COURT OF APPEALS
DECISION
DATED AND FILED

July 7, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2567-CR **Cir. Ct. No. 02CF000048**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL D. SOULIER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Bayfield County: JOHN H. PRIEBE, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Michael Soulier appeals a judgment, entered upon a jury's verdict, convicting him of one count of aggravated battery, two counts of battery to a law enforcement officer and one count of resisting an officer, contrary

to WIS. STAT. §§ 940.19(6), 940.20(2) and 946.41(1).[1] Soulier also appeals the denial of his motion for postconviction relief. Soulier argues that the evidence at trial was insufficient to support his convictions for aggravated battery of his wife, Laurie Soulier, and battery to law enforcement officers Joshua Fleig and Jane Hagedorn. Soulier additionally argues he was denied his fair trial rights when the trial court sustained an objection precluding him from presenting what he claims was admissible non-hearsay evidence. Finally, Soulier claims the trial court erred by denying his motion for a new trial based on newly-discovered evidence. We reject these arguments and affirm the judgment and order.

A. Sufficiency of the Evidence

¶2 Soulier argues that the evidence at trial was insufficient to support his convictions for aggravated battery and battery to law enforcement officers Fleig and Hagedorn. Whether the evidence supporting a conviction is direct or circumstantial, we utilize the same standard of review regarding its sufficiency. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We must uphold Soulier's conviction "unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***Id.*** If there is a possibility that the jury "could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt," we must uphold the verdict even if we believe that the jury "should not have found guilt based on the evidence before it." ***Id.*** at 507. It is the

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

jury's function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985). Thus, if more than one inference can be drawn from the evidence, this court will follow the inference that supports the jury's finding "unless the evidence on which that inference is based is incredible as a matter of law." ***Poellinger***, 153 Wis. 2d at 506-07.

¶3 Here, the trial court instructed the jury that in order to find Soulier guilty of aggravated battery, the State had to prove beyond a reasonable doubt that: (1) Soulier caused bodily harm to Laurie; (2) Soulier intended to cause bodily harm to Laurie; (3) Soulier's conduct created a substantial risk of great bodily harm to Laurie; and (4) Soulier knew that his conduct created a substantial risk of great bodily harm. *See* WIS. STAT. § 940.19(6); WIS JI—CRIMINAL 1226 (2001). Soulier contends the State failed to prove that his conduct created a substantial risk of great bodily harm. The term "great bodily harm" is defined as "bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury."

¶4 Officer Fleig testified at trial that when he responded to the Soulier residence, Laurie informed him that Soulier had physically attacked her—strangulating her and pushing her around the house. According to Fleig, Laurie also indicated that Soulier had thrown a dust pan at her face. Fleig noted that the left side of Laurie's face was swollen and bruised, and there was an open laceration near her eye. Although Laurie recanted her abuse allegations and testified at trial that she lied when she told Officer Fleig that Soulier hit her and threw a dustpan at her, there was ample evidence adduced at trial to establish that

Soulier fought with Laurie and caused injury to her by throwing a dustpan at her face.[2] The jury could reasonably find that Soulier threw the dustpan intentionally and in fact caused injury to Laurie's face. Further, the jury could reasonably find that throwing a dustpan in the direction of Laurie's eye with sufficient force to cause bruising and a cut created a substantial risk of causing great bodily harm, namely permanent or protracted loss or impairment of her eye. The evidence was sufficient to support the conviction for aggravated battery.

¶5 With respect to his convictions for battery to a law enforcement officer, the trial court instructed the jury that in order to find Soulier guilty of aggravated battery to the officers, the State had to prove beyond a reasonable doubt that (1) Soulier caused bodily harm to Officers Fleig and Hagedorn; (2) Fleig and Hagedorn were law enforcement officers; (3) they were acting in their official capacity; (4) Soulier knew or had reason to know that Fleig and Hagedorn were law enforcement officers acting in their official capacity; (5) the officers did not consent to the bodily harm caused by Soulier; and (6) Soulier acted intentionally. *See* WIS. STAT. § 94.20(2); WIS JI—CRIMINAL 1230 (1994).

