

**COURT OF APPEALS
DECISION
DATED AND FILED**

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 § 808.10 and RULE 809.62, STATS.

September 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0837-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CRAIG BERMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEAN W. DiMOTTO, Judge. *Reversed and cause remanded.*

WEDEMEYER, P.J.¹ Craig Berman appeals from a judgment of conviction entered after a jury convicted him of disorderly conduct, contrary to § 947.01, STATS. He claims: (1) the State failed to prove that he committed the offense of disorderly conduct; (2) the trial court erred by barring defense *voir dire*

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

questions regarding bias against defendants with prior convictions; (3) the trial court erroneously exercised its discretion when it excluded testimony from an impeachment witness; (4) the trial court erred when it prohibited the defense from calling a character witness; and (5) the trial court erroneously exercised its discretion by not considering probation and by sentencing him to the maximum penalty. Because the trial court erroneously exercised its discretion when it excluded the testimony of an impeachment witness and because this restriction denied Berman's constitutional right to present a complete defense, this court reverses the judgment and remands for a new trial.

BACKGROUND

On January 18, 1998, Berman returned from a weekend trip and informed his live-in girlfriend/fiancée, Julie Walter, that their relationship was over and that he was moving out of the residence they shared. Berman also told Walter that he was going back to his wife and that he wanted to take his clothes and other belongings with him.

As Berman was gathering his belongings, the situation began to escalate towards trouble. Walter claims that she repeatedly asked Berman what changed and why he was leaving. She also claims that Berman responded by shoving her onto a sofa and then threatening her. Berman, on the other hand, claims that it was Walter who became physically abusive as he attempted to leave. He claims that as he was attempting to remove his belongings, Walter was hitting him and pleading with him not to leave her. In either case, as Berman carried the first load of his belongings out to his car, Walter locked him out of the house. When Berman returned and found the front door locked, he proceeded to the back door. There, Berman found both the screen/storm door and the inside door locked.

Using his key and some additional force, Berman opened the doors, damaging them in the process. He then gathered another load of his belongings, carried them out to his car and drove away.

Approximately ten hours later, Walter telephoned the police to report that Berman had battered her. The responding officer spoke with Walter and observed the damage to the doors.

On January 28, 1998, Berman was charged with disorderly conduct and stood trial. At trial, Walter testified on cross-examination that she had no prior knowledge that Berman was trying to reconcile with his wife. In the defense case, the defendant called Julie Loduha, Berman's wife, to impeach Walter's testimony. Defense counsel asked Loduha if there had been a telephone call from Walter to Loduha's home and what Loduha said to Walter. The State made a hearsay objection that the trial court immediately sustained. Defense counsel attempted to explain to the court why there was no hearsay problem, but the court insisted that the answer sought was an out-of-court statement. Defense counsel then asked Loduha whether Walter was aware that Loduha and her husband had been trying to reconcile. Again, the State objected. Initially, the court was going to allow Loduha to answer if she had knowledge of Walter's awareness, but the court changed its mind, sustained the objection and ruled that the question called for state-of-mind testimony. Subsequently, the defense case concluded with Berman having been denied the opportunity to impeach Walter with testimony other than his own.

The jury convicted Berman and he now appeals.

DISCUSSION

Berman makes a number of claims supporting the argument that this court should reverse his conviction or remand for resentencing. First, Berman claims that the State failed to prove he committed the offense of disorderly conduct. Second, he claims that the trial court erred by barring defense *voir dire* questions regarding bias against defendants with prior convictions. Third, Berman claims that the trial court erroneously exercised its discretion by excluding certain testimony from an impeachment witness. Fourth, he claims that the trial court erred when it prohibited the defense from calling a character witness. Finally, Berman claims that the trial court erroneously exercised its discretion in not considering probation and in sentencing him to the maximum penalty. This court concludes that the trial court erroneously exercised its discretion when it excluded certain testimony of an impeachment witness and this court also concludes that this error is cause for reversal. In accordance with *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938), this court need not address any of Berman's additional claims.

