COURT OF APPEALS
DECISION
DATED AND FILED

January 20, 1998

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.

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No. 96-3543-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JONATHON GILS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN J. DIMOTTO, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Jonathon Gils appeals from a judgment of conviction entered after a jury found him guilty of two counts of armed robbery, one count of aggravated battery, and one count of substantial battery, all as a party to a crime, contrary to §§ 939.05, 940.19(2), 940.19(5), and 943.32(1)(a) & (2), STATS. Gils also appeals from an order denying his postconviction motion. Gils

claims that he was deprived of the effective assistance of counsel because his trial counsel: (1) failed to obtain the transcript of his preliminary hearing and thus, failed to impeach Claudino Claudio with alleged inconsistencies between his pretrial and trial testimony; (2) failed to move to suppress his tennis shoe which was found at April Parker's residence; and (3) entered into a stipulation permitting the admission and publication of a photograph of Claudino Claudio's injuries. Further, Gils claims that the trial court erred by failing to give a cautionary instruction when it published the photograph to the jury. Additionally, Gils contends that the trial court deprived him of his right to be present at trial by communicating with a juror during deliberations outside of his presence, and that the trial court erred by not excusing the juror for cause. Finally, Gils claims that the trial court erred by failing to instruct the jury on the lesser-included offense of substantial battery.[1] We affirm.

I. BACKGROUND.

This case arises from armed robberies committed by Jonathan Gils and his uncle, Cory Gilmore, on October 16 and October 27, 1995, of Claudino Claudio's liquor store. At trial, James Claudio, Claudino Claudio's son, testified that on October 16, 1995, he was working alone at the liquor store. James Claudio

[1] Gils has included, in the appendix to his brief in chief, an argument relating to alleged prosecutorial misconduct. Although Gils is represented by counsel on appeal, this argument is Gils's personal work product. Gils has also filed a motion on his own behalf presenting other issues for our appellate review. The Wisconsin Constitution gives a litigant the right to prosecute or defend a lawsuit in state court "either in his [or her] own proper person or by an attorney of the suitor's choice." WIS. CONST. art. I, § 21(2). The general rule is that where a litigant is represented by counsel, he or she is not entitled to conduct court proceedings. *See* H.C. Lind, Annotation, *Right of Litigant in Civil Action Either to Assistance of Counsel Where Appearing Pro Se or to Assist Counsel Where Represented*, 67 A.L.R.2d 1102, § 3 (1959). Therefore, because Gils is represented by counsel on appeal, we decline to address the additional arguments which he has personally raised.

testified that at about 5:30 p.m., Gils and Gilmore entered the liquor store, that Gils rushed behind the counter and pointed a gun at him, and that both Gils and Gilmore began demanding money. Claudio opened the registers and Gils and Gilmore took the money. Gilmore then hit Claudio in the head with a liquor bottle, and then either Gilmore or Gils hit Claudio in the head again with another liquor bottle. Gilmore and Gils then left the store.

Claudino Claudio testified that on October 27, 1995, he was working alone at the liquor store. Claudio testified that about 8:00 p.m., Gils and Gilmore entered the store. Gils asked Claudio where the Tanqueray gin was located, and, as Claudio was getting a bottle, Gils and Gilmore rushed him. Claudio was carrying a gun at the time, and Gils started wrestling with Claudio for the gun. As Gils and Claudio struggled for the gun, Gilmore began hitting Claudio in the head with liquor bottles with such force that the bottles broke. Claudio estimated that he was hit with fifteen to twenty bottles based on the amount of broken bottles he and his son found on the floor the next day. Gils eventually took the gun away from Claudio and Gils and Gilmore left the store. Claudio's testimony at trial concerning whether he actually saw Gils and Gilmore steal money from the store was somewhat inconsistent; however, Claudio testified that a box containing money spilled over during the struggle and that about $1150 was missing from the store the next day. Claudio was taken to the hospital following the attack, and received 210 stitches to his head.

