

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 30, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-1206-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

COREY TURNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County:
ROBERT J. KENNEDY, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Corey Turner appeals from a judgment convicting him of battery by a prisoner and disorderly conduct. Turner argues that the evidence at trial was insufficient to support a jury verdict of guilty on the battery charge and that the State made an improper closing argument. Because we

conclude that the evidence was sufficient and the prosecutor's closing arguments were proper, we affirm.

Turner was convicted after a jury trial of battery by a prisoner and disorderly conduct, as a repeat offender on both charges. The incident that led to the conviction occurred while Turner was in Walworth county. The testimony at trial established that while in jail Turner was given a conduct report. After receiving the report, Turner became quite upset and began banging his fists and shouting that he did not want to go "in the hole." Correctional officers attempted to get him to calm down, telling him that if he did calm down he would not have to go.

Turner continued to be loud and aggressive. Eventually, the officers donned riot gear and went into Turner's cell to subdue him. Turner shouted obscenities and taunted the officers. The officers testified that when they entered his cell, Turner took an aggressive stance and rushed towards them, punching at the officers. The officers then tried to restrain Turner. As they did so, Turner continued to punch, kick and shout at the officers. The officers successfully restrained Turner, carried him out of the cell and put him in a restraining chair. As they were strapping Turner into the restraining chair, one of the officers, Officer Wesley Phillips, noticed that he had injured his arm. He did not have the injury before he entered Turner's cell. Other officers suffered injuries as well.

Turner was charged specifically with having injured Phillips. Turner argues that the evidence offered at trial was insufficient to convict him on the charge of battery by a prisoner because the State did not prove that he caused the harm suffered by Phillips or that he intended to harm Phillips. We reject these arguments.

When considering a challenge to a finding of fact, “an appellate court 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 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, 755 (1990). When considering a record that could support contrary inferences, this court is obliged to accept the inference drawn by the trier of fact unless the evidence on which the inference is drawn is incredible as a matter of law. *See id.* at 506-07, 451 N.W.2d at 757. “If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before.” *Id.* at 507, 451 N.W.2d at 758.

Turner first argues that the State did not prove that he intended to harm Phillips. The evidence established, however, that Turner intended to confront the officers as they entered his cell. Turner then punched and kicked at the officers when they were in his cell, taunted them and swore at them. A jury could reasonably infer from this evidence that he intended to harm all or any of the officers, including Phillips.

In addition, Turner argues that the State did not prove that he actually harmed Phillips. Phillips testified that when he entered Turner’s cell he was not injured and when he left the cell he was. He further testified that he believed his injury occurred when he was trying to restrain Turner’s legs and his arm got pinched between Turner’s legs and the toilet. The jury could reasonably infer from this evidence that Turner’s overt acts caused Phillips’ injuries.

Turner's next argument is that the State engaged in improper closing argument when it stated that if Turner intended to hit another officer but struck Phillips, the jury could nonetheless convict. Turner asserts that the prosecutor told the jury that if any officer in the room was injured, then it could find Turner guilty whether there was intent or not. The effect of this argument, Turner asserts, is that the prosecutor asked the jury to convict Turner of a crime different from the one with which he was charged.

First, we note that the record does not contain a transcript of the closing arguments, so we must rely on the trial court's and the attorneys' recollections.¹ In an affidavit submitted in support of Turner's motion for postconviction relief, his trial counsel stated that the prosecutor's argument was that the State did not have to prove that Turner intended to injure Phillips, but rather only had to prove that Turner intended to injure someone. The record indicates that this statement is basically consistent with the trial court's and the prosecutor's characterization of the statement.²

Turner argues that this was improper because he was charged with injuring Phillips. Wisconsin, however, recognizes the law of transferred intent. If

¹ While generally we will not address an alleged error in closing argument if no record exists, see *Smith v. State*, 65 Wis.2d 51, 54, 221 N.W.2d 687, 689 (1974), this rule does not apply if counsel stipulate to what was said or the trial court reconstructs the statements, see *Johnson v. State*, 75 Wis.2d 344, 368-69, 249 N.W.2d 593, 605-06 (1977). In this case, after closing arguments, the trial court went back on the record and memorialized some of the objections that had been raised. Further, while the State did not expressly stipulate to what was said during the closing arguments, it has not objected to either Turner's or the court's characterization. Therefore, we will consider the arguments concerning the statements made during closing.

² The trial court and the prosecutor discussed generally that the prosecutor's argument had explained the doctrine of transferred intent. The prosecutor argued that if someone swings at one person but hits a different person, he or she may still be charged with battery to the second person.

a person intends to commit an injury to one person, but actually causes an injury to a second person, then the person may be charged with intending to cause injury to the second person. *See State v. Gould*, 56 Wis.2d 808, 810, 202 N.W.2d 903, 904 (1973). The prosecutor's statement merely explained this doctrine to the jury.

In his reply brief, Turner argues that the statement by the prosecutor encouraged the jury to find Turner guilty of a crime other than the one with which he was charged.³ Turner, however, was charged with battery to Phillips. The prosecutor's argument was that under the theory of transferred intent, the intent element of that crime can be established if the jury found that Turner intended to hit someone, but in fact hit Phillips. Transferred intent is not a crime, but rather a way of establishing an element of a crime. The prosecutor's argument did not encourage the jury to find Turner guilty of any crime but the one with which he was charged. We cannot conclude that Turner was unfairly prejudiced by the State's arguments.

By the Court.—Judgment affirmed.

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

³ Turner does not specifically identify the other crime.

