

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 15, 2001

Cornelia G. Clark
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.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-2200-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHIRLEY A. KOLVE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jackson County: ROBERT W. RADCLIFFE, Judge. *Affirmed.*

¶1 VERGERONT, J.¹ Shirley Kolve appeals a judgment of conviction for disorderly conduct contrary to WIS. STAT. § 947.01 (1999-2000)² and an order

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000).

² All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

denying her postconviction motion. She contends a new trial should be granted in the interest of justice because the real controversy was not fully tried. She argues evidence showing the victim's testimony was fabricated and was not presented to the jury, and that counsel was unaware of a defense to the charge. We reject these claims and affirm the judgment of conviction.

BACKGROUND

¶2 The disorderly conduct charge results from an incident involving Shirley Kolve and Mary Kolve, David Kolve's girlfriend.³ David, Mary, Mary's sister and David's two children drove to Shirley's residence to pick up some items from a shed when Shirley walked to the car and the altercation ensued. The complaint alleged Shirley leaned into the car, preventing Mary from closing the door, and "grabbed a hold of Mary ... around the collar."

¶3 In the jury trial, defense counsel asserted in opening argument that Shirley had been wrongfully accused because, although Mary and Shirley had a volatile relationship, Mary still chose to be on Shirley's property, thus provoking Shirley. Mary testified she had been on Shirley's property in the past, and saw no problem with being there on that particular day, and that it was Shirley, not she, who began the hostilities on that day. Shirley disputed this version of events, testifying Mary had not been on the property before, and she was not upset to see Mary in the car. The testimony of Mary's sister and of David corroborated Shirley's testimony on some points and Mary's testimony on other points. In closing argument, defense counsel told the jury, "[c]redibility is key here. You

³ David Kolve was previously married to Shirley Kolve. Mary Kolve was previously married to David's nephew. We will refer to the Kolves by their first names for clarity.

have different stories being told by Mary, David, and Mary's sister." The prosecutor also informed the jury, "[y]our job as jurors is to judge the credibility of the witnesses as well as their testimony." The jury found Shirley guilty. She filed a postconviction motion for relief, which the trial court denied.

DISCUSSION

¶4 Under WIS. STAT. § 752.35 this court has the power to grant a discretionary reversal of conviction "if it appears from the record that the real controversy has not been fully tried." *See also State v. Hicks*, 202 Wis. 2d 150, 159, 549 N.W.2d 435 (1996). In this case we must be convinced the jury was precluded from considering "important testimony that bore on an important issue." *State v. Darcy N.K.*, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) .

¶5 Shirley contends the jury did not hear evidence that Mary coached her sister, and the coaching resulted in fabricated testimony from Mary's sister regarding what Shirley was wearing the evening of the altercation. At the postconviction hearing David testified he overheard Mary coach her sister on what happened during the incident, and Mary's sister did not recall very much of the incident on her own.

¶6 Shirley also contends David's testimony at the postconviction hearing shows Mary is untruthful and the jury did not hear this evidence. David testified at the postconviction hearing that Mary was a "very dishonest person." He said he testified truthfully during the trial, but felt he may have "leaned more to Mary" because he was engaged to her at the time. Since that time he broke off the engagement and no longer has any relationship with Mary.

¶7 We conclude David's testimony at the postconviction hearing is simply additional evidence going to the credibility disputes that were presented and explored at trial.

¶8 At the trial there were several instances where Mary's testimony conflicted with that of David's. For example, David testified he heard Mary's statement to his son that when his son turned fourteen years old, he could live with Mary and David; Mary said she did not remember making that statement. David testified Mary made the initial comments to Shirley and not vice versa, and he testified to a crude, insulting comment Mary made to Shirley. Mary agreed she made the initial comments to Shirley, but said she was polite in her statements to Shirley and denied using profane language.

¶9 Testimony at trial also indicated Mary discussed her sister's testimony with her. On cross-examination Mary denied comparing notes with her sister, or making any attempt to "get the stories straight," but did admit she discussed the facts of the situation with her sister. Mary's sister also acknowledged this discussion with Mary.

¶10 Shirley argues this case is analogous to *Garcia v. State*, 73 Wis. 2d 651, 245 N.W.2d 654 (1976), but we do not agree. The major fact in dispute in *Garcia* was the identification of the defendant. The testimony of a confessed participant to the crime was not presented to the jury, and that testimony had the effect of showing the defendant was not at the crime scene nor participated in any way. The court considered this to be "very material and significant," *id.*, to the case and reversed the judgment of conviction.

¶11 In contrast, in this case the credibility of Mary and her sister was thoroughly explored on cross-examination and by emphasizing conflicts with

other testimony. David's postconviction testimony is not evidence of a different type, but simply more evidence from one of the interested parties of the same type already presented. Moreover, because David's relationship with Mary changed after trial and before his postconviction testimony, a jury could question the motives for his postconviction testimony rather than question Mary's credibility at trial, thus decreasing the significance of his new testimony even further. In short, Shirley has not persuaded us the testimony from David that the jury did not hear prevented the real controversy from being tried.

¶12 Next, Shirley argues trial counsel was not aware self-defense is a defense to the charge of disorderly conduct, and, had counsel been aware, the instruction would have ensured that the real issue was fully tried. Shirley points to *State v. Olsen*, 99 Wis. 2d 572, 299 N.W.2d 632 (Ct. App. 1980), as support for her argument. In *Olsen*, the defendant and the co-defendants were charged with disorderly conduct by participating in a peaceful demonstration. The court held that in order to use the claim of self-defense in a disorderly conduct charge, there must be an allegation or evidence that the defendant used force. *Id.* at 580. We disagree with Shirley that this defense was available to her.

¶13 The privilege of self-defense is available when a person reasonably believes force is necessary to prevent or terminate an unlawful interference with his or her person. WIS. STAT. § 939.48(1). The belief that an unlawful interference may occur is "crucial." *State v. Hobson*, 218 Wis. 2d 350, 367, 577 N.W.2d 825 (1998). A reasonable belief is a belief a person of ordinary prudence and intelligence in the accused's position would have under all the circumstances at the time the incident occurred. *Maichle v. Jonovic*, 69 Wis. 2d 622, 627, 230 N.W.2d 789 (1975).

¶14 The evidence does not show a reasonable person in Shirley's position would have believed herself to be in danger of unlawful interference of her person by Mary. Nothing in the evidence suggests Mary intended to harm Shirley. We conclude no reasonable jury could have found Shirley's actions were reasonably necessary to prevent an unlawful interference with her person. A defendant is not entitled to have the jury consider a theory of defense when there is no evidence supporting it. *Olsen*, 99 Wis. 2d at 578-79.

By the Court.—Judgment and order affirmed.

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