Police officers responding to the robbery recovered a jacket nearby which matched the description of Gilmore's jacket, and a white "Fila" athletic shoe. A business card in the jacket stated that "April" had an appointment on November 13, 1995, at 1:30 p.m. at "Dr. Mammen's" office. Officers contacted Dr. Mammen and learned the appointment was for April Parker. Officers then

went to April Parker's residence and, after receiving her consent, entered the apartment. The police found and arrested Gils at the apartment and seized a white "Fila" athletic shoe belonging to Gils.

Gils and Gilmore were charged with the attempted armed robbery and aggravated battery of Claudino Claudio, and the armed robbery and substantial battery of James Claudino, all as party to a crime. The charge of attempted armed robbery of Claudino Claudio was later amended to completed armed robbery. After a jury trial, Gils was convicted of all of the charges. Gils filed a postconviction motion which was denied. Gils now appeals.

II. ANALYSIS.

A. Ineffective Assistance of Counsel Claims

Gils first argues that he was denied the effective assistance of counsel because his trial counsel: (1) failed to obtain the preliminary hearing transcript, and thus, failed to impeach Claudino Claudio with discrepancies between his pretrial and trial testimony; (2) failed to move to suppress his tennis shoe which was found at April Parker's residence; and (3) entered into a stipulation permitting the admission and publication of a photograph of Claudino Claudio's injuries.

The familiar two-pronged test for ineffective assistance of counsel claims requires defendants to prove (1) deficient performance and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Johnson***, 133 Wis.2d 207, 216-17, 395 N.W.2d 176, 181 (1986); *see also* ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996) (holding ***Strickland*** analysis applies equally to ineffectiveness claims under state constitution). To prove deficient

performance, a defendant must show specific acts or omissions of counsel which were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. A defendant's claim will fail if counsel's conduct was reasonable, given the facts of the particular case, viewed as of the time of counsel's conduct. ***Id***. We will "strongly presume" counsel to have rendered adequate assistance. ***Id***.

To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.*** at 687. In order to succeed, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id***. at 694. If this court concludes that the defendant has not proven one prong, we need not address the other prong. *See* ***id***. at 697. On appeal, the trial court's findings of fact will be upheld unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985). Proof of either the deficiency or the prejudice prong is a question of law which this court reviews *de novo*. ***Id.*** at 634, 369 N.W.2d at 715.

1. Gils's preliminary hearing transcript—failure to impeach Claudino Claudio.

Gils claims that his counsel was ineffective for not obtaining a copy of the preliminary hearing transcript, and consequently, for not impeaching Claudino Claudio with inconsistencies between his testimony at the preliminary hearing and his testimony at trial. At the ***Machner*** hearing,[2] Gils's trial counsel

[2] *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

testified that before trial she did not obtain a copy of the transcript of Gils's preliminary hearing. Counsel specifically testified that she "made efforts to obtain the transcript," but was "never able to get it from the court reporter." Counsel's inability to obtain the transcript, however, seems not to have been caused by the non-existence of the transcript, nor by any fault of the court reporter.[3] To the contrary, counsel explained the problem by testifying at the ***Machner*** hearing that she "could never get in touch with the court reporter." Counsel gave no reason for her inability to contact the court reporter, and we find it difficult, therefore, to explain her conduct. Counsel had almost three months between the preliminary hearing and the trial in which to obtain the transcript, yet she failed to do so. She also failed to move the court for an adjournment in order to allow more time in which to produce the transcript. In normal circumstances, preliminary hearing transcripts are obtainable and often play an important role in the preparation and presentation of an effective defense. Therefore, given the facts of this case and counsel's lack of a reasonable excuse, we conclude that counsel was deficient within the meaning of ***Strickland*** for failing to obtain a copy of the preliminary transcript.

