COURT OF APPEALS
DECISION
DATED AND FILED

September 14, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-3180-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAWRENCE R. PETERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Deininger, JJ.

¶1 PER CURIAM. Lawrence Peterson appeals a judgment convicting him of aggravated battery and being party to the crime of battery. He also appeals an order denying his motion for postconviction relief. He claims the evidence was insufficient to support his party-to-battery conviction and he should be granted a

new trial on the aggravated battery charge based on newly discovered evidence or because the real controversy was never tried. We reject his contentions and affirm.

BACKGROUND

¶2 Peterson was hanging out with friends in a parking lot when George Simon and Jessica Maveus walked by. Peterson and Simon began arguing, and eventually got into a physical altercation. A number of Peterson's friends joined in the fight. Maveus tried to pull someone off Simon and was pushed back, punched and kicked by Peterson's friends. After the fight had broken up and Simon and Maveus were headed toward their car, Simon was hit by a flying object causing permanent loss of vision in his right eye. He did not see what the object was or who had thrown it, but he and Maveus both testified that Peterson was the only one who was still in the vicinity after the fight, and that they had heard him exclaim, "[t]ake that, bitch" right before Simon was struck.

¶3 Peterson was convicted of being party to the crime of battery for Maveus's injuries and of aggravated battery for Simon's injuries. At the postconviction hearing, Aaron Bloodsaw testified that he saw Aaron Branch throw a beer can that hit Simon in the eye. Private investigator William Garrot and Peterson's mother both testified that Branch had admitted on separate occasions having thrown the beer can. The defense presented a tape recording of a telephone conversation in which Branch told Peterson's mother that he would admit having thrown the can after the statute of limitations had expired. On the stand, Branch denied having thrown the can or having previously admitted throwing the can.

¶4 The trial court did not credit Bloodsaw's testimony due to his friendship with Peterson, his lengthy delay in coming forward, and his prior

criminal convictions. It expressed doubt about whether taking an oath had any meaning for Bloodsaw and noted that Bloodsaw had enough knowledge of the criminal justice system to realize he would probably suffer no repercussions for perjuring himself on Peterson's behalf. The court further pointed out inconsistencies between Bloodsaw's testimony and the victim's account. Based on these factors, it deemed Bloodsaw's testimony to be inherently unreliable and incredible. It also found that Peterson should have known if his friend Bloodsaw was at the scene, and located him before trial.

¶5 The trial court did not place much weight on Garrott's testimony because there were no circumstantial guarantees of the trustworthiness of the alleged statement Branch made to Garrott. After observing Branch and Peterson's mother testify, the court was persuaded that Peterson's mother would do just about anything to get her son out of prison, and to that effect, had attempted to persuade Branch to take the blame for the crime. He found any inculpatory statements made by Branch either to Garrott or on the tape to be inherently unreliable and incredible, particularly as Branch had emphasized that he would not come forward if he would still face potential sanctions for doing so. The trial court concluded that the evidence which Peterson had offered in support of his motion was manufactured and insufficient to warrant a new trial.

STANDARD OF REVIEW

¶6 When reviewing the sufficiency of the evidence, we will sustain a conviction unless the evidence, viewed most favorably to the State, is so lacking in probative value that it can be said as a matter of law that no trier of fact could reasonably have found the defendant guilty beyond a reasonable doubt. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501-02, 451 N.W.2d 752 (1990).

¶7 The parties disagree about the appropriate standard of review to apply to a motion for a new trial based on newly discovered evidence. The State points to several cases in which we have deferred to the trial court's analysis of the newly discovered evidence factors as a discretionary determination. *See, e.g.,* ***State v. Carnemolla***, 229 Wis. 2d 648, 656, 600 N.W.2d 236 (Ct. App. 1999), *review denied,* 2000 WI 2, 231 Wis. 2d 375, 607 N.W.2d 291 (Wis. Dec. 20, 1999) (No. 98-2928-CR); ***State v. Terrance J.W.***, 202 Wis. 2d 496, 500, 550 N.W.2d 445 (Ct. App. 1996). Peterson, in turn, cites a line of cases in which this court has independently determined as a constitutional question of law whether the denial of a new trial has deprived a defendant of his due process rights. *See, e.g.,* ***State v. Avery***, 213 Wis. 2d 228, 234, 570 N.W.2d 573 (Ct. App. 1997); ***State v. Coogan***, 154 Wis. 2d 387, 395, 453 N.W.2d 186 (Ct. App. 1990). We need not resolve this conflict in the caselaw here because we would reach the same result under either standard. Finally, we will not disturb factual findings regarding the credibility of witnesses unless they are clearly erroneous. *See* ***Terrance J.W.***, 202 Wis. 2d at 501.

