COURT OF APPEALS
DECISION
DATED AND FILED

September 9, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2557-CR **Cir. Ct. No. 2012CF4552**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LESLIE LOWE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARY E. TRIGGIANO, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Leslie Lowe appeals a judgment of conviction, entered upon a jury's verdict, on one count of battery by a person subject to certain domestic abuse injunctions. Lowe also appeals an order denying his postconviction motion for acquittal. Lowe asserts that there is insufficient

evidence to support the jury's verdict. We reject his argument and affirm the judgment and order.

¶2 On August 24, 2012, Vanessa Conway flagged down police outside her residence, reporting that Lowe had appeared there, pushed her inside, cursed at her, and punched her once in the chest, causing her to fall into the wall. Conway had previously obtained a domestic abuse injunction against Lowe, effective through May 25, 2015, requiring Lowe to stay away from Conway's residence and to refrain from contacting her. Lowe was charged on September 14, 2012, with one count of battery by a person subject to certain domestic abuse injunctions, with domestic abuse and habitual offender enhancers. An information filed in November 2012 added one count of criminal trespass to a dwelling with a domestic abuse enhancer.

¶3 A jury convicted Lowe of the battery but acquitted him of the trespass. The circuit court sentenced him to two years' initial confinement and two years' extended supervision, imposed and stayed in favor of three years' probation. Lowe filed a postconviction motion, seeking acquittal on the grounds that the evidence at trial had been insufficient to support the jury's verdict. The circuit court denied the motion, explaining that the matter hinged on witness credibility, something left to the jury's determination. Lowe appeals.

¶4 Evidence "must be sufficiently strong to exclude every reasonable theory of [the defendant's] innocence." ***Schwantes v. State***, 127 Wis. 160, 176, 106 N.W. 237 (1906). However, this rule "does not mean that if any of the evidence brought forth at trial suggests innocence, the jury cannot find the defendant guilty." ***State v. Poellinger***, 153 Wis. 2d 493, 503, 451 N.W.2d 752 (1990). Instead, the rule stated in ***Schwantes*** "refers to the evidence which the

jury believes and relies upon to support its verdict." ***Poellinger***, 153 Wis. 2d at 503.

¶5 Further, the ***Schwantes*** rule is not the test on appeal. ***Poellinger***, 153 Wis. 2d at 503. A reviewing court may overturn a verdict for insufficient evidence "only if the trier of fact could not possibly have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt." ***State v. Watkins***, 2002 WI 101, ¶68, 255 Wis. 2d 265, 647 N.W.2d 244. "[A]ppellate courts do not independently apply the 'reasonable hypothesis' test." ***Id.***, ¶67 n.17. For purposes of appellate review, "'the trier of fact is free to choose among conflicting inferences of the evidence and may, within the bounds of reason, reject that inference which is consistent with the innocence of the accused.'" ***State v. Smith***, 2012 WI 91, ¶31, 342 Wis. 2d 710, 817 N.W.2d 410 (citation omitted). "[T]he defendant bears a heavy burden in attempting to convince a reviewing court to set aside a jury's verdict on insufficiency of the evidence grounds." ***State v. Booker***, 2006 WI 79, ¶22, 292 Wis. 2d 43, 717 N.W.2d 676.

¶6 There are five elements the State had to prove in order for the jury to convict Lowe of battery by a person subject to a domestic violence injunction: (1) that Conway had petitioned for a domestic abuse injunction against Lowe; (2) that at the time of the alleged offense, Lowe was subject to the injunction; (3) Lowe intentionally caused bodily harm to Conway; (4) Conway did not consent to the bodily harm; and (5) Lowe knew Conway petitioned for the injunction and knew that Conway did not consent to the causing of bodily harm. *See* WIS JI—CRIMINAL 1229.

¶7 The only element in dispute is whether Lowe intentionally caused harm to Conway. "'Bodily harm' means physical pain or injury, illness, or any

impairment of physical condition." WIS. STAT. § 939.22(4). Lowe does not dispute that Conway testified that he punched her, that it caused her to be winded, and that it "didn't feel nice." Rather, Lowe's entire appellate argument is that Conway's testimony at trial was so inconsistent with her prior statements to police and with earlier testimony that she has no credibility and the jury could not possibly rely on her testimony to find guilt. Specifically, Lowe complains that Conway was inconsistent about: how (text or voice) and how often (all day or twice) she spoke to Lowe on August 24; where (his mother's, the Salvation Army, or Goodwill) and when (12:30 p.m., 1:15 p.m., 2 p.m., or 5 p.m.) she dropped off some of Lowe's clothing; whether Lowe grabbed her by the arm and neck when he came into her apartment; and how much time passed (minutes or hours) between the time Lowe left and the time Conway called police.

¶8 We necessarily reject Lowe's challenge. The jury is the sole arbiter of witness credibility, and it alone is charged with the duty of weighing the evidence. *See* ***State v. Webster***, 196 Wis. 2d 308, 320, 538 N.W.2d 810 (Ct. App. 1995). As arbiter, the jury has the power to accept one portion of a witness's testimony while rejecting another portion. *See* ***O'Connell v. Schrader***, 145 Wis. 2d 554, 557, 427 N.W.2d 152 (Ct. App. 1988). Thus, the jury could have rejected all of Conway's inconsistencies—none of which was particularly relevant to the elements of the offense—and still believed her when she testified, consistently, that Lowe punched her and caused her to be winded. The jury could infer, because the punch "didn't feel nice," that the punch caused her pain whether it left physical marks or not. In addition, causing Conway to be winded is an impairment. Accordingly, there is sufficient evidence from which the jury could have found Lowe guilty beyond a reasonable doubt.

By the Court.—Judgment and order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).