¶6 Officer Fleig testified that he ultimately found Soulier at his mother's house and, after informing Soulier that he was being arrested for domestic battery, Soulier fled the house on foot. Fleig testified that he and Officer Hagedorn eventually caught Soulier and during the course of physically restraining him, he was injured. Hagedorn similarly testified that she suffered

[2] To the extent Laurie's testimony conflicts with that of Officer Fleig regarding the events of that evening, it is the jury's function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985).

injury during her efforts to help restrain Soulier. When viewed most favorably to the State, the evidence was sufficient for the jury to find that Soulier intentionally kicked and swung his arms at Officer Fleig while resisting arrest, thus resulting in injury to Fleig's hand and leg to a degree that required medical treatment. Likewise, the evidence supports a finding that Soulier intentionally kicked and flailed his arms at Officer Hagedorn causing injury to her hand, again to a degree that required medical treatment. Soulier nevertheless contends that because the officers could not specify which kick or which swing of the arm caused their respective injuries, the evidence was insufficient to support the convictions. We are not persuaded.

¶7 A jury need not agree on precisely how the officers were injured so long as the State proves beyond a reasonable doubt that the injuries were sustained as part of a continuous episode involving multiple violent acts directed by Soulier against the officers in a short span of time. The jury need only unanimously agree "that the defendant intentionally committed an act which caused the victim bodily harm sometime during the incident." ***State v. Giwosky***, 109 Wis. 2d 446, 458, 326 N.W.2d 232 (1982). The evidence is sufficient to support Soulier's convictions for battery to the officers.

B. Witness Testimony

¶8 Soulier argues he was denied his fair trial rights when the trial court sustained the State's objection precluding him from presenting what he claims was admissible non-hearsay evidence. Soulier's mother, Elizabeth Johnson, testified on behalf of the defense at trial, recounting the circumstances of Soulier's arrest at her home shortly after the incident with Laurie. Defense counsel then asked Johnson to relate the substance of a conversation she had with Laurie later that

evening. The trial court sustained the State's hearsay objection. Defense counsel accepted the court's ruling, made no offer of proof and concluded his direct examination of Johnson.

¶9 Had she been allowed to answer the question, Soulier claims Johnson would likely have testified that Laurie recanted her accusation against Soulier that very evening, shortly after his arrest. Based on his theory that Laurie not only recanted at trial, but also on the very night of the incident, Soulier now contends that Johnson's testimony about the alleged recantation was not inadmissible hearsay but, rather, was admissible as a non-hearsay prior consistent statement to rebut an express or implied charge of recent fabrication under WIS. STAT. § 908.01(4)(a)2.

¶10 At trial, however, Soulier failed to make an offer of proof as to this theory of admissibility. WIS. STAT. § 901.03(1)(b). An offer of proof is a condition precedent to any appellate review of the alleged error. ***State v. Williams***, 198 Wis. 2d 516, 538, 544 N.W.2d 406 (1996). In any event, we conclude that any error in sustaining the State's objection was harmless. The test for harmless error is "whether there is a reasonable possibility that the error contributed to the conviction." ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). A reasonable possibility is a "possibility sufficient to undermine our confidence in the conviction." ***State v. Williams***, 2002 WI 58, ¶50, 253 Wis. 2d 99, 644 N.W.2d 919 (citations omitted).

