COURT OF APPEALS
DECISION
DATED AND RELEASED

December 12, 1996

No. 95-3172-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TIMOTHY L. BAHLER,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Columbia County: JOHN R. STORCK, Judge. *Affirmed*.

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. Timothy L. Bahler appeals from a judgment of conviction and order denying his motion for postconviction relief. We affirm.

A jury convicted Bahler of several felonies, only one of which is relevant to this appeal. Bahler argues that the evidence is insufficient to support his conviction for battery during a burglary, contrary to § 943.10(2)(d), STATS. As argued by Bahler, the issue is narrow: whether the battery was "a natural and probable consequence" of the burglary. *See* § 939.05(2)(c), STATS. We affirm

a conviction unless the evidence, viewed most favorably to the State, is so insufficient in probative value that, as a matter of law, no reasonable trier of fact could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990).

Although the jury specifically asked for an instruction on the meaning of the term "natural and probable consequence," the court stated it could not locate a definition in the case law, so it referred the jury to the instructions they had already been given and declined to give an additional instruction. Defense counsel did not object. Both Bahler and the State argue that we should base our review of the sufficiency of the evidence on the meaning of "natural and probable consequence" as found in relevant law and available jury instructions. But since it does not make sense to base our review on instructions not given to the jury, we consider instead what reasonable jurors may have concluded using common meanings of the term.

In that light, we believe a reasonable fact finder could conclude that the battery was a natural and probable consequence of the burglary. The burglary was committed by several people entering the house of an elderly woman during the early morning hours. Some of these same persons, including Bahler, previously attempted a burglary at the same residence at that hour but abandoned the plan when the occupant awakened. Before the second burglary, the parties to the crime discussed the possibilities for preventing the victim from seeing them. This constituted sufficient evidence.

Bahler next argues that we should use our power of discretionary reversal under § 752.35, STATS., on the ground that the real controversy was not fully tried. He argues that his trial counsel's failure to request an instruction on the term "natural and probable consequence" precluded a full trial. We reject the argument. While the jury may not have applied the precise legal definition that the complete instruction would have provided, the legal definition is not so far removed from the ordinary meaning that we can conclude the real controversy was not fully tried.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.