

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 24, 2008

David R. Schanker
Clerk of Court of Appeals

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.

Appeal No. 2007AP2792-CR

Cir. Ct. No. 2005CF95

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FRANK COTTONE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Vilas County: ROBERT E. KINNEY, Judge. *Reversed and cause remanded.*

¶1 PETERSON, J.¹ Frank Cottone appeals a judgment of conviction for misdemeanor battery and an order denying his motion for a new trial. Cottone argues the trial court erred by finding the State's failure to disclose a tape recorded

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

conversation of a witness's statement to police was not prejudicial. He also argues the trial court erred by submitting simple battery as a lesser included offense of aggravated battery. We agree that the State's failure to disclose evidence was prejudicial and therefore reverse and remand for a new trial. We do not reach the second argument.

BACKGROUND

¶2 On October 11, 2005, the State charged Cottone with committing aggravated battery of an elderly person, a felony. Despite Cottone's objection, the court gave the jury the option of finding Cottone guilty on the lesser included offense of simple battery, a misdemeanor. Cottone was convicted of misdemeanor battery on February 27, 2007.

¶3 The battery charge arose out of a fight between fifty-five year-old Cottone and his sixty-nine year-old neighbor, Ronald Clesen, on August 8, 2005. Both Cottone and Clesen testified at trial. Each had a different version of events, characterizing the other as the aggressor.

¶4 Cottone's wife, Vera, was the only other witness to the fight. She testified that Clesen had threatened to shoot their dogs. On August 8, her husband waited outside for Clesen to come by on his daily walk so he could speak to Clesen about the threats. Vera testified she was in the house when she heard Clesen yell, "I didn't threaten your wife, I didn't threaten your wife." She then walked outside where she saw Clesen swing his arm and charge Cottone. The two men exchanged words but she was too far away to hear them. Clesen charged Cottone again and attempted to punch him. Cottone hit Clesen in the head and Clesen fell down. From his position on the ground Clesen swung at Cottone, then grabbed Cottone's ankles and tripped Cottone so that Cottone fell on top of him.

Vera then briefly covered her eyes, and when she looked again, she saw the two men standing and Clesen head-butting Cottone.

¶5 Deputy Randy Schneider testified that he spoke to Vera on the phone following the fight. Vera said she “thought she saw Mr. Clesen trying to hit her husband, but she could not see exactly what had happened that day.” He stated Vera told him she thought Clesen tripped over her husband and fell down. Schneider also asserted Vera had not mentioned that Clesen grabbed Cottone around the ankles, then proceeded to hit and head-butt him. Cottone’s attorney attempted to cross-examine Schneider on the likelihood that the report he relied on contained omissions because the telephone interview had not been taped. Counsel then learned that the interview had in fact been taped, but the tape was not turned over during discovery.

¶6 Cottone moved for a new trial due to the discovery violation. The trial court held that while the State had violated the discovery statute without good cause, any error was harmless because the tape recording of the phone conversation would not have helped Cottone.

DISCUSSION

¶7 Cottone argues the court erred by denying his motion for a new trial. In reviewing an alleged discovery violation we must address first whether the State actually violated its discovery obligations. *State v. DeLao*, 2002 WI 49, ¶14, 252 Wis. 2d 289, 643 N.W.2d 480. If we determine there was a discovery violation, we must then address whether the State has shown good cause for the violation and, if not, whether the violation prejudiced the defendant. *Id.*, ¶15. Each of these three steps presents a question of law that we review independently of the trial court. *Id.*, ¶¶14-15.

¶8 The State concedes it violated the discovery statute by failing to disclose the tape. However, the State contests the second step, arguing that “there has been no showing of bad faith or intentional non disclosure [sic] of the tape’s existence.” The State explains that it “was unaware of the tape until Deputy Schneider was called as a rebuttal witness regarding Vera Cottone’s testimony.” The State’s explanation here echoes that of the State in *DeLao*. In *DeLao*, the State argued “there is no indication that [the State] engaged in sandbagging or otherwise acted in bad faith.” *Id.*, ¶55. The court, however, noted “the State’s assertions miss the mark because it has the burden to provide some explanation other than good faith.” *Id.* The court went on to conclude, “[T]he fact that the prosecutor ... did not actually know of the evidence is no explanation at all.” *Id.*, ¶58. Likewise, in this case, the State’s argument that it did not know the tape existed is not sufficient to establish good cause. The State bears the burden to provide an explanation other than good faith and has not done so. Thus, the State has not established good cause.

