COURT OF APPEALS
DECISION
DATED AND FILED

May 17, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2105-CR **Cir. Ct. No. 2003CF494**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN GROVER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] John Grover appeals a judgment of conviction for misdemeanor battery and an order denying his motion for a new trial. He argues he is entitled to a new trial because the victim essentially testified to prejudicial

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

other acts evidence that tainted the fact-finding process. We affirm the judgment and order.

BACKGROUND

¶2 On April 20, 2003, Sarah Dinzy was home with a "gentleman friend" when Grover, the father of the younger of her two children, knocked on her door. Dinzy attempted to look through the peephole to see who was there, but Grover was covering it. Grover opened the door with a key he had to the apartment as Dinzy tried to push the door closed. Dinzy asked Grover to leave, but he entered the apartment with a woman. Dinzy testified that Grover attempted to get the woman to hit Dinzy but she did not. Grover then hit Dinzy twice in the face and left with the woman. A neighbor called the police and Officer Thomas Herbert responded. A picture was taken of a cut above Dinzy's right eye. Grover was ultimately charged with substantial battery and criminal trespass. The battery charge was later amended to misdemeanor battery.

¶3 At the jury trial, Dinzy testified that Grover had previously been incarcerated, implied that he had physically abused her in the past and speculated that he planned to harm her again. Dinzy also stated she had consumed five or six beers earlier that afternoon, that she has mood swings and is clinically depressed. She also stated she "was pretty out of it" when she gave her statement to the police and "had said some things in there that I just like didn't really remember what I was saying." She further stated alcohol in combination with medication she takes for her mood swings cause her to have seizures.

¶4 The jury found Grover not guilty on the trespass charge but guilty on the misdemeanor battery charge. He was sentenced to eighteen months' initial confinement followed by six months' extended supervision. He filed a

postconviction motion for a new trial and to correct errors in the judgment.[2] The court granted the motion to amend the judgment but denied Grover a new trial.

DISCUSSION

¶5 Grover contends he is entitled to a new trial in the interest of justice, pursuant to WIS. STAT. § 752.35. That section states, in relevant part, as follows:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial ….

We exercise our power of discretionary reversal only in extraordinary cases. ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990). Situations in which the controversy may not have been fully tried have arisen in two factually distinct ways:

> (1) when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case … and (2) when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried.

State v. Wyss, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985). Furthermore, for there to be a miscarriage of justice, "an appellate court must first make a finding of substantial probability of a different result on retrial." ***Vollmer***, 156 Wis. 2d at 19.

[2] The judgment of conviction originally described the battery as a felony, rather than a misdemeanor.

¶6 Grover does not argue that the jury was deprived of the opportunity to hear important testimony. Therefore, we look only to whether the jury had before it improperly admitted evidence. Grover argues that several statements by Dinzy prejudiced the jury because they constituted inadmissible other acts evidence. These statements include: Grover was previously in jail and prison; Grover had hit her before; and Grover was going to return to the apartment "and do some more damage." Grover argues these statements tainted the fact-finding process and prejudiced the jury. For example, he contends that "an untainted juror could have harbored suspicion that [Dinzy's] injury was perhaps the product of being intoxicated or having a seizure."

¶7 To the extent Dinzy made the remarks Grover takes issue with, they were brief and in no way highlighted. For example, Grover's attorney asked Dinzy whether her relationship with Grover took place primarily in Green Bay. Dinzy responded "Milwaukee, Green Bay, prison." Shortly thereafter, Grover's attorney asked Dinzy if Grover saw their child regularly. Dinzy responded "No, because he was in jail before that." Dinzy was responding to Grover's attorney's questions. The other statements Grover complains of are similar in that they were simple statements in answer to Grover's attorney's questions and they were not elaborated on. The prosecution did not argue that the jury should consider these statements when coming to its decision.

¶8 Regardless whether the evidence was properly admitted, this court is satisfied that Dinzy's statements were not so substantial as to cloud the crucial issue in the case. *See* ***Wyss***, 124 Wis. 2d at 735. The jury was instructed it should find Grover guilty of battery if it determined (1) Grover caused bodily harm to Dinzy; (2) Grover intended to cause bodily harm to Dinzy; (3) Grover caused bodily harm without Dinzy's the consent and (4) Grover knew that Dinzy did not

consent. None of the statements Grover complains of go to these issues. Thus, we cannot say the real controversy was not fully tried. Furthermore, given the evidence, including the photographic depiction of Dinzy's injury, this court cannot say there is a substantial degree of probability that a new trial would produce a different result.

By the Court.—Judgment and order affirmed.

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