COURT OF APPEALS
DECISION
DATED AND FILED

August 22, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1242-CR **Cir. Ct. No. 01-CM-126**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY A. TIEPELMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Grant County: ROBERT P. VAN DE HEY, Judge. *Affirmed*.

¶1 ROGGENSACK, J.[1] Larry A. Tiepelman appeals his conviction for disorderly conduct as a habitual criminal, contrary to WIS. STAT. §§ 947.01 and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

939.62(1)(a) and the circuit court's order denying his motion for postconviction relief. Tiepelman argues that in the interest of justice, a new trial should be granted because important evidence was not presented to the jury and the real controversy was not fully tried. Upon our review of the record, we conclude that the circuit court did not erroneously exercise its discretion in denying the motion for a new trial. Additionally, because we are satisfied that the real controversy was tried, we decline to exercise our discretionary power to grant a new trial under WIS. STAT. § 752.35. Accordingly, we affirm the judgment and order of conviction.

BACKGROUND

¶2 On May 6, 2001, at approximately 2:00 a.m., Grant County police officer Todd Stenner was dispatched to Mary Tiepelman's apartment in the City of Boscobel. Upon his arrival, Stenner found Mary standing in the back parking lot of her apartment complex frightened and crying. Stenner interviewed Mary for about thirty minutes and completed a domestic abuse worksheet, including a narrative statement of what occurred. Mary stated that she and her husband, Larry, had gotten into an argument and he had shoved her twice into the wall. Stenner, joined by police officer Jerron Grapes, entered Mary's apartment and found Larry in bed. Grapes interviewed Larry and subsequently arrested him for disorderly conduct contrary to WIS. STAT. § 939.62(1)(a).

¶3 A jury found Larry guilty of disorderly conduct. At trial, both Mary and Larry testified to the events leading up to Larry's arrest. Their testimony differed in several respects. Mary testified that on May 5, 2001, she left for work at 2:30 p.m. and returned home just before 10:00 p.m. Larry was home and the two started to argue about the purchase of a truck and he shoved her twice into the

wall. Mary then left the apartment and ran down the stairs dialing 911 on her cordless phone. The police arrived shortly thereafter.

¶4 In contrast, Larry testified that Mary returned home from work at approximately 8:20 p.m. He offered to take her out to dinner and they decided on Pizza Hut. Larry testified that after dinner, they shopped briefly at Wal-Mart, filled up the car with gas at a nearby Kwik Trip and returned home. Shortly thereafter, Larry testified that he and Mary did discuss the purchase of a truck but, he "absolutely" did not shove his wife.

¶5 On rebuttal examination, Mary denied eating at Pizza Hut and shopping at Wal-Mart. Additionally, Mary testified she called 911 approximately one hour after she returned home from work or around 11:00 p.m. It is undisputed, however, that the police were dispatched to Mary's apartment at 2:04 a.m.

¶6 On February 12, 2002, Larry filed a motion for postconviction relief. Attached to the motion were two checks signed by Mary Tiepelman, made out to Wal-Mart and Kwik Trip, respectively. Also attached was an affidavit from an employee of Mary's bank stating that she believed that the check was drawn on Mary's account the evening of May 5, 2001. Larry argued that the evidence corroborated his testimony, casting doubt on Mary's credibility. Larry argued that because the checks were not available at trial, the issue of Mary's credibility was not fully tried and therefore, a new trial is warranted in the interest of justice. The circuit court denied Larry's motion for a new trial, stating that "the overall credibility of the witnesses was fairly placed before the jury." Larry appeals.

DISCUSSION

Standard of Review.

¶7 A circuit court's ruling on a motion to grant a new trial in the interest of justice is discretionary. ***State v. Harp***, 161 Wis. 2d 773, 775, 469 N.W.2d 210, 211 (Ct. App. 1991). A discretionary decision is one a reasonable court could reach by considering the relevant facts, the proper standard of law and a demonstrative process of logical reasoning. ***Rodak v. Rodak,*** 150 Wis. 2d 624, 631, 442 N.W.2d 489, 492 (Ct. App. 1989). We will not disturb the circuit court's decision unless the court erroneously exercised its discretion. ***Priske v. General Motors Corp.***, 89 Wis. 2d 642, 663, 279 N.W.2d 227, 236 (1979).

New Trial.

¶8 Larry argues the circuit court erred in denying his motion for a new trial because the real issue, Mary's credibility, was not fully tried. He argues that in a "he said/she said" criminal case, credibility is the critical, determinative issue and "major evidence" damaging her credibility was not available at trial. Therefore, a new trial is warranted. We disagree.

¶9 A circuit court may, in the interest of justice, grant a new trial when the real controversy has not been fully tried. ***Harp***, 161 Wis. 2d at 775, 469 N.W.2d at 211. A court may exercise its discretionary power without finding the probability of a different result on retrial. ***Id.*** Cases where the real controversy was not fully tried include cases where the jury was not given the opportunity to hear *important* evidence that bore on a critical issue of the case. *See, e.g.,* ***Garcia v. State***, 73 Wis. 2d 651, 655, 245 N.W.2d 654, 656 (1976) (court granted a new trial because testimony of a confessed participant to the crime was not presented to

the jury); ***State v. Hicks***, 202 Wis. 2d 150, 164, 549 N.W.2d 435, 441 (1996) (court granted a new trial because the jury did not hear important DNA evidence relevant to the critical issue of identification).

¶10 The critical issue in the present case is credibility. The issue, however, was fairly placed before the jury. The jury heard both Mary and Larry testify to the events of the evening. They were able to see Mary describe the incident and listened as defense counsel impeached her memory of certain details, including the time she called the police. The checks placing Mary at Wal-Mart and Kwik Trip may cast doubt on Mary's testimony of the events earlier in the evening. They do not, however, controvert her testimony that Larry engaged in disorderly conduct, therefore, we are not convinced that the jury was precluded from considering important evidence that bore on a central issue in the case. *See* ***Hicks*****,** 202 Wis. 2d at 160, 549 N.W.2d at 440. Accordingly, we conclude that the circuit court properly exercised its discretion when it denied Tiepelman's motion for a new trial.

Discretionary Reversal.

¶11 It appears that Tiepelman also seeks a new trial under WIS. STAT. § 752.35. Section 752.35 grants us discretionary power to give relief if "it appears from the record that the real controversy has not been fully tried." Discretionary reversal is a formidable power that should be exercised sparingly and with great caution. *See* ***State v. Watkins***, 2002 WI 101, ¶79, ___ Wis. 2d ___, 647 N.W.2d 244. Upon our review of the record, we conclude that Tiepelman has failed to show that the real controversy has not been fully and fairly tried. Therefore, we decline to exercise our discretionary authority to grant him a new trial.

CONCLUSION

¶12 Upon our review of the record, we conclude that the circuit court did not erroneously exercise its discretion in denying the motion for a new trial. Additionally, because we are satisfied that the real controversy was tried, we decline to exercise our discretionary power to grant a new trial under WIS. STAT. § 752.35. Accordingly, we affirm the judgment and order of conviction.

By the Court.—Judgment and order affirmed.

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