OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

March 3, 2021

To:

Hon. Michael P. Maxwell
Circuit Court Judge
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Monica Paz
Clerk of Circuit Court
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Annice Kelly
4623 75th St., #278
Kenosha, WI 53142

Eric Michael Muellenbach
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707

Susan Lee Opper
District Attorney
515 W. Moreland Blvd., Rm. G-72
Waukesha, WI 53188-2486

You are hereby notified that the Court has entered the following opinion and order:

2020AP953-CR State of Wisconsin v. Pamela M. Perez (L.C. #2018CF1299)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Pamela M. Perez appeals from a judgment convicting her of one count of disorderly conduct and one count of battery, both as a domestic abuse repeater. Perez argues that the evidence presented at her jury trial was insufficient to prove that she engaged in disorderly conduct or that she caused bodily harm to S.H., the victim in this case and Perez's long-time significant other. Based upon our review of the briefs and record, we conclude at conference that

this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] We summarily affirm.

These charges stemmed from an incident that occurred on July 24, 2018. Officers responded to Perez and S.H.'s home in New Berlin, Wisconsin, for a report of a domestic dispute. Perez made the call to 911, but "seemed surprised" to see the police. She explained that "she called 9-1-1 because she was trying to get a phone number to a woman's center, and she didn't want police officers to respond." The officer testified that he "smelled [a] strong odor of intoxicants on [Perez's] breath" and "[h]er eyes were glassy and bloodshot." Perez admitted she had been drinking.

The officers also spoke to S.H., who reported that Perez had hit him in the "left side of his neck" and that he was "still in pain."[2] S.H. told the officer that the events began the previous evening when Perez began drinking alcohol, "became very intoxicated," and started "calling [S.H.] names like stupid, dumb, and then … telling him that he had a flat head … because he has no brains and he's dumb." As a result, S.H. decided to sleep on the couch in the living room. That morning, S.H. awoke when Perez, still intoxicated, "fell on top of him" when she was "trying to close the blinds and the windows and must have tripped over something." S.H. told Perez to "leave him alone," and she retreated to the bedroom, slamming the door shut while "screaming out profanities … like motherfucker, asshole, [and] stupid." Later, Perez approached S.H. and put her phone in his face, "so close that it was touching his forehead and his nose" and

[1] All references to the Wisconsin Statutes are to the 2017-18 version.

[2] S.H. and Perez have been in a relationship and living together for twenty-seven years. S.H. is disabled as a result of a work-related accident. He has undergone a number of surgeries, has pins and plates in his neck, and walks with a cane. Perez is his caregiver.

blocking his view. S.H. knocked the phone out of Perez's hand, and it fell on the floor. Perez responded by swinging "her right hand and hit[ing S.H.] on the side of his left neck so hard that the vision in both of his eyes went bright white."[3] The officers subsequently placed Perez under arrest for domestic violence.

The State charged Perez with disorderly conduct, domestic abuse, and battery, domestic abuse, both as a domestic abuse repeater.[4] At trial, S.H. testified; however, his trial testimony was strikingly different from the statements he made to police and from his written statement.[5] He told the jury that he and Perez were having a "disagreement" about finances but that Perez never hit him. S.H. also testified that he would not "have ever consented to [Perez] hitting [him]." As to his story changing, S.H. stated, "I don't remember a lot of the things that happened," but he admitted that some of the information contained in his statement "[c]ould be" correct. S.H. acknowledged when questioned by the State that he still loves Perez and that he "always want[s] to protect her" and that he "would do anything to protect her."

[3] S.H. also provided a handwritten statement to police, later that day, recounting substantially the same story.

[4] As Perez was charged as a repeater, her misdemeanor charges were increased to felonies pursuant to WIS. STAT. § 939.621(1)(b) and (2).

[5] The officers testified at trial regarding their conversations with S.H. Perez objected to this testimony on the basis of hearsay, but the court overruled the objection, as the testimony was being used for impeachment purposes. Perez does not challenge the admission of this testimony on appeal. S.H.'s handwritten statement was also entered into evidence.

The jury found Perez guilty of both offenses, and the court sentenced her.[6] Perez now appeals.

Perez argues on appeal that the evidence was insufficient to prove that she engaged in disorderly conduct or that she caused bodily harm to S.H. In reviewing a claim of insufficient evidence, we "may not reverse a 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." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). "[W]e do not substitute our judgment for that of the jury merely because evidence is in conflict or because there is evidence which might have supported a different result." ***State v. Edmunds***, 229 Wis. 2d 67, 73, 598 N.W.2d 290 (Ct. App. 1999).

We conclude that the evidence presented at Perez's trial was sufficient to support the jury's verdict on both counts. On the disorderly conduct count,[7] Perez argues that the evidence was insufficient, as S.H. and "Perez were having a disagreement and that both parties engaged in the same type of behavior." According to Perez, her "behavior did not tend to cause a disturbance as S.H. had already created the disturbance," and she "was merely reacting." We disagree. The evidence presented, including that Perez was calling S.H. names and being

[6] The court ordered two years' probation on each conviction and imposed and stayed consecutive three-year sentences on each count, composed of one and one-half years' initial confinement and one-half year extended supervision.

[7] WISCONSIN STAT. § 947.01, the disorderly conduct statute, states: "Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of" the offense of disorderly conduct.

generally verbally abusive, "screaming out profanities," slamming the bedroom door, putting her phone in S.H.'s face, and hitting him on the side of the neck hard enough that the "vision in both of his eyes went bright white," all support the jury's finding that Perez engaged in disorderly conduct under the circumstances. Perez does not explain how both parties engaging in "the same type of behavior" would prohibit her disorderly conduct conviction, but in any event there was also evidence indicating that S.H. attempted to de-escalate the situation by sleeping on the couch, telling Perez to leave him alone, and retreating to the outdoor patio.

Further, it was reasonable for the jury to resolve the credibility issues and conflicts in S.H.'s testimony to reach this result. *See* ***Poellinger***, 153 Wis. 2d at 506-07; ***Johnson v. State***, 55 Wis. 2d 144, 147, 197 N.W.2d 760 (1972) ("The credibility of the witnesses and the weight of the evidence is for the trier of fact."); ***State v. Sharp,*** 180 Wis. 2d 640, 511 N.W.2d 316 (Ct. App. 1993) ("Where there are inconsistencies within a witness's testimony or between witnesses' testimonies, the jury determines the credibility of each witness and the weight of the evidence."); *see also* ***State v. Bednarz***, 179 Wis. 2d 460, 507 N.W.2d 168 (Ct. App. 1993) (noting that a victim of domestic abuse "may change [his or] her story in an attempt to exonerate the abuser").

On the battery count,[8] Perez argues that neither the bodily harm nor the consent elements of the offense have been satisfied, as S.H. testified that Perez did not hit him and the State did not ask S.H. if he consented, it asked him whether he would "have ever consented." Perez

[8] WIS. STAT. § 940.19(1) provides: "Whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed is guilty" of battery.

claims that S.H.'s answer is "speculation and does not answer the question of whether he consented." As addressed above, it was within the province of the jury to resolve the conflicts between S.H.'s written statement, statement to police, and his trial testimony in favor of a finding that Perez hit S.H. We also disagree that S.H.'s answer regarding consent was speculation. S.H.'s testimony was that he would not "have ever consented" to Perez hitting him, meaning that at no time in the past would he have consented, including on the date of the incident. The question was worded in that manner by the State due to S.H. testifying that Perez did not hit him; accordingly, the State was unable to word the question more directly. We conclude the evidence was sufficient to support the jury's verdict.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals