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DISTRICT IV

July 1, 2021

To:

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

2020AP951-CR State of Wisconsin v. Sir Jordan Cosby (L.C. # 2017CF312)

Before Fitzpatrick, P.J., Blanchard, and Graham, JJ.

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).

Sir Jordan Cosby appeals a judgment, entered upon a jury's verdict, convicting him of substantial battery of a fellow prisoner. Cosby challenges the sufficiency of the evidence to support the jury's verdict. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We summarily affirm. *See* WIS. STAT. RULE 809.21 (2019-20).¹

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

The State charged Cosby with battery by a prisoner and substantial battery, both as a party to a crime, after Cosby and another inmate allegedly beat a third inmate, A.L. A jury found Cosby guilty of both charges after a trial. A.L. did not testify at trial. On appeal, Cosby challenges his conviction for battery by a prisoner on the ground that the State failed to present evidence sufficient to prove him guilty of the offense.

In order to prove Cosby guilty of battery by a prisoner under WIS. STAT. § 940.20(1), the State was required to prove the following elements: (1) that Cosby was a prisoner confined to a Wisconsin prison; (2) that he intentionally caused bodily harm to A.L.; (3) that A.L. was an inmate at the prison; (4) that Cosby caused bodily harm without A.L.’s consent; and (5) that Cosby knew A.L. was an inmate and knew that A.L. did not consent to the harm. *See* WIS JI—CRIMINAL 1228. The only one of these elements that is in dispute on appeal is whether Cosby caused bodily harm without A.L.’s consent. Cosby argues that the State failed to present any evidence to prove this element. He asserts that, ordinarily, in order to prove a lack of consent, the State will elicit testimony from the victim that he or she did not consent. Here, A.L. did not testify. Additionally, Cosby asserts that he and his co-defendant both gave testimony indicating that A.L. had been the aggressor. Cosby argues that the State provided “no evidence which even suggested A.L. did not consent to the fight.”²

² In support of his argument, Cosby cites two unpublished court of appeals decisions in his appellant’s brief: one per curiam opinion and one unpublished judge-authored opinion. WISCONSIN STAT. RULE 809.23(3)(a) prohibits citation of unpublished opinions as precedent or authority, “except to support a claim of claim preclusion, issue preclusion, or the law of the case, and except as provided in par. (b).” RULE 809.23(3)(b), in turn, states that *authored*, unpublished opinions issued on or after July 1, 2009, may be cited for their persuasive value. The unpublished, authored opinion cited by Cosby was issued in 2005 and, therefore, is not citable under RULE 809.23(3)(b). The unpublished per curiam opinion cited by Cosby was not used to support a claim of claim preclusion, issue preclusion, or the law of the case. Therefore, the opinion should not have been cited in the appellant’s brief. Although Cosby

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The State counters in its respondent's brief that the issue was not whether A.L. consented to a fight, but whether he consented to the bodily harm that he sustained. The jury was instructed at trial that "[b]odily harm means physical pain or injury, illness, or any impairment of physical condition." The State asserts that the evidence at trial was sufficient to sustain findings that Cosby caused bodily harm to A.L. and that A.L. did not consent to that bodily harm. We agree.

When reviewing the sufficiency of the evidence to support a conviction, the test is whether "the evidence, viewed most favorably to the state and the conviction, is so lacking 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).

As to Cosby's assertion that A.L. was the aggressor, there was contradictory testimony at trial from correctional officer Doyal Johnson, who testified that Cosby and Massey "attacked" A.L., and that they caught A.L. "by complete surprise." Johnson testified that he did not see how A.L. "could have threw a punch" and that, if he did, "he didn't throw it first." Another officer, Carolyn Voight, testified that she observed A.L. lying on the ground with Cosby and Massey "standing over" him. She witnessed Cosby "throwing punches." Voight testified that A.L. did not appear to be defending himself and that, when she got to A.L., he "appeared to be unconscious" and unresponsive, with blood covering his eyes.

made an apology in the reply brief for citing the unpublished per curiam opinion, he failed to acknowledge his mistake in citing the unpublished, authored opinion from 2005. We admonish Cosby's counsel for lack of attention to fundamental rules governing the use of court precedent and expect that counsel will not repeat these errors in the future.

Another correctional officer, Chad Geschke, testified that he observed Cosby throw four punches to A.L.'s face and that A.L. did not move or defend himself. Matthew Burns, a prison lieutenant, testified that he observed A.L. lying on his back and that Cosby was "punching him with his closed fist." Both Geschke and Burns testified that A.L. appeared to be unconscious. In addition, the State introduced photographs into evidence that showed A.L. after the battery with serious injuries to his head and face.

Cosby asserts that the testimony of the correctional officers should not be given any weight because they arrived after the fight began and had no knowledge of what occurred before they arrived. Cosby argues that the officers' testimony is contradicted by his own testimony and that of Massey that A.L. was the aggressor. However, "[i]t is generally not the province of the reviewing court to determine issues of credibility." *State v. Wachsmuth*, 166 Wis. 2d 1014, 1023, 480 N.W.2d 842 (Ct. App. 1992). It is the jury's responsibility to resolve conflicts and inconsistencies in the evidence and to judge the credibility of the evidence. *State v. Pankow*, 144 Wis. 2d 23, 30-31, 422 N.W.2d 913 (Ct. App. 1988). This court will not substitute its own judgment for the jury's unless the evidence is inherently or patently incredible. *See State v. Saunders*, 196 Wis. 2d 45, 54, 538 N.W.2d 546 (Ct. App. 1995). We are not persuaded that that is the case here. Given the ample evidence in the record showing that Cosby caused bodily harm to A.L. and that A.L. lost consciousness, the jury reasonably could have inferred that A.L. did not consent to the injuries he sustained. We are satisfied that the evidence supports the jury's verdict.

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

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

Sheila T. Reiff
Clerk of Court of Appeals