COURT OF APPEALS
DECISION
DATED AND FILED

March 26, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2972-CR **Cir. Ct. Nos. 00 CM 10228, 01 CM 240**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CORREY ROBERTSON,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed.*

¶1 SCHUDSON, J.[1] Correy Robertson appeals from the judgments, following a jury trial, convicting him of two counts of battery and one count of bail jumping, all as a habitual criminal. Robertson argues that, under WIS. STAT.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f), (3) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise indicated.

§ 752.35, a new trial is warranted in the interest of justice "because the trial court and the State elicited testimony from the investigating officers in this matter vouching for the veracity of [the victim's] statements to the officers while suggesting that [he] was untruthful, thereby preventing the real controversey [sic] from being fully tried." This court affirms.

¶2 Robertson was charged with committing battery, on November 15, 2000, to Tamala Williams, with whom he had three children. Subsequently he also was charged with committing battery to her on January 9, 2001, and, because his contact with her violated the no-contact condition of his bail on the earlier charge, he also was charged with bail jumping. The three counts of the two cases were tried together.

¶3 Williams testified. She said she still loved Robertson, and that he had not battered her on November 15, 2000 or January 9, 2001. Williams said that, following each of the two incidents, she had lied to the investigating officers when she told them that Robertson had battered her on those dates.

¶4 Following Ms. Williams's testimony, the State recalled Officer Cherie Jones, who had responded to the scene of the November 15, 2000 incident. After the prosecutor and defense counsel had completed their questioning of Officer Jones, the trial judge questioned her:

> THE COURT: Officer, I have a question for you. You, in your investigation, interviewed the alleged victim in this case, Tamala Williams; is that correct?
>
> [OFFICER JONES]: Yes.
>
> THE COURT: You made observations of her demeanor and of her physical appearance; is that correct?
>
> [OFFICER JONES]: That's correct.
>
> THE COURT: And you did likewise, with respect to the defendant, insofar as you had contact with him?

> [OFFICER JONES]: That is correct.
>
> THE COURT: You would make note of the—his demeanor and you testified to that yesterday; is that correct?
>
> [OFFICER JONES]: That is correct.
>
> THE COURT: You made note of his physical appearance; is that correct?
>
> [OFFICER JONES]: That's correct.
>
> THE COURT: And you further investigated and at some point, got to the conclusion of your investigation—made a determination as to who should be arrested; is that correct?
>
> [OFFICER JONES]: That is correct.
>
> THE COURT: Who did you determine to be arrested?
>
> [OFFICER JONES]: We determined that the defendant should be arrested.
>
> THE COURT: How did you make that determination?
>
> [OFFICER JONES]: He was the primary aggressor.

The court then gave the prosecutor and defense counsel the opportunity to further question Officer Jones, based on the court's questions. Each declined.

¶5 Robertson did not object to any of the trial court's questions of Officer Jones. On appeal, however, he argues, "While it is acceptable, and even desirable, for a trial judge to ask witnesses questions to assist a jury in its search for the truth, the trial judge here went beyond that function." Robertson contends that, by "reinforc[ing] the idea that … the police decided to arrest [him]," the court's questioning "made Ms. Williams' out-of-court statements more credible than her testimony."

¶6 Echoing these same themes, Robertson also challenges certain testimony of Officer Bradley Blum, who had responded to the scene of the January 9, 2001 battery, and who also testified after Ms. Williams had testified at the trial. On direct, the prosecutor and Officer Blum had this exchange:

> [PROSECUTOR]: At any point in having this discussion [about the January 9 battery incident] with Tamala Williams, did you question what she was telling you?
>
> [OFFICER BLUM]: No.
>
> [PROSECUTOR]: At the end of the investigation, was somebody arrested?
>
> [OFFICER BLUM]: Yes.
>
> [PROSECUTOR]: Who was arrested?
>
> [OFFICER BLUM]: Correy Robertson was arrested.

¶7 The defense did not object. In fact, cross-examining Officer Blum, defense counsel explored the same subject:

> [DEFENSE COUNSEL]: I believe the district attorney asked you a question saying, Miss Williams told you these things and you didn't question them at that time; is that correct?
>
> [OFFICER BLUM]: No, I didn't question what she was stating to me.
>
> [DEFENSE COUNSEL]: What she said to you at this point, you just accepted it as being truthful?
>
> [OFFICER BLUM]: Yes, I did.

