COURT OF APPEALS
DECISION
DATED AND FILED

June 26, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP119-CR **Cir. Ct. No. 2014CF315**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEPHEN R. JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Stephen Jones challenges his conviction for stalking, contrary to WIS. STAT. § 940.32(2) (2015-16).[1] Jones argues he is entitled to a new trial because he was improperly charged with "Stalking – Previous Violent Crime Conviction Against Same Victim, Repeater, Domestic Abuse Repeater." Jones claims improper evidence was admitted at trial and the jury was also improperly instructed. Jones further asserts ineffective assistance of counsel. We reject Jones' arguments and affirm.

BACKGROUND

¶2 Jones was charged with stalking, contrary to WIS. STAT. § 940.32(3)(b), a Class F felony, as a repeater and as a domestic abuse repeater, as well as with felony bail jumping. The State filed a motion in limine seeking to admit evidence that Jones had previously been convicted in Outagamie County of misdemeanor battery and disorderly conduct, both as acts of domestic violence, against the same victim. The State also argued the evidence of Jones' prior convictions could be viewed as "other acts" evidence, but the State primarily argued that it "needs to prove elements of Stalking, which includes an element that the victim reasonably feared bodily injury or death" because Jones had previously caused her physical injury. The State further argued the context of Jones' prior relationship with the victim was relevant and admissible to corroborate what took place in the present case, as well as to present the full story of the circumstances. In addition, the evidence would purportedly rebut any argument by Jones that his actions in the present case were accidental. Because it was a domestic violence

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

matter, the State also asserted the circuit court must give greater latitude to admit the evidence under WIS. STAT. § 904.04(2)(b)1.

¶3 The circuit court heard the motion on the morning of trial. The court inquired as to whether the victim would testify that at the time of the present incident she was fearful because of the prior incident. The State informed the court that it expected the victim would deny the prior incident caused her fear, and the State would likely use the prior conviction evidence to impeach the victim. The State explained, "[S]he's going to go up there and do something that a lot of domestic violence victims do, and say, He didn't do anything. I didn't fear." The State also asserted:

> Additionally, Your Honor, I filed this other-acts motion sort of as a safety net because this case is filed as a stalking previous violent crime conviction. That means a substantive element today that I need to prove is that the defendant was previously convicted of a violent crime within the last seven years against the same victim. Therefore, that's going to have to be introduced into evidence. Why I filed the other-acts however is because I wanted to talk to the victim about the specifics if she indicated she did not fear for her safety.

¶4 The circuit court ruled that proof of the prior conviction of "this violent offense against the victim" was an element of the offense, and "not even other acts." The court also found the evidence would be admissible to impeach the victim regarding her fear of Jones. The court recognized, "[I]t's a common practice for victims of domestic violence to change their testimony. And normally the State is allowed to impeach their own witnesses regarding that."

¶5 During opening statements at trial, the State addressed the evidence of Jones' prior convictions for battery and disorderly conduct. The State said the jury was "going to hear that the defendant is not just charged with stalking, but

he's charged with stalking as a person who has a previous violent conviction against the same victim." The State asserted it would prove that Jones was convicted for a prior violent domestic offense involving the same victim, "[a]nd that will tell you right there why she was scared. That will tell you right there why she left and why she hid out." The State also informed the jury that it found out that "[j]ust this morning [Jones] called [the victim] about four to five times. Last night, [Jones] called her about 20 to 30 times …." In addition, the State contended that during the eight months Jones had been in custody before trial, Jones had called the victim about 1400 times.

¶6 Defense counsel recognized in his opening statement the "quantity" of Jones' contacts with the victim, but he asserted that Jones' course of conduct did not cause the victim to fear for her bodily safety. Counsel noted that Jones never threatened the victim, and he contended the State took facts out of context.

¶7 At trial, the victim testified that she had been married to Jones for ten years, but she had filed for divorce during the year prior to trial. She and their son had moved out of the house, but she had not informed Jones where she moved. However, she also testified that she was not afraid Jones would hurt her. She further testified Jones would call her in the middle of the night and text throughout the day, and she feared Jones would come to her place of employment. She eventually notified security at her place of employment in case he did show up. She testified that she did not remember receiving a voice message from Jones saying, "Expect me at your work."

¶8 The State cross-examined the victim at trial about Jones' prior battery conviction—"[I]s it true that Mr. Jones kicked you in the face?" She replied, "Do we have to talk about it? It's kind of painful for me to talk about

me." The State then asked, "Did he push you to the ground before he kicked you in the face?" She replied, "It was four years ago. I don't … I try to put it out of my head and not think about it." The State asked, "Do you remember when you were on the ground and he took his foot and kicked you straight in the face?" The victim replied, "I don't know how it happened." When asked if she remembered that as a result of the assault her lip was split open, she replied, "It bled." She admitted that when the police talked to her that night she told police she "fell over a wash basket." However, she conceded at trial this statement was untruthful.

¶9 Various witnesses testified that the victim had told them she feared for her safety and the safety of her child. Testimony also established that Jones called the victim 1347 times during his eight months in custody prior to the trial. Jones also called the victim sixteen times the night prior to the trial and four times the morning of the trial. The State admitted into evidence voicemails Jones left for the victim. In these voicemails, the jury heard Jones state, "I'll be coming to your work tomorrow. Alright, well, expect me at your work."

¶10 Jones testified at trial in his own defense. Jones denied threatening the victim in the present case. On cross-examination, the State asked, "But you did kick her in the face in 2010. Is that correct?" Jones testified, "I'm unaware of that." The State asked, "Isn't it true that when you kicked [the victim] in the face she was holding [your one-month-old child]?" Jones replied, "Like I said, sir, I do not remember coming home from the bar." The following exchange then occurred:

> Q: So when she was holding [your] one-month [-old child], you ripped her by the hair off the chair and kick[ed] her in the face?
>
> A: That is incorrect. She told me that she was sitting at the chair facing away from me. I came home. I wasn't mad or

> angry. I was throwing the tennis ball for the dogs inside and just acting kind of wild because I was drunk. And we have chairs that have big tall wooden backrests on them. I grabbed the backrest and I picked up the chair and she slid off and hit the ground on her rