

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

October 3, 1995

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

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1360-CR

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GREGORY C. KIRST,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

SCHUDSON, J.<sup>1</sup> Gregory Kirst appeals from a judgment of conviction following a bench trial for battery, contrary to § 940.19(1), STATS. He argues that there was insufficient evidence to support his conviction. This court disagrees and affirms.<sup>2</sup>

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<sup>1</sup> This appeal is decided by one judge pursuant to § 752.31(2), STATS.

<sup>2</sup> Kirst was also convicted of one count of criminal damage to property, contrary to § 943.01(1),

The trial court convicted Kirst of causing bodily harm to Stephen M. Baker by hitting him in the ribs with an anti-theft device called "The Club." Kirst argues that Baker's testimony that he closed his arm over "The Club" while defending himself could constitute nothing more than a defensive grabbing of "The Club." He contends, therefore, that because independent witness Joseph Catanese did not see him strike Baker and City of Milwaukee Police Officer Reginald Hampton did not observe any injuries to Baker, the evidence was insufficient to prove battery.

The test for sufficiency of evidence is whether a reasonable trier of fact could be convinced of guilt beyond a reasonable doubt. See *State v. Wachsmuth*, 166 Wis.2d 1014, 1022-1023, 480 N.W.2d 842, 846 (Ct. App. 1992). This court must view the evidence in a light most favorable to the trier of fact's verdict and indulge every reasonable inference that may be drawn, and if more than one reasonable inference may be drawn, this court must adopt an inference that supports the finding made by the trial court. *Id.* at 1023, 480 N.W.2d at 846. This court will not disturb a conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). Further, it is the function of the trier of fact to assess the weight and credibility of testimony, and this court will only substitute its judgment when the trier of fact relied upon evidence that was inherently or patently incredible as a matter of law. *Wachsmuth*, 166 Wis.2d at 1023-1024, 480 N.W.2d at 846-847.

Baker testified that on November 6, 1993, he began chasing Kirst after observing him smash out the windows in Baker's vehicle with "The Club." Following a brief chase, Kirst pulled "The Club" from his jacket and began swinging it at Baker. After avoiding Kirst's first two swings, Baker was struck in the ribs with "The Club." A struggle ensued during which Kirst struck and kicked him "many times." Baker also testified that he suffered pain and coughed up blood.

(..continued)

STATS. He does not, however, challenge this conviction on appeal.

The State also elicited testimony from Joseph Catanese, a citizen who observed a portion of the altercation while driving his vehicle. Catanese testified that he saw Baker chasing Kirst and also saw Baker and Kirst wrestling over "The Club." Catanese approached the men, took "The Club," and secured it in his vehicle.

The State also introduced the testimony of City of Milwaukee Police Officer Reginald Hampton. Hampton testified that upon arriving at the scene he observed Baker and Catanese attempting to subdue Kirst. Hampton noted that Baker had visible bruises and was coughing up blood.

Kirst bases his argument on the following portion of Baker's testimony:

The defendant swung—charged me and swung the Club at me a couple times. I avoided it. He swung it at me in the ribs underneath the left arm, at which time I closed my arm over it and held on to his arm and the Club and managed to wrestle him to the ground, at which point another person jumped out of his car and asked us to stop fighting.

Kirst, however, conveniently ignores not only the logical inferences that may be drawn from this testimony in combination with the other evidence, but also other portions of Baker's testimony including the following, on cross-examination:

Q:... Did you get hit in the head that night?

A:Yes, I got hit all over.

Q:Where else did you get hit?

A:All over my whole body.

....

Q:And this man [Kirst] seated to my right struck you many times?

A:Yes, he did.

....

Q:So when you testified today that you were struck or that you blocked a couple times and then you managed to get the instrument away, is that correct, that's a total of three; blocked two and grabbed it on the third one?

A:No. The defendant swung at me several times. I do not remember how many times. He charged me. He made contact with the Club once, hit me under the arm, at which point I was able to grab on to the Club, and he would not let go, and then I managed to get him onto the ground eventually. I was very concerned that he was going to hit me with the Club again. The other gentleman, after I pleaded with him, removed the Club from the defendant's hand.

....

Q:Did you get struck many, many times in an altercation that lasted a long time, or did you get hit once?

A:No. I got hit with hands and feet many times.

Q:Mr. Kirst struck you with his hands and his feet?

A:Yes.

Q:What was going on with the Club at the time? How could he do anything with his feet?

A:Well, since I had one of my hands on the Club and one of my hands on the arm holding the Club, Mr. Kirst had two free feet and one free arm to do with what he chose.

Q:What did he do?

A:He chose to hit me in the head, chose to hit me in the arms and the body. He kicked me a couple times. I mean—

Q:Did you tell the police that?

A:I don't remember whether I did or not. I remember telling them that he hit me with the Club. I remember telling them that the Club was in the other person's car.

This court concludes that the State presented sufficient evidence for a trier of fact to return a guilty verdict. The fact that Baker testified that he closed his arm over “The Club” is not so inconsistent with his overall description of the attack as to make his testimony incredible as a matter of law. Additionally, while neither Catanese nor Hampton actually observed Kirst hit Baker in ribs, their testimony corroborated Baker’s account. Finally, the record contains sufficient evidence from Baker and Officer Hampton to support the trial court’s conclusion that Baker suffered bodily injuries from Kirst’s use of “The Club.” The totality of evidence was sufficient in probative value and force that the trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *See Poellinger*, 153 Wis.2d at 501, 451 N.W.2d at 755.

*By the Court.* – Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.