However, in this particular case, we conclude that Gils was not prejudiced by the lack of a preliminary transcript, and thus, that he was not denied the effective assistance of counsel under ***Strickland***. Gils claims that he was prejudiced by his counsel's failure to obtain the preliminary hearing transcript because, without the transcript, his counsel on cross-examination was unable to impeach Claudino Claudio with inconsistencies between his trial and preliminary

[3] A copy of the preliminary hearing transcript has been produced and was included in the appellate record pursuant to a stipulation entered into between Gils and the State.

hearing testimony. Gils supports his claim of prejudice by listing, in an appendix to his brief in chief, ten examples of what he believes to be inconsistencies between Claudio's preliminary hearing testimony and his trial testimony. We first note that according to RULE 809.19(1)(e), STATS., a party's appellate brief should contain "[a]n argument … contain[ing] the contention of the appellant [and] *the reasons therefor* …." (Emphasis added.) In our view, merely listing examples of testimony in an appendix, without argument in the brief explaining the *reasons* why the testimony is inconsistent, and how the inconsistencies prejudiced the defendant, does not comport with RULE 809.19(1)(e), STATS. We also observe that four of the ten examples compare trial testimony with Gilmore's, rather than Gils's, preliminary hearing transcript; that one is a repetition; and that one of the examples merely lists trial testimony without comparing it to anything at all.[4]

With respect to the remaining four examples, the alleged inconsistencies are as follows: (1) Claudio testified at the preliminary hearing that he had seen Gils and Gilmore in his store "about three times" earlier in the day, but at trial he testified that he had seen them "twice" earlier in the day; (2) Claudio allegedly testified at the preliminary hearing that only Gils "rushed him," but at trial he testified that both Gils and Gilmore rushed him; (3) Claudio testified at the preliminary hearing that Gils did not ask for money, but at trial he testified that both Gils and Gilmore said, "where's the money?" and; (4) Claudio testified at the preliminary hearing that he "wrestled [Gils] to the ground," but at trial he testified

[4] As Gils admits, although counsel failed to obtain a copy of his preliminary hearing transcript, counsel did obtain a copy of Gilmore's preliminary hearing transcript. Thus, counsel had the opportunity to explore any inconsistencies between testimony at Gilmore's preliminary hearing and the trial. Therefore, such alleged inconsistencies do not raise ineffectiveness concerns.

that he never "went down."[5] We conclude that Gils's trial counsel brought some of these inconsistencies to the jury's attention, that some of the alleged inconsistencies were not actual inconsistencies, and that to the extent that trial counsel did not present actual inconsistencies to the jury, Gils was not prejudiced.

To begin, Gils's counsel, during her cross-examination of Claudio, did bring to the jury's attention Claudio's inconsistent testimony with regard to the number of times Gils and Gilmore had been in the store earlier on the day of the incident.[6] With regard to whether only Gils had rushed him, or whether both Gils and Gilmore had rushed him, Claudio's testimony at trial was not actually

[5] Gils also argues in his reply brief, with reference to one of the examples included in his brief in chief's appendix, that "Initially Mr. Claudio stated that, after the actors took the gun from him, they stood around and picked up the money. He testified later that, after they got the money, they left the store." This statement is very misleading because although it was included as an example of an inconsistency between testimony at trial and testimony at Gils's preliminary hearing, it actually involves inconsistencies between different portions of trial testimony, and between trial testimony and testimony at Gilmore's preliminary hearing. Thus, this alleged inconsistency is irrelevant to our determination.

[6] The following exchange occurred during counsel's cross-examination of Claudio:

> Q [Counsel]: And on October 27th, 1995, you had seen my client in the liquor store previously; is that a fair statement?
> A [Claudio]: That day, yes.
> Q: And you testified before you saw him two times before in the store; is that right?
> A: Yes.
> Q: Do you remember testifying under oath on November 17th, 1995 and being asked the same question had you seen this man earlier in the same day?
> A: Yes.
> Q: And at that point in time, do you remember saying that they were there three times?
> A: Well with the last time, they was there three times.
> Q: Three times?
> A: Twice before and the last time. Three times.

