COURT OF APPEALS
DECISION
DATED AND RELEASED

December 27, 1996

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(1), 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. 96-1929-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT H. WICHMAN,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Brown County: DONALD J. HANAWAY and WILLIAM C. GRIESBACH, Judges. *Affirmed.*

MYSE, J. Robert H. Wichman appeals his conviction of battery and the denial of his post-trial motion for a new trial. Wichman contends the trial court erred by admitting his statement made to the investigating officer, which Wichman contends was inadmissible because of the officer's failure to administer ***Miranda***[1] warnings. Wichman further contends he is entitled to a new trial based on newly discovered evidence consisting of a witness's refreshed recollection that the victim of the battery had a set of keys in his hand at the time Wichman struck him in what he alleges to have been self-defense.

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

Because this court concludes that there is sufficient evidence to support the trial court's finding the statement made to the officer was made at the investigative stage of proceedings while Wichman was not in custody, no ***Miranda*** warnings were required and that the newly discovered evidence is insufficient to warrant a new trial, the judgment of conviction and denial of Wichman's motion are affirmed.

The incident giving rise to this charge occurred at Lambeau Field during a Lions-Packers football game on December 31, 1994. Both Wichman and Todd Schafer drove charter buses to the game and had lunch at a nearby restaurant. They were returning to Lambeau Field when Wichman struck Schafer. At that time, officer Daniel Bennington was escorting one of the Lions' coaches to a press box when he observed a woman standing near some parked vehicles hollering for assistance. Bennington observed a man later identified as Schafer, who appeared to be injured, stumble out from between the vehicles with his hands to his face. Bennington also observed Wichman walk from between the vehicles. As Wichman attempted to walk away from the scene, the woman communicated in some way that he was involved in the incident. Bennington approached Wichman and asked him what was going on. Wichman responded that he was just getting even. Bennington asked for identification, investigated the offense and ultimately placed Wichman under arrest for his assault on Schafer. Wichman contends that when Bennington approached him, Wichman asked Bennington if he was under arrest, to which Bennington responded "yes."

From this, Wichman argues he was in custody at the time his statement was given to the officer and ***Miranda*** warnings were required. Wichman filed a motion for a new trial following his conviction alleging that one of the State's witnesses now recalls that at the time Wichman struck Schafer, Schafer had keys in his hand. Wichman now contends that the witness's recently refreshed recollection is a material fact in support of Wichman's contention that he struck Schafer in self-defense based upon his fear that Schafer was going to strike him with a fist in which he was clutching a set of keys.

Wichman first contends that the court erred by admitting Bennington's testimony as to Wichman's statement that he was getting even with Schafer when he struck him because Bennington had not given Wichman ***Miranda*** warnings prior to his interrogation. The admissibility of a statement

by a defendant raises a question of constitutional fact, which this court reviews without deference to the trial court's determination. ***State v. Turner***, 136 Wis.2d 333, 343-44, 401 N.W.2d 827, 832 (1987). In this case, Bennington indicated that the statement was made during the preliminary stages of an investigation conducted in response to a woman's call for assistance. Bennington testified that the statement was made following his first inquiry as to what was going on, that Wichman had not been placed under arrest at the time of the inquiry and that Bennington at that point did not fully understand what had happened in the incident to which his attention had been drawn. Wichman, however, contends that his answer to Bennington's inquiry was to ask whether he was under arrest. Wichman testified that Bennington said he was.

Miranda warnings need not be given to an individual who has not been placed in custody. ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966). A person temporarily detained as a result of an officer's reasonable suspicion under ***Terry v. Ohio***, 392 U.S. 1 (1968), is not entitled to ***Miranda*** warnings. ***State v. Leprich***, 160 Wis.2d 472, 476-77, 465 N.W.2d 844, 845 (Ct. App. 1991). In this case, the trial court concluded that Bennington's version of events accurately reflected the events in question. By finding Bennington had only temporarily detained Wichman to investigate the incident, the court properly concluded no ***Miranda*** warnings were necessary. Questions of historical fact are reviewed under the clearly erroneous standard and only after the historical facts have been determined does the de novo standard involving a constitutional issue apply. *See* ***State v. Johnson***, 177 Wis.2d 224, 233, 501 N.W.2d 876, 878 (Ct. App. 1993).

In this case, there is adequate evidence to support the trial court's conclusion that Wichman was not under arrest at the time the statement was made to Bennington. Bennington testified to the facts as they transpired at that time. The court accepted Bennington's version of events and thereby implicitly rejected Wichman's contrary version of the facts that he alleges occurred at the time of Bennington's investigation. The credibility of witnesses is a matter submitted to the unique determination of the trial court. ***Estate of Wolff v. Town Bd. of Weston***, 156 Wis.2d 588, 597-98, 457 N.W.2d 510, 513-14 (Ct. App. 1990). We will not disturb the trial court's determinations of credibility unless the court's findings of fact are clearly erroneous. ***Employers Ins. v. Jackson***, 190 Wis.2d 597, 613, 527 N.W.2d 681, 687 (1995); § 805.17(2), STATS.

Also supporting the trial court's determination is the fact that Bennington in his initial contact with Wichman had insufficient information upon which to base an arrest. The initial inquiry was part of Bennington's preliminary investigation into the incident. From this investigation, Bennington ultimately decided to arrest Wichman. Wichman's contention that he was placed under arrest first is not only inconsistent with Bennington's testimony but defies logic.

Wichman also contends that he is entitled to a new trial based on newly discovered evidence. The problem with this contention is that the possession of keys is not an essential element to support the defense of self-defense. If Schafer was about to strike Wichman and Wichman struck only to prevent injury to himself, whether Schafer was holding keys is irrelevant to Wichman's ability to assert the affirmative defense of self-defense. The existence of keys in Schafer's hand is not a material fact.

Perhaps the most troubling part of this case is the County's failure to file a response brief. The appellate court must resolve allegations of error independently and in a manner consistent with the requirements of law. The appellate court has the power to reverse a conviction based upon the State's failure to file a brief. ***State ex rel. Blackdeer v. Levis***, 176 Wis.2d 252, 261, 500 N.W.2d 339, 342 (Ct. App. 1993). Only because the issues were so easily resolved in this case and were so patently without merit did this court determine to address the merits of the appeal. The Brown County district attorney's office should be advised that this court will not hesitate to reverse based on the State's failure to file a brief in the future when the appellant's contentions present even a prima facie claim for relief.

By the Court.—Judgment and order affirmed.

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