¶11 Soulier sought to introduce the evidence in order to establish that Laurie had given prior consistent recantations long before taking the witness stand at trial. The State, however, made no issue as to the timing of her recantation. Rather, it pointed out the fact of her recantation and relied on the contrary

statements Laurie gave to police at the scene of the crime. Moreover, Laurie testified at trial that she had given prior statements to police that were contrary to her initial accusations, but consistent with her trial testimony. Specifically, Laurie described a letter she wrote to the district attorney six days after the incident in which she recanted her accusations consistent with her trial testimony. Laurie additionally testified that she gave separate statements to the victim/witness coordinator recanting her accusations, again consistent with her trial testimony. Because the jury heard evidence of Laurie's prior consistent recantations, there is no reasonable possibility that the error, if any, in sustaining the State's objection contributed to the conviction. ***Dyess***, 124 Wis. 2d at 543.

C. New Trial Based on Newly-Discovered Evidence

¶12 Finally, Soulier claims the trial court erred by denying his motion for a new trial based on newly-discovered evidence. A trial court may grant a new trial based on newly-discovered evidence if the following requirements are met: (1) the evidence was discovered after trial; (2) the moving party was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative to the evidence that was introduced at trial; and (5) it is reasonably probable that a different result would be reached at a new trial. ***Id.*** "If the newly-discovered evidence fails to meet any of these tests, the moving party is not entitled to a new trial." ***State v. Avery***, 213 Wis. 2d 228, 234, 570 N.W.2d 573 (Ct. App. 1997).

¶13 As an exhibit to his postconviction motion, Soulier attached a criminal complaint charging Officer Hagedorn with felony theft and forgery. Soulier argued that had he known of Hagedorn's alleged misconduct, he would have inquired into it on cross-examination in an effort to undercut her credibility.

At the time of Soulier's trial, however, there was nothing more than an investigation of possible wrongdoing. In fact, the charges were not filed against Hagedorn until six months after Soulier's trial and were still pending at the time of the postconviction hearing. In denying Soulier's postconviction motion for a new trial, the trial court concluded that it would have held this line of questioning inadmissible even if the pending investigation of Hagedorn had been known at trial.

¶14 The extent and scope of cross-examination for impeachment purposes rests within the sound discretion of the trial court. *See* ***State v. McCall***, 202 Wis. 2d 29, 35-36, 549 N.W.2d 418 (1996). Although a defendant is entitled to significant latitude on cross-examination, it is the trial court's duty to curtail any undue prejudice by limiting cross-examination, including the exclusion of bias evidence that would divert the trial to extraneous matters or confuse the jury by placing undue emphasis on collateral issues. ***Id.*** at 41-42.

¶15 To the extent Soulier believes these alleged "other bad acts" would have impeached Hagedorn's credibility, Soulier has failed to satisfy the three-part test for admitting proof of prior bad acts. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). The first inquiry is whether the other acts evidence is offered for an acceptable purpose under WIS. STAT. § 904.04(2). ***Sullivan***, 216 Wis. 2d at 772-73. After ascertaining whether the other acts evidence is offered for a permissible purpose under § 904.04(2), the analysis turns to whether the other acts evidence is relevant. In assessing relevance, we must first consider whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be

without the evidence. ***Id.*** Finally, we must question whether the probative value of the other acts evidence outweighs the danger of unfair prejudice. ***Id.***

¶16 Even assuming the other acts evidence could properly be admitted to impeach Hagedorn's credibility, Soulier has failed to show how this was either relevant or probative of consequential issues in the case. Hagedorn's credibility had no bearing on whether Soulier battered his wife as she was never at the scene of that offense and took no statements relating to that offense. Hagedorn's credibility was only tangentially material to the battery against the officers. Fleig testified regarding Soulier's battery of the officers and Soulier's attempts to elude capture. Although Hagedorn's testimony corroborated that of Fleig, Fleig's testimony is also corroborated by evidence of the injuries both officers sustained during the arrest. Because Soulier has failed to show a reasonable probability that a different result would be reached at a new trial, *see* ***Avery***, 213 Wis. 2d at 234, we conclude that the trial court properly exercised its discretion when it denied Soulier's motion for a new trial.

By the Court.—Judgment and order affirmed.

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