inconsistent with his testimony at Gils's preliminary hearing.[7] Similarly, with respect to whether only Gilmore had demanded money, or whether both Gils and Gilmore had asked for money, Claudio's testimony at trial was internally inconsistent, thereby obviating the need for impeachment with his inconsistent prior testimony.[8] This leaves only one actual inconsistency between Claudio's testimony at trial and at Gils's preliminary hearing concerning whether he "went down" or not during the assault. We conclude that this inconsistency was minor when compared with the overwhelming evidence of guilt against Gils, and that therefore he was not prejudiced by his trial counsel's failure to use it to impeach Claudio. *See* ***State v. DeLeon***, 127 Wis.2d 74, 85, 377 N.W.2d 635, 641 (Ct. App. 1985) (no ineffectiveness when counsel does not cross examine with respect to minor inconsistencies which would not have affected the verdict). Thus, we conclude that Gils's counsel's failure to obtain the preliminary hearing transcript, although deficient, was not prejudicial, and therefore, did not amount to ineffective assistance of counsel.

[7] During both the trial and the preliminary hearing, Claudio testified at some points that both Gils and Gilmore had rushed him, and at other times that only Gils had rushed him. For example, at trial, on direct examination, when asked who had rushed him, he answered "both of them." However, he also stated that Gils reached him first. Also, during cross-examination at trial, Claudio repeatedly said that Gils had rushed him and started wrestling with him, without also referring to Gilmore. At Gils's preliminary hearing, Claudio also testified at one point that both Gils and Gilmore rushed him, but at another point stated that Gils "was the one that went back with me," and that "he rushed me awful quick." Therefore, his testimony at trial, though internally inconsistent, was very similar to, rather than inconsistent with, his testimony at Gils's preliminary hearing.

[8] At trial, on direct examination, Claudio testified that both Gils and Gilmore said: "Where's the money?" On cross-examination, however, Claudio pointed to Gilmore in response to the court's question: "Who was saying get the gun, get the money?"

2. Failure to suppress evidence found at April Parker's residence.

Gils claims that his counsel was ineffective for failing to move to suppress his tennis shoe which was found at April Parker's residence. Trial counsel is not ineffective for failing to make frivolous motions or arguments. *See* ***State v. Toliver***, 187 Wis.2d 346, 360, 523 N.W.2d 113, 118 (Ct. App. 1994). We conclude that a motion to suppress the tennis shoe would have been frivolous because April Parker consented to the search of her residence.

Under the Fourth Amendment, a warrantless entry and search is presumptively unreasonable. *See* ***Schneckloth v. Bustamonte***, 412 U.S. 218, 219 (1973); ***State v. Boggess***, 115 Wis.2d 443, 448-49, 340 N.W.2d 516, 520 (1983). Consent, however, is a well-settled exception to the Fourth Amendment requirements of both a warrant and probable cause. *See* ***Schneckloth***, 412 U.S. at 219. Third parties may consent to a search as long as they have common authority. *See* ***United States v. Matlock***, 415 U.S. 164, 171 (1974); ***State v. Kieffer***, 207 Wis.2d 464, 470, 558 N.W.2d 664, 667 (Ct. App. 1996).

In this case, Parker had at least common authority, if not sole authority, over her own residence, for which Gils did not even have a key. Gils's counsel testified at the ***Machner*** hearing that she believed the search was consensual because the police reports indicated that Parker had given consent for the officers to search her home, and because Parker had indicated to counsel, on a number of occasions when they spoke in person, that she had, in fact, given her consent. Gils has not presented us with any facts or argument rebutting the State's claim that the search was consensual. Therefore, we conclude that consent was given, and that the search was proper. Consequently, any motion to suppress

would have been meritless and counsel was not ineffective for failing to make such a motion.