ANALYSIS

Sufficiency of the Evidence on the Battery Charge

¶8 The elements of battery are causing bodily harm with intent to cause bodily harm and knowledge of the victim's lack of consent. *See* WIS. STAT. § 940.19(1) (1997-98).[1] A person may be found guilty of an offense as party to the crime when he has undertaken conduct that aided another person in the

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

execution of a crime, desiring or intending his conduct to yield such assistance. *See* ***State v. Asfoor***, 75 Wis. 2d 411, 427, 249 N.W.2d 529 (1977). Whether the act committed by another was the natural and probable consequence of the defendant's conduct is a jury question. *See* ***id***. at 431.

¶9 Peterson claims the evidence was insufficient to convict him of being party to the crime of battery to Maveus because he did not strike her himself, did not encourage any of his friends to do so, and was not even aware that she had been struck. However Simon testified that Peterson initiated the fight, and that he himself was aware that Maveus was attempting to assist him. The jury could infer that Peterson knew his friends were hitting Maveus, since Simon knew it. It could further infer that Peterson knew that a possible injury to Maveus was a natural and probable consequence of continuing his fight with Simon. The jury could also infer that Peterson was ready to assist his friends from the fact that he had earlier shouted insults at Maveus and had accepted his friend's help in beating Simon. Therefore, the evidence was not so lacking in probative value as to preclude the jury from reaching the verdict it did.

Newly Discovered Evidence on the Aggravated Battery Charge

¶10 In order to obtain a new trial based on newly discovered evidence, a defendant must show by clear and convincing evidence that: (1) the proffered evidence was discovered after the trial; (2) the defendant was not negligent in seeking to discover it; (3) the evidence would be material to an issue at trial; (4) the evidence would not merely be cumulative to evidence which was previously introduced at trial; and (5) it is reasonably probable that a different result would be reached at a new trial. *See* ***Coogan***, 154 Wis. 2d at 394-95.

¶11 Bloodsaw's statement that he saw Branch throw a can which hit Simon and Elliott and Peterson's mother's statements that Branch had admitted having thrown the can, were all discovered after trial. The statements were material to the issue of whether Peterson had committed the aggravated battery against Simon and were not merely cumulative to evidence presented at trial. We need not determine whether Peterson was negligent in discovering the statements however, because we conclude it is not reasonably probable that the statements would lead to a different result at trial.

¶12 The trial court made a series of factual findings that the evidence Peterson presented to show Branch had thrown the can was fabricated and not worthy of belief. The trial court's findings of incredibility were supported by the transcript of the tape recording between Peterson's mother and Branch, by the inconsistencies between Bloodsaw and Simon's accounts, and by the trial court's own observations of the witnesses. The findings were not clearly erroneous. A finding that newly discovered evidence is incredible necessarily leads to the conclusion that it would not lead to a reasonable doubt in the minds of the jury. *See* ***Carnemolla***, 229 Wis. 2d at 660. Therefore, we agree with the trial court's conclusion that Peterson failed to satisfy the standard for a new trial, and independently conclude that his due process rights were not violated.

Real Controversy

¶13 This court has discretion to order a new trial when the real controversy has not been tried because the jury was never given the opportunity to hear important testimony. *See* WIS. STAT. § 751.06; ***State v. Hicks***, 202 Wis. 2d 150, 159-60, 549 N.W.2d 435 (1996). Here, however, we are satisfied by the trial

court's factual findings that no important credible evidence was kept from the jury.

By the Court.—Judgment and order affirmed.

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