¶8 Then, on redirect, the prosecutor continued to elicit testimony to which Robertson did not object, but to which he now brings part of his challenge:

> [PROSECUTOR]: Defense counsel asked you about … another woman who was— Is there a neighbor?
>
> [OFFICER BLUM]: Yes.
>
> [PROSECUTOR]: At any point did she say that the victim was lying?
>
> [OFFICER BLUM]: No.
>
> [PROSECUTOR]: Did she indicate at all the victim was lying?
>
> [OFFICER BLUM]: No.
>
> [PROSECUTOR]: This whole issue of whether you questioned the victim's statement or not[;] to clarify, did you doubt the victim?
>
> [OFFICER BLUM]: No.
>
> [PROSECUTOR]: Why didn't you doubt her?

> [OFFICER BLUM]: I was having a difficult enough time getting a statement from her originally, and she was crying. She was upset. Everything she was telling me was consistent.
>
> When she stated she was hit in the head, I saw a visible injury to the head. I had no reason to doubt her on that. She told me a lamp shade or a lamp. I'm sorry—I did observe the lamp. Everything she was telling me was consistent.
>
> She was—stated he was upstairs and I went up there to check. He wasn't upstairs, but then she did point to the back[]door. He must have went [sic] out there—way— He must have went [sic] that way.
>
> Upon further investigation, speaking with Officer Barchus, she told me she observed the subject, who was later apprehended, after our investigation was complete, that that statement was consistent with him going out the back[]door. I didn't have reason to doubt her.

¶9 Under WIS. STAT. § 752.35, this court may reverse a judgment "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, … regardless of whether the proper motion or objection appears in the record." Although this court acknowledges that Robertson has raised certain legitimate issues, the record establishes that the challenged testimony did not prevent the real controversy from being fully and fairly tried.

¶10 WISCONSIN STAT. § 906.14 provides, in part:

> **(2)** INTERROGATION BY JUDGE. The judge may interrogate witnesses, whether called by the judge or by a party.
>
> **(3)** OBJECTIONS. Objections to the calling of witnesses by the judge or to interrogation by the judge may be made at the time or at the next available opportunity when the jury is not present.

The supreme court has explained, "The judge does have a right to clarify questions and answers and make inquiries where obvious important evidentiary matters are

ignored or inadequately covered on behalf of the defendant and the [S]tate." ***State v. Asfoor***, 75 Wis. 2d 411, 437, 249 N.W.2d 529 (1977).

¶11 In this case, however, the court's questions did not develop evidentiary matters that had been "ignored or inadequately covered." *See* ***id.*** In fact, as Robertson argues, to the extent that the questions may have elicited testimony implicitly commenting on the credibility of another witness, and to the extent that the questioning may have punctuated certain points clearly favorable to the State, the trial court may have crossed the "fine line which divides a judge's proper interrogation of witnesses and interrogation which may appear to a jury as partisanship." *See* ***id.***; *see also* ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984) ("No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth.").

¶12 Still, and in part because the very subject the trial court's questions explored had been thoroughly addressed by the parties' questions, the court's questioning made no difference. That, perhaps, may help to explain why defense counsel did not object. In any event, having reviewed the entire trial record, this court can see no basis for concluding that the trial court's questioning of Officer Jones interfered with "the real controversy" being "fully tried." *See* WIS. STAT. § 752.35.

¶13 Similarly, the prosecutor's questioning of Officer Blum was inconsequential (perhaps, once again, helping to explain why defense counsel did not object). After all, jurors certainly understand that when police officers respond to a crime scene, observe injuries, and interview victims, witnesses, and suspects, they often assess credibility and make arrests based on their assessments. The

challenged testimony did nothing more than confirm these rather obvious propositions.

¶14 Here, considered in isolation, the challenged testimony elicited by both the trial court and the prosecutor causes certain legitimate concerns. Considered in the full context of all the trial testimony, however, the challenged testimony was cumulative, and of little or no consequence. The real controversy was fully and fairly tried.

By the Court.—Judgments affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.