COURT OF APPEALS
DECISION
DATED AND FILED

September 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0685

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EVELIO DUARTE-VESTAR,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: MARK A. FRANKEL, Judge. *Affirmed.*

EICH, J.[1] Evelio Duarte-Vestar appeals from an order denying his "Motion to Vacate, Set Aside[], Reverse [and] Void Sentences." He appears to argue that: (1) he was convicted of offenses with which he was never charged; (2) he was charged with offenses that had previously been dismissed or of which

[1] This appeal is decided by a single judge pursuant to § 752.31(2)(f), STATS.

he had been acquitted; and (3) the trial judge should have recused himself. We reject his arguments and affirm the order.

Duarte-Vestar was charged in this case (trial court no. 93-CM-1307) with battery, as a repeater. The charge stemmed from an incident on March 8, 1993, when Duarte-Vestar struck his attorney across the face during court proceedings. A jury found Duarte-Vestar guilty of the charge, and he was sentenced to three years in prison, to run consecutive to all other current sentences, including those in case no. 92-CM-3242, in which he was charged with eleven misdemeanor counts (all as a repeater); three counts of violation of a domestic abuse injunction, one count of battery, one count of criminal trespass to a dwelling, and six counts of bail jumping. Following a jury trial, Duarte-Vestar was convicted of five of the counts and acquitted on four, and two counts were dismissed on motions by the State. He was sentenced to a total of thirteen years in prison on these convictions.

Duarte-Vestar argues first that he was convicted of four offenses with which he was never charged: aggravated battery in case no. 93-CM-1307; "domestic abuse of a restraining order and injunctions" (apparently in case no. 93-CM-3242); aggravated battery (also apparently in case. no. 93-CM-3242); and possession of cocaine. His argument is dispelled by a careful reading of the judgements of conviction and criminal complaints in the two cases.

With respect to the aggravated battery in case no. 93-CM-1307, the record reflects that Duarte-Vestar was not convicted of aggravated battery, only simple battery. It is true that the judgment of conviction states as the offense: "Battery; Aggravated Battery." This is because the statute heading for § 940.19, STATS., 1993, read as follows: "940.19 Battery; Aggravated Battery." The

judgment of conviction plainly stated the specific type of battery of which Duarte-Vestar was convicted by supplying the particular statutory subsection: § 940.19(1), STATS., which is the "simple battery" statute.

The next three convictions Duarte-Vestar addresses relate to case no. 92-CM-3242. With respect to the conviction for "abuse of a restraining order and injunctions," the criminal complaint in that case charges Duarte-Vestar with knowingly violating a domestic abuse injunction under § 813.12(8), STATS., 1992, and that is the offense of which he was convicted. And, as before, the judgment of conviction shows that Duarte-Vestar was not convicted of aggravated battery, as he contends, but only simple battery. Finally, with respect to his claim that he was improperly convicted of possession of cocaine, no such conviction exists. The only reference to cocaine possession in the papers is in the repeater allegations: he was charged as a repeater based on a prior conviction for possession of cocaine with intent to deliver.

Duarte-Vestar's next argument that he was charged in the instant case, no. 93-CM-1307, with offenses that had previously been dismissed or of which he had been acquitted in case no. 92-CM-3242, is equally frivolous. It is true, as we have indicated above, that several of the counts in the other case, 92-CM-3242, were dismissed or resulted in an acquittal. However, Duarte-Vestar was never recharged with those particular offenses, either in case no. 93-CM-1307 or any other case to which we have been referred. 92-CM-3242 and 93-CM-1307 are separate cases involving wholly separate incidents.

Finally, Duarte-Vestar argues that the trial judge should have recused himself from the case because, in Duarte-Vestar's opinion, he was prejudiced and biased against him. Duarte-Vestar, however, fails to provide any

facts to support his position. All he says is that "Section 757.19(2), made a mandatory Recusal of Judge [Frankel]." We have often held that we will not address arguments that are undeveloped and not supported by the record. *See* ***Barakat v. DH&SS***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995). Even so, disqualification is required under § 757.19(2), STATS., only when the judge determines "that, in fact or in appearance, he or she cannot act in an impartial manner…." Section 757.19(2)(g). Duarte-Vestar's assertion that, in his view, the judge was not impartial, in and of itself, does not require recusal. *See* ***State v. American TV & Appliance of Madison, Inc.***, 151 Wis.2d 175, 183, 443 N.W.2d 662, 665 (1989).

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)(4), STATS.