The United States Supreme Court has recognized the due process rights of a defendant in a criminal trial. See *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). These rights include “the right to a fair opportunity to defend against the state’s accusations” and “[t]he rights to confront and cross examine witnesses and to call witnesses in one’s behalf.” *Id.* at 294. Following the Supreme Court, Wisconsin has decided that a criminal defendant has the right to present testimony in his defense as long as the testimony presented is relevant. See *State v. Maday*, 179 Wis.2d 346, 354, 507 N.W. 365, 369 (Ct. App. 1993). In the instant case, Berman claims that the trial court erred by restricting the

questioning of an impeachment witness and, as a result, he was denied a fair opportunity to present a defense to the State's accusations.

Berman's theory of defense is that it was Walter who was assaultive and disorderly towards him, not the other way around. To advance this defense, Berman testified and described his January 18, 1999, encounter with Walter. He explained that after he told Walter he was leaving, she became verbally and physically abusive. Berman also planned to advance his defense by impeaching the credibility of his accuser, Walter. Berman gave testimony that directly contradicted the testimony Walter had given on cross-examination, and he also called Loduha as a witness to directly contradict and impeach Walter's testimony.

Walter testified on cross-examination that there were no indications of any problems with her relationship with Berman and that she had no idea he was trying to reconcile with his wife. She also testified that she could not recall calling Berman's house and arguing with Loduha that Berman should come back to stay with her (Walter).

Berman took the stand and refuted this testimony. He stated that Walter knew of a couple of occasions where Berman had spent the night at his home with his wife. In fact, Berman testified that Walter had even telephoned while he was at home and argued with his wife. Loduha was then called to corroborate Berman's testimony and to impeach Walter's testimony; however, when defense counsel questioned Loduha regarding what she (Loduha) said during the supposed telephone conversation, the court erroneously sustained a hearsay objection.

Defense counsel asked Loduha if she had ever spoken with Walter in person or on the phone and Loduha responded, "Yes." Defense counsel then

asked Loduha, “What did you indicate to Ms. Walter, if anything, in this phone call? I want to know what you told her.” The State immediately objected on hearsay grounds and the trial court sustained the objection saying “It’s an out-of-court statement.”

The trial court was correct that Loduha’s answer would repeat an out-of-court statement, but that fact alone does not make the answer hearsay. This court concludes that the answer was not hearsay under § 908.01, STATS., and that the trial court erroneously exercised its discretion by sustaining the hearsay objection.

By denying Berman the opportunity to introduce Loduha’s statement, the trial court denied him the right to impeach Walter by testimony other than his own. In *State v. Daniels*, 160 Wis.2d 85, 95-96, 465 N.W.2d 633, 636 (1991), the Wisconsin Supreme Court recognized the perceived self-serving nature of a defendant’s testimony about the complainant’s violence and recognized his constitutional right to produce supporting evidence corroborating his testimony. In addition, Wisconsin allows impeachment by contradiction where the impeachment relates to witness bias and personal knowledge. See *State v. Spraggin*, 71 Wis.2d 604, 623, 239 N.W.2d 297, 310 (1976). This is precisely the type of impeaching testimony that Berman wanted to elicit from Loduha. He wanted to introduce testimony that corroborated his own testimony that Walter had prior knowledge of his attempts to reconcile with his wife as well as the fact that Walter had a turbulent and violent character.

As a criminal defendant, Berman has the right to present any relevant testimony in his defense. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within

the framework of the rules of evidence. Under the facts and circumstances of this case, this court concludes that the restriction of Loduha's testimony, which Berman had a right to introduce under *Chambers*, 410 U.S. at 302, denied Berman his fundamental due process protection and deprived him of a fair trial. Accordingly, this court concludes that Berman is entitled to a new trial. Therefore, the judgment of conviction is reversed and this case is remanded for further proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded.

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