3. Stipulation regarding the photograph's publication.

Finally, Gils raises an ineffectiveness claim with respect to his counsel's stipulation regarding the publication to the jury of a photograph of Claudino Claudio's injuries. Defense counsel initially objected to the admission of the photograph. The court decided to admit the photograph, but stated on the record that it would give a cautionary instruction if the photograph was published to the jury. The court, however, eventually published the photograph to the jury without a cautionary instruction. Although the court did not explicitly state in its earlier ruling that it was admitting the photograph pursuant to a stipulation, the parties apparently stipulated that the photograph could be admitted and published to the jury. The court, in denying Gils's postconviction motion, held that Gils's stipulation waived any right to request a cautionary instruction. Gils claims that his stipulation to the admission and publication of the photographs was based on the court's statement that it would give a cautionary instruction, and that the trial court erred by failing to give the instruction. However, Gils also alternatively argues that if his counsel is found to have waived the right to request a cautionary instruction by stipulating to the admission of the photograph, the stipulation amounted to ineffective assistance of counsel.

The trial court's decision to display photographs to the jury is discretionary, and will be upheld unless it is wholly unreasonable or the only purpose of the photographs is to inflame and prejudice the jury. *See* ***State v. Thompson***, 142 Wis.2d 821, 841, 419 N.W.2d 564, 571 (Ct. App. 1987). Gils has presented this Court with no case law or argument suggesting that a trial court

lacks the discretion to admit and publish photographs to the jury without cautionary instructions. Therefore, although the trial court indicated that it would give the jury a cautionary instruction, we conclude that it had no duty to do so. Further, we hold that its decision to publish the photograph without a cautionary instruction was not erroneous because there was a proper purpose to admit and publish the photograph. Gils was charged with the aggravated battery of Claudino Claudio. In order to find Gils guilty of that charge, the jury needed to find that Claudio had suffered great bodily harm. The photograph at issue showed the head injuries which Claudio sustained as a result of the attack. Therefore, it was relevant and helpful in assisting the jury to determine whether Claudio had suffered great bodily harm, and served a proper purpose. Consequently, the trial court's decision to admit the photograph and publish it without a cautionary instruction was not erroneous. Whether or not counsel waived the right to request a cautionary instruction is irrelevant because the trial court had no duty to grant the request. Gils may not claim that he was prejudiced by an alleged waiver of his counsel's right to ask the trial court to do what it did not need to do, and, therefore, this final aspect of his ineffectiveness claim also fails.

B. Publication of the photograph without a cautionary instruction.

As noted, Gils also claims on appeal that the trial court's decision to publish the photograph of Claudino Claudio's head injuries to the jury, without a cautionary instruction, amounted to an erroneous exercise of discretion. For the reasons previously explained, we conclude that the trial court did not erroneously exercise its discretion.

C. Judge's communication with juror—juror bias.

After the jury began deliberating, one of the jurors sent a note to the trial court judge which said, "I am closely associated with one of the suspects of the robbery/murder that took place last week. I feel that because of that I have already formed an opinion regarding these two defendants." After receiving the note, the judge met in chambers with the juror and had an apparently short conversation off the record regarding the note. Although Gils's counsel was present during this conversation, Gils was not present. Following the conversation, with Gils present, the trial court summarized on the record the conversation which had occurred off the record. The trial court then asked the juror if she could set the opinion she had formed aside and decide the case fairly and impartially, and the juror answered that she could. Gils moved to excuse the juror and moved for a mistrial. The trial court, however, denied the motion, finding that the juror was able to remain fair and impartial. Gils claims on appeal that: (1) the trial court erred by not excusing the juror for cause, and; (2) the trial court violated Gils's right to be present at trial by conducting the initial conversation with the juror outside of his presence. We disagree with Gils's first claim. With respect to the second claim, we find that there was trial court error; however, we conclude that the error was harmless.

Whether a juror is biased and should be dismissed for cause is committed to the sound discretion of the trial court. ***State v. Nienhardt***, 196 Wis.2d 161, 166, 537 N.W.2d 123, 125 (Ct. App. 1995). In ***Nienhardt***, a juror, in response to a question on voir dire, said that she saw defense counsel "yelling" at the defendant shortly before the trial began. The trial court decided not to excuse the juror after the juror indicated that she could be fair and impartial. On appeal, this Court stated:

> We conclude that the trial court properly exercised its discretion in not striking the juror who made the objectionable comment and not granting a mistrial. The court considered the juror's observation of defense counsel but also recognized that she indicated that she could fairly and impartially decide the issues in the case. The court apparently believed her response was credible and that she could be impartial. We will not overturn that determination.

