COURT OF APPEALS
DECISION
DATED AND FILED

February 1, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1075-CR **Cir. Ct. No. 2004CF379**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT A. FLOWER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: PAUL F. REILLY, Judge. *Affirmed*.

Before Brown, Nettesheim and Anderson, JJ.

¶1 BROWN, J. Scott A. Flower was successful in obtaining the lesser-included instruction of substantial battery to a charge of aggravated battery, but was unsuccessful in his request for simple battery as a lesser-included offense of substantial battery. The jury found him guilty of substantial battery, and he appeals. We reject Flower's argument that there was a reasonable factual basis for

acquittal on the substantial battery offense and conviction on the simple battery offense and affirm.

¶2 Flower trespassed onto the property of Matthew Peterson and entered Peterson's house without permission. There, he confronted Peterson and Flower's estranged wife, Pamela. He battered both of them. The State charged Flower with two counts of aggravated battery and one count of criminal trespass. Flower pled not guilty, and the case proceeded to a jury trial on all three counts.

¶3 The evidence regarding the battery to Peterson consisted of injuries to Petersen's nose and ribs and a laceration to Peterson's scrotum. The laceration was stitched at the hospital by medical personnel. The evidence regarding the battery to Pamela is not relevant to this appeal. At the end of the testimony, Flower asked that the lesser-included offense of substantial battery be submitted as to both battery counts and that, as to the count involving Peterson, the lesser-included offense of simple battery be given as well. The State acquiesced to the giving of substantial battery to both battery counts but objected to simple battery being added relative to the Peterson count. The trial court agreed to give substantial battery as a lessor-included instruction to the two aggravated battery counts and rejected the request for simple battery as a lesser-included offense to the battery on Peterson. The jury found Flower guilty of two counts of substantial battery and one count of criminal trespass. This appeal is limited to the rejection of simple battery as a further lesser-included instruction in the Peterson-related count.

¶4 Whether a lesser-included offense should have been submitted to a jury is a legal matter that we independently determine. ***State v. Martin***, 156 Wis. 2d 399, 402, 456 N.W.2d 892 (Ct. App. 1990). The analysis has two steps.

First, the requested instruction must concern a crime that is, as a legal matter, a lesser-included offense of the crime charged. ***Id.*** Second, if it is, there must be reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense. ***Id.***

¶5 WISCONSIN STAT. § 939.22(38) defines "substantial bodily harm" to mean in relevant part: "bodily injury that causes a laceration that *requires* stitches, staples, or a tissue adhesive." (Emphasis added.) Flower submits that there was evidence in the testimony from which a reasonable juror could conclude that stitches were not "required." On one side of the ledger, it is true that eight stitches were in fact used to close the laceration to Peterson's scrotum. But Flower submits that, on the other side of the ledger, Peterson only described his injuries as "[s]ore ribs, sore nose, sore private area. Bruises—just your typical fighting bruises." Further, Petersen stated that he believed his injury was caused by Flower's fingernail. Additionally, Flower notes that the reason why ambulance personnel did not provide medical attention to Peterson at the scene is because Peterson did not complain about any injury at the time. Flower also points out that the medical records show how Peterson's injury resulted in a laceration three centimeters in length and the treatment involved a "single layer repair." Flower also underscores that the medical record states that the repair consisted of "eight *simple* sutures." (Emphasis added.)

¶6 Flower submits that the injury Peterson received "could only be fairly characterized as a superficial wound." In his view, "[t]he very nature of the injury itself in this case raised doubt as to whether or not the treatment chosen was required under the circumstances." Thus, in Flower's mind, the "record here raised the question of whether or not stitches were 'required' to repair Peterson's

injury or simply the treatment of choice made by the treating physician." He claims that this was a question for the jury.

¶7 We are convinced, however, that Flower's argument is logically unsound. The fact that there were eight *simple* sutures is not proof that the wound was superficial from a *medical* standpoint. Nor does the fact that Peterson downplayed the injury have any probative value on the question of whether medical personnel believed to a reasonable medical probability that stitches were required. And Flower does not explain the medical significance of "single layer" repair. Thus, he has no basis to conclude therefrom that the injury was minor other than his own say-so. In sum, there is *no evidence* supporting Flower's conclusion that the wound was "superficial," and there is no evidence supporting even an inference that stitches were simply the "treatment of choice" by the treating physician. In simple terms, A, B, C and D nowhere lead to X.

¶8 We leave this case by stating the obvious. The treating physician applied stitches to treat the wound. There is no evidence that the stitches were put there due to whim or because the physician thought they might look nice or because Peterson made a cosmetic choice for stitching. The jury had absolutely no evidence to conclude that the stitches were not medically necessary other than Flower's self-serving claim that the wound was a minor one. To prove the absence of medical necessity, Flower had the obligation to produce evidence from medical personnel. Absent that, a jury was free to use all resources within their general knowledge to infer that if Peterson was stitched up by a treating physician, it was because the treating physician thought it necessary. To rebut that inference, Peterson had to present testimony on the issue of medical necessity. He did not. His appeal fails.

By the Court.—Judgment affirmed.

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