

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 5, 2002**

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.

**Appeal No. 02-0173-CR  
STATE OF WISCONSIN**

**Cir. Ct. No. 01-CF-15**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**SCOTT D. WORSECH,**

**DEFENDANT-RESPONDENT.**

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APPEAL from orders of the circuit court for Clark County: JON M. COUNSELL, Judge. *Reversed and cause remanded with directions.*

Before Vergeront, P.J., Deininger and Lundsten, JJ.

¶1 PER CURIAM. The State appeals an order which dismissed one count of its complaint against Scott Worsch, and a subsequent order denying reconsideration. The dismissed count alleged that Worsch, while himself a prisoner, had attempted to intentionally cause bodily harm to another inmate, without the other inmate's consent, in violation of WIS. STAT. §§ 940.20(1) and

939.32 (1999-2000).<sup>1</sup> The trial court concluded that the facts set forth in the complaint were insufficient to establish probable cause for an attempted battery because they did not show both that Warsech intended actual bodily harm and that anything intervened to prevent Warsech from causing bodily harm. We disagree and reverse with directions that the dismissed count be reinstated for further proceedings.

### BACKGROUND

¶2 As a factual basis for the complaint, the State attached copies of police reports by Clark County Deputies Patricia Arciszewski and Mike Koprek, as well as statements made by Warsech and the alleged victim, Paul Pearson.

¶3 While on duty at the Clark County Jail, Arciszewski reported having observed Warsech exit his cell into a common area, approach Pearson while appearing agitated, and then repeatedly strike Pearson in the back and head area with both fists, while Pearson remained seated and did not react.

¶4 Koprek also reported having observed Warsech striking Pearson in the back and head. Koprek further stated that he responded, removed Warsech from the area, and placed restraints on him. Koprek indicated that he did not observe any injuries on Pearson, and that Pearson stated he was not injured and did not need medical attention.

¶5 Pearson stated that Warsech was angry with Pearson for some prior taunting and for putting a towel over Warsech's cell window to block his view.

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

Pearson indicated that Worsech started “wailing” on his back while Pearson was playing cards and that Pearson just ducked down. Pearson said Worsech then tried to pull him off his chair down to the floor and tried to get him to agree to go into the shower area for a fight, saying that one of them “wouldn’t be leaving standing.”

¶6 Worsech also referred to the prior taunting and towel incidents. He stated that he approached Pearson and asked Pearson to step into the shower area with him to take care of the problem, but that Pearson just sat there, so Worsech pushed him off his chair.

#### DISCUSSION

¶7 As we explained in *State v. Chinavare*, 185 Wis. 2d 528, 533, 518 N.W.2d 772 (Ct. App. 1994):

A criminal complaint is a written statement of the essential facts constituting the offense charged. To be viable, a complaint must establish probable cause that a crime was committed by the defendant. A complaint establishes probable cause if it sets forth facts sufficient to permit an impartial judicial officer to make the judgment that the charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal process. The complaint need not, however, contain all the allegations of fact which if proved would be necessary to convict.

(Citations omitted.) *See also* WIS. STAT. §§ 968.01 and 968.03. The sufficiency of a criminal complaint is a question of law which this court reviews de novo.<sup>2</sup> *State v. Kordas*, 191 Wis. 2d 124, 127, 528 N.W.2d 483 (Ct. App. 1995).

¶8 The statutes which are necessary to understand the essential elements for the alleged offense of attempted battery by a prisoner are set forth in WIS. STAT. §§ 940.20(1), 939.22(4), and 939.32(3). Section 940.20(1) provides:

Any prisoner confined to a state prison or other state, county or municipal detention facility who intentionally causes bodily harm to an officer, employee, visitor or another inmate of such prison or institution, without his or her consent, is guilty of a Class D felony.

Section 939.22(4) defines “bodily harm” as “physical pain or injury, illness, or any impairment of physical condition.” And, finally, § 939.32(3) states:

An attempt to commit a crime requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that the actor does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that the actor formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

¶9 The parties do not dispute that the allegations in the complaint were sufficient to show that Warsech was aware at the time of the alleged offense that he and Pearson were both prisoners confined to a county detention facility and that Pearson did not consent to bodily harm. The issues on appeal are whether the allegations in the complaint established probable cause to believe: (1) that

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<sup>2</sup> Given our de novo review of the complaint, we are not persuaded by Warsech’s arguments that we are limited to considering only those inferences which the State explicitly argued in the trial court.

Worsech intended to cause Pearson bodily harm, and (2) that Worsech took actions unequivocally demonstrating that he would have committed the crime but for some intervention.

¶10 Here, there were allegations that Worsech struck Pearson multiple times on his head and back. Such blows could have caused some degree of pain, even if Pearson did not consider himself to be “injured” or in need of medical attention. We are therefore satisfied that the observed blows, in conjunction with Worsech’s statement that one of them “wouldn’t be leaving standing,” supply probable cause to believe Worsech intended to cause bodily harm.

¶11 With regard to the intervention element, we see nothing in the attempt statute which requires physical intervention. It would be fair to infer, then, that the mere approach of the deputy could have deterred Worsech from continuing to strike (or trying to strike) Pearson, thus constituting an intervening event. Moreover, Pearson himself stated that he “ducked” some of Worsech’s blows. Therefore, it would also be fair to infer that Pearson’s own evasive actions were a factor in his avoiding more serious injury or bodily harm. Given such permissible inferences, we are satisfied there was probable cause to believe that Worsech would have completed a battery had Pearson not ducked and/or had the deputy not approached Worsech in a timely manner. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

*By the Court.*—Orders reversed and cause remanded with directions.

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