Id., 196 Wis.2d at 166, 537 N.W.2d at 125. Similarly, in the instant case, after learning that the juror was potentially biased, the judge questioned the juror to determine whether she could act in a fair and impartial manner. The juror answered that she believed that she could be fair and impartial, and the trial court believed the juror. As in ***Nienhardt***, we will not overturn the trial court's credibility determination. Therefore, we conclude that the trial court's decision not to excuse the juror was a proper exercise of discretion.

With respect to Gils's second claim, the Wisconsin Supreme Court has held that a trial court's "comments to the deliberating jury without the defendant and his counsel being present (unless the defendant has waived that right) deny the defendant his constitutional right to be present at trial." ***State v. Burton***, 112 Wis.2d 560, 565, 334 N.W.2d 263, 265 (1983). Such error, however, does not automatically entitle the defendant to a new trial; the error may be found to be harmless beyond a reasonable doubt. ***State v. McMahon***, 186 Wis.2d 68, 88, 519 N.W.2d 621, 629 (Ct. App. 1994).

In this case, the trial court communicated with a juror during deliberations without the defendant being present. Although the State argues that the trial court's discussion only involved the "identification of the problem," it appears that there was more involved in the conversation. As noted previously, in her note to the judge, the juror stated that she felt that she had already formed an

opinion. However, as the trial court stated on the record, "in further discussing" the issue with the trial court, the juror apparently "indicated that [she] would put th[e] robbery/murder incident out of [her] consideration and that [she] would decide th[e] case based on the facts of what [she] saw and heard in th[e] case and by applying the law that [the judge] ha[d] read." Thus, during a conversation outside of the defendant's presence, the juror's problem was not merely identified, but actually resolved. Presumably because of the discussion with the judge, the juror, who had expressed concerns about her ability to be impartial, decided that she could remain fair and impartial. Thus, although the trial court stated, in its denial of Gils's postconviction motion, that it "explored the issue" with the defendants on the record "immediately" after the juror "expressed" the issue, it appears that the statements made on the record while Gils was present were merely a summary of a completed "exploration" which had already reached its conclusion outside of Gils's presence. Although in this case the discussion between the trial court and the juror took place in the presence of Gils's counsel without Gils's waiver, ***Burton*** requires both the defendant and defendant's counsel to be present during any communication between the trial court and the jurors during jury deliberations. In ***Burton,*** the court wrote:

> [W]e do not condone the practice of a judge entering the jury room or communicating with a jury outside of the presence of *the defendant and* of counsel for the defendant both and the state, even when the judge scrupulously takes a court reporter with him or her to the jury room to record the comments. The judge is a figure of authority and respect during the trial; his or her intrusions into the sanctity of jury deliberations may affect those deliberations. Even a transcript of the judge's communication cannot reveal a judge's facial expressions or tone of voice. Defense counsel *and defendant* must be present to have the opportunity to observe the judge's demeanor first-hand, to object to statements or request curative statements in the event that the communication may be improper in any way.

Burton, 112 Wis.2d at 569, 334 N.W.2d at 267 (emphasis added). Therefore, according to ***Burton***, we must conclude in this case that the trial court's communication outside of the defendant's presence constituted error.

The error, however, does not require reversal because we conclude that it was harmless beyond a reasonable doubt. *See* ***McMahon***, 186 Wis.2d at 88, 519 N.W.2d at 629. In ***McMahon***, this court held that the trial court erred by communicating with the jury during its deliberations on five separate occasions, at times by actually entering the jury room, without the defendant being present, and without the defendant's waiver of his right to be present. This court, however, held that the error was harmless because: (1) the trial court conferred with the defendant's attorney prior to the conversations and the defense attorney agreed upon what the court was to tell the jury; (2) none of the communications was of "such substantive nature that defendant's presence could have aided in dealing with a legal problem"; and (3) in only one instance was the jury brought into open court without the defendant being present. ***Id***. In this case, there was only one, presumably brief, conversation between one juror and the judge, in contrast to ***McMahon***, where there were five conversations between the judge and the entire jury. Gils's attorney was present during the conversation, it did not occur in open court, and did not involve a legal problem with which Gils could have aided his counsel or the court. Therefore, after reviewing the facts of this individual case, we conclude that the error was harmless beyond a reasonable doubt.

