (or in this case threatening) behavior only if the defendant knew of the conduct at the time the crime was alleged to have been committed. *See State v. Boykins*, 119 Wis. 2d 272, 277, 350 N.W.2d 710 (Ct. App. 1984).

¶9 Walter also contends that Paul's statement was admissible because it showed Paul's hostility toward Walter, thus providing Paul a motive to testify falsely against him. Even if the statement were admissible to attack Paul's credibility, several family members testified to Paul's hostility toward Walter, which was not in dispute in any event. Those witnesses also testified to Paul's

poor reputation for credibility. Additional evidence that Paul had a motive to testify falsely was merely cumulative.

¶10 A new trial in the interest of justice is not warranted. Walter seeks a new trial under the provision of WIS. STAT. § 752.35 (1999-2000)¹ granting this court discretion to order one where the real controversy was not fully tried. That happened here, Walter contends, because cumulative trial court errors were exacerbated by his inadequate representation of himself. Principally, he contends that: (1) he was prevented from fully showing Paul's history of violence, (2) that the trial court allowed inadmissible cross-examination of his prior bad acts, (3) that the trial court erroneously allowed a witness to answer the jury's questions about Walter's gun, and (4) that Walter blundered by asking questions that allowed into evidence Paul's prior, consistent statements about the incident.

¶11 Notwithstanding the possibility that certain evidence was allowed that could have been excluded, and certain evidence was excluded that could have been allowed, we conclude that the case was fully and fairly tried. The dispositive issue on the battery charge was whether Paul and his nephew truthfully testified that Walter attacked Paul without provocation, or whether Walter truthfully testified that Paul struck him first and then threatened him with a knife. None of the claimed evidentiary errors bore directly on that question. Walter fully and effectively presented his version of the events, and he used several witnesses to extensively explore the issue of Paul's credibility, temper and hostility toward him. When Walter chose to represent himself, a decision he concedes was

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

knowing, intelligent and voluntary, he assumed the risk that he would lose certain benefits of counsel. *See State v. Clutter*, 230 Wis. 2d 472, 477-78, 602 N.W.2d 324 (Ct. App. 1999) (This court will not rescue the defendant from “the folly of his choice to represent himself.”). One of those benefits was familiarity with the rules of evidence.

By the Court.—Judgment and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

