COURT OF APPEALS
DECISION
DATED AND FILED

April 18, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1636-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KENNETH R. WHITMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 ANDERSON, J. Kenneth R. Whitman appeals from a judgment of conviction for battery to a corrections officer contrary to WIS. STAT. § 940.20(1)

(1999-2000)[1] and disorderly conduct contrary to WIS. STAT. § 947.01. First, Whitman argues that the trial court, in giving the standard jury instruction on intent and in refusing to give Whitman's "somnolentia" theory of defense instruction, shifted the burden of proof to Whitman.[2] Second, Whitman argues that the trial court erred in requiring him to appear before the jury in prison garb. Finally, Whitman contends that it was a misuse of discretion for the trial court to permit the State to present the time line as evidence of motive. On Whitman's first two contentions, we disagree because the trial court did not err in either decision. On Whitman's third contention, we agree that the admission of the State's time line was error; however, we hold this to be harmless. Therefore, we affirm.

Facts

¶2 On September 11, 1998, Whitman, while an inmate at the Walworth County Jail, struck and injured Corrections Officer Paul Yakowenko. Yakowenko began his shift that day by checking on each of the inmates he was to supervise. When he arrived outside of Whitman's cell, he saw linen and clothing on the bunk area; he "didn't see any body parts" where the inmate would normally be. Yakowenko double-checked his roster to confirm that an inmate was supposed to be in the cell. Having confirmed that an inmate named Whitman was in fact supposed to be in the cell, Yakowenko asked, "Mr. Whitman, are you in there, Mr. Whitman[?]" Yakowenko got no response. After getting no response,

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] "Somnolentia" or "sleep intoxication" occurs when a person is suddenly awakened and acts out in a certain fashion without knowledge of the conduct. Whitman's "somnolentia" theory of defense was that he did not intend the battery of the corrections officer because he was in a state of "sleep intoxication" called "somnolentia."

Yakowenko radioed to the control officer to open the cell door so he could go in and see if anything was underneath the pile of linen and clothing on the bunk. After the door was opened, Yakowenko walked into the cell and approached the bunk. Using two fingers, Yakowenko grasped the orange uniform that was on top of "about a body size pile" on the bunk. Yakowenko then lifted up the orange uniform and saw "Whitman lying there with his eyes wide open looking right at me." Whitman then screamed profanities at Yakowenko, while asking Yakowenko what he was doing. Yakowenko responded by telling Whitman that he was "just checking to see if you were okay."

¶3 At this point, Whitman got up and started flailing his arms while screaming and yelling at Yakowenko. Yakowenko stepped backward out of the cell. When Yakowenko was outside of the cell, he put his hand up with his open palm facing outward in order to employ a police technique called "empty hand control." "Empty hand control" is used to try to calm down an individual. Yakowenko also verbally told Whitman to calm down, at which point Whitman hit Yakowenko in the face. Yakowenko grabbed his face "because the pain was very, very intense." Yakowenko signaled for help by activating his duress alarm.[3] He described the event in this way:

> I grabbed my face because the pain was very, very intense. I grabbed my face, I pulled my cord, and I tried to talk on my radio that I carry with me to tell them that I had been hit.

After getting no response on his radio, Yakowenko looked back up to see Whitman coming toward him, yelling profanities and saying "come on, I didn't hit

[3] Officers at the Walworth County Jail wear a duress alarm. It is a device worn on the shoulder of an officer's uniform. On it is a cord that the officer can pull in case he or she gets into trouble. When the cord is pulled, a signal is sent to the master control area, setting off an alarm and conveying, via computer, the location of the person in duress.

you that hard." At that time, Yakowenko said that the pain was so intense it caused him to go down on one knee. Waiting for backup and not knowing whether Whitman was going to come after him again, Yakowenko made his way toward the door and out of the pod of cells. He was met and assisted by another officer and eventually taken to the emergency room. As a result of Whitman's assault, Yakowenko sustained a contusion on the left side of his face and bleeding on the inside of his mouth.

Analysis

¶4 We disagree with Whitman's contention that in denying his proposed "somnolentia" instruction, the trial court improperly shifted the burden of proof to Whitman on the issue of intent. The trial court has wide discretion in selecting jury instructions; this discretion extends to both choice of language and emphasis. ***State v. McCoy***, 143 Wis. 2d 274, 289, 421 N.W.2d 107 (1988). The trial court acted within its discretion when it gave the standard jury instruction on intent, and, in giving this instruction, the trial court did not shift the burden of proof to Whitman. The standard instruction on intent concludes by stating that the State must prove intent beyond a reasonable doubt. WIS JI—CRIMINAL 1228. The pertinent part of the instruction reads:

> If you are satisfied beyond a reasonable doubt that the defendant, while a prisoner confined to a county detention facility, intentionally caused bodily harm to an officer of such detention facility without the consent of that person, you should find the defendant guilty.
>
> If you are not so satisfied, you must find the defendant not guilty.

Id. We hold the entire premise of Whitman's first argument to be invalidated by the very language of the standard instruction, which says that the State must prove intent beyond a reasonable doubt.

¶5 Next, we do not find trial court error in rejecting Whitman's challenge to having to appear before the jury in prison garb. First, there is some question as to whether the jury would have perceived the green cotton shirt and trousers that Whitman appeared in as prison attire. There is no indication that there was any lettering that identified a prison or jail on Whitman's clothing. Clothing which does not clearly identify the accused as a prisoner is not sufficient to support a finding that the defendant was denied a fair trial. ***United States v. Forrest***, 623 F.2d 1107, 1116 (5th Cir. 1980). Second, and more importantly, any error was not prejudicial because the first question put to Whitman on direct was "Mr. Whitman, are you currently incarcerated in the Wisconsin correctional system?" Whitman answered, "Yes, I am." Because of this question, the jury would have been aware of Whitman's prisoner status regardless of the clothing he wore that day. Even if we had found error, it would have been harmless. ***State v. Dyess***, 124 Wis. 2d 525, 544-45, 370 N.W.2d 222 (1985).

¶6 Finally, while we agree with Whitman that the trial court improperly allowed the State to present a time line as evidence of motive, we do not hold this to be prejudicial error. The State was allowed to introduce a time line of other acts evidence in order to establish Whitman's motive in assaulting Officer Yakowenko. The time line showed the dates of Whitman's incarceration, his parole hearing and his trial court proceedings that had occurred prior to the attack on Yakowenko. The State concedes that the evidence of motive was weak. The State acknowledged, and we agree, that "[t]he 'time line' evidence painted a picture of a person who would probably be angry with the criminal justice system. However, this evidence does little to explain why that anger would be personally directed against Officer Yakowenko."

¶7 The admission of this evidence was error, but there is no reasonable probability that this error contributed to Whitman's conviction. ***Id.*** The State produced eyewitness testimony from another corrections officer and a nurse who both saw Yakowenko immediately after the attack while he was still down on the ground, dazed and holding the left side of his swelling face. In fact, Whitman does not deny striking Yakowenko; instead, he claims that because of "somnolentia," he cannot remember hitting the officer. This other evidence presented by the State is untainted by error. A trial proceeding will not be undermined where the error was peripheral or the verdict is strongly supported by evidence untainted by error. ***Id.*** at 545.

By the Court.—Judgment affirmed.

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