D. Failure to instruct on lesser-included offense of substantial battery.

Finally, Gils claims that the trial court erred by failing to instruct the jury on the lesser-included offense of substantial battery.

> Submission of a lesser included offense instruction is proper *only* when there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense. The key word in the rule is "reasonable." The rule does not suggest some near automatic inclusion of all lesser but included offenses as additional options to a jury. The evidence supporting submission of the lesser-included offense [instruction] must be relevant and appreciable when viewed in a light most favorable to the defendant.

State v. Fleming, 181 Wis.2d 546, 560-61, 510 N.W.2d 837, 842 (Ct. App. 1993) (citations and quotation marks omitted). Gils was charged with the aggravated battery of Claudino Claudio. The jury should have been instructed on the lesser-included offense of substantial battery only if there were reasonable grounds in the evidence to acquit Gils of aggravated battery and to convict Gils of substantial battery. There is no dispute that there were reasonable grounds in the evidence to convict Gils of substantial battery; thus, the only issue is whether there were reasonable grounds to acquit Gils of aggravated battery.

The elements of aggravated battery are: (1) the defendant caused great bodily harm to another person; and (2) the defendant intended to cause substantial bodily harm or great bodily harm. Section 940.19(5), STATS. Gils does not contend that he did not intend to cause at least substantial bodily harm. Rather, he argues that there were reasonable grounds for the jury to conclude that he did not cause great bodily harm to Claudino Claudio. Great bodily harm is defined as a bodily injury which: (1) creates a substantial risk of death; or (2) causes serious permanent disfigurement; or (3) causes a permanent or protracted loss or impairment of the function of any bodily member or organ; or (4) causes other serious bodily injury. Section 939.22(14).

In his brief, Gils argues that the jury could have reasonably found that Claudino Claudio did not suffer great bodily harm because "there is absolutely no evidence in the record from any medical provider or anyone else to indicate that Mr. Claudio's lacerations created a substantial risk of death or that he was caused a permanent serious disfigurement or impairment of his bodily functions or organs." Thus, Gils claims that the jury could have reasonably concluded that Claudio's injuries did not satisfy any of the first three factors in the definition of great bodily harm found in § 939.22. Gils, however, actually admits in his brief that the jury, acting reasonably, had to conclude that the injuries met the fourth prong of the definition, that is, that the injuries were "serious." For instance, Gils states: "It cannot be disputed that this is a serious injury," and elsewhere in his brief argues that "[t]he instruction given by the court on Aggravated Battery unfortunately is very broad and fails to instruct the jury that someone who has a serious injury, nonetheless, may not be covered under that definition." Gils apparently does not understand that the fact that an injury is "serious," regardless of whether it meets the first three prongs of the definition, is all that is needed in order for the injury to constitute "great bodily harm," and that therefore, in order for the jury to acquit him of aggravated battery, the jury would have to be able to reasonably conclude that the injuries were not "serious."

Case law shows that the phrase "other serious bodily injury" found in § 939.22(14), STATS., allows a jury to find "great bodily harm" whenever any "serious" injuries have occurred. In ***State v. Bronston***, 7 Wis.2d 627, 97 N.W.2d 504 (1959) (opinion modified on other grounds in ***State v. Bronston***, 7 Wis.2d 627, 98 N.W.2d 468 (1959)), overruled by ***La Barge v. State***, 74 Wis.2d 327, 246 N.W.2d 794 (1976), the supreme court held that the rule of *ejusdem generis* was applicable to the phrase "other serious bodily injury" found in § 939.22(14),