¶9 Therefore, we must decide whether the violation prejudiced² Cottone. *See id.*, ¶15. An error is not prejudicial if the beneficiary proves “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *State v. Anderson*, 2006 WI 77, ¶114, 291 Wis. 2d 673, 717 N.W.2d 74 (citation omitted).

¶10 The State argues the error was not prejudicial because the tape recording did not differ significantly from the police report, which had been

² The terms harmless error and prejudicial error are often used interchangeably in cases analyzing this issue. *State v. DeLao*, 252 Wis. 2d 289, ¶59 n.10.

provided to Cottone before trial. The State also argues the tape recording was not exculpatory and in fact would have been even more effective than Deputy Schneider in impeaching the detailed account of the fight Vera provided in her testimony.

¶11 The State does not sufficiently address Cottone's contentions for how the recording could have helped his case. Cottone argues the error significantly undercut his ability to impeach Schneider's recollection and instead bolstered Schneider's credibility. At trial, Cottone attempted to undermine Schneider's credibility by cross-examining him on the likelihood that his report contained omissions because the interview had not been taped. Schneider then revealed the interview had been taped. Had Cottone known about the tape recording he would not have asked Schneider these questions. This is especially significant because Schneider's testimony attacked the veracity of Vera's recollection and Vera was the only witness to the incident. Schneider testified Vera's description of the fight at trial was more detailed than her description to him immediately following the incident, implying she was embellishing her testimony to accord with her husband's description of events.

¶12 Cottone contends the tape shows Vera's account to Schneider was less detailed because she was not asked for details by Schneider. Rather, the interview was a "wide-ranging" casual conversation. A review of the tape recording supports Cottone's assertion. Vera was clearly upset while talking to Schneider and he did not press her for details. Vera described how Clesen charged her husband, stating, "And he charged up toward my husband, and pushed him, or something and my husband from what I could see, looked like he clipped a little bit, and he fell down. And then I don't know what happened after that. I was like you know um, but." Schneider responded, "Hysterical probably." Vera

responded, “Yeah, but then I think that um, I’m not sure if he got up and swung at my husband again and then I don’t know ... I’m a nervous wreck here.” Schneider did not press Vera about what happened next. Instead, the conversation turned to the subject of the dogs. Thus, the tape recording could have been used to undercut Schneider’s description of his conversation with Vera and explain the difference in her accounts of the incident.

¶13 By surprising Cottone in his cross-examination, the error undercut Vera’s credibility. As the only witness to the incident, Vera’s credibility was important to Cottone’s defense. Additionally, the information on the tape cast doubt on Schneider’s summary of his conversation with Vera. Therefore, we cannot conclude that it is “clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.” *State v. Harvey*, 2002 WI 93, ¶46, 254 Wis. 2d 442, 647 N.W.2d 189.³

¶14 Cottone also argues the court erred by submitting simple battery as a lesser included offense of aggravated battery. He argues that submission of simple battery was improper because under the evidence adduced at trial there were not reasonable grounds to acquit on aggravated battery and convict on simple battery. *See State v. Wilson*, 149 Wis. 2d 878, 898, 440 N.W.2d 534 (1989). However, because we conclude the discovery violation entitles Cottone to a new trial, we need not reach this argument. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

³ Cottone also argues that the tape showed Schneider omitted any reference to Vera’s statement that she saw Clesen “charging” towards her husband. However, this information was also contained in the police report in Cottone’s possession and thus Cottone still had the ability to cross-examine Schneider on his failure to testify to that statement.

By the Court.—Judgment and order reversed and cause remanded.

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