STATS, 1957.[9] The rule of *ejusdem generis* is a canon of statutory construction which states that "where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated." BLACKS LAW DICTIONARY, 517 (6th ed. 1990). Thus, in ***Bronston***, the court held that the victim's injuries were not "serious" injuries under the statute because they were not of the same general class as the enumerated types of injuries, i.e., those creating a high probability of death, permanent disfigurement, or the loss or impairment of an organ or bodily function. *See* ***Bronston***, 7 Wis.2d at 633, 97 N.W.2d at 508. However, in ***La Barge v. State***, 74 Wis.2d 327, 334, 246 N.W.2d 794, 797 (1976), the supreme court overruled ***Bronston*** and held that the rule of *ejusdem generis* did not apply to § 939.22(14). Instead, the court ruled that the phrase "others serious bodily injury" has a distinct meaning independent of the other three prongs of the definition of great bodily harm, and was intended to broaden the scope of § 939.22(14) to include injuries not in the same general class as the specifically enumerated types of injuries. *See* ***id.***

With respect to the definition of "serious bodily injury," the ***La Barge*** court held that "[t]he words 'serious bodily injury' are words of ordinary significance, and . . . they are well understood by any jury of ordinary intelligence." ***Id.*** at 335, 246 N.W.2d at 797-98 (citation, internal quotations and parentheses omitted). It should also be noted that, in ***Cheatham v. State***, 85 Wis.2d 112, 125, 270 N.W.2d 194, 200 (1978), the supreme court considered and rejected a claim that ***La Barge***'s definition of "other serious bodily injury"

[9] Section 939.22(14), STATS., 1957, was identical to the current statute, except that it contained the phrase "high probability of death," instead of the current phrase, "substantial risk of death."

rendered § 939.22(14), STATS., unconstitutionally vague. The ***Cheatham*** court based its holding on the fact that "'[g]reat bodily harm' still requires 'serious' injury, something greater than mere 'bodily harm.' Although the line between the two is not mathematically precise, it is one a jury is capable of drawing." ***Id.*** at 124, 270 N.W.2d at 200. Thus, a jury may conclude that a victim has suffered "great bodily harm" as long as the victim has suffered an injury that is "serious," defining the term as it is ordinarily understood, regardless of whether it creates a substantial risk of death, permanent disfigurement, or impairment.

In the instant case, no reasonable jury could conclude that Claudino Claudio's injuries were not "serious." The trial testimony established that Claudio was hit in the head with between seven and possibly twenty liquor bottles, with sufficient force that the bottles broke. He suffered numerous lacerations on his scalp, face, nose and cheeks. Following the attack, Claudio was treated at St. Michael's Hospital for two days, and received 210 stitches to his head. Given these facts, a jury acting reasonably would have no choice but to conclude that these particular injuries were "serious," as the term is ordinarily understood.[10] Therefore, no reasonable jury could acquit Gils of aggravated battery, and the trial court's decision to deny Gils's request for the lesser-included offense of substantial battery was proper.

[10] Gils argues that the jury could have reasonably found that the injuries did not constitute "great bodily harm" but instead constituted "substantial bodily harm" under § 939.22(38), STATS. Section 939.22(38) defines "substantial bodily harm" as "bodily injury that causes a laceration that requires stitches; any fracture of a bone; a burn; a temporary loss of consciousness, sight or hearing; a concussion; or a loss or fracture of a tooth." Essentially, Gils argues that because the injury involved lacerations, the jury could have reasonably found that it fit the definition of substantial bodily harm rather than great bodily harm. This argument, however, fails to address the fact that, in order to acquit Gils of aggravated battery, the jury would have to conclude that the lacerations did not constitute a "serious" injury. On these particular facts, which involved 210 stitches and multiple facial lacerations, we conclude that no reasonable jury could conclude that the lacerations were not "serious."

In sum, we conclude that Gils has failed to show any error on the trial court's part which was not harmless, and therefore, we affirm.

By the Court.—Judgment and order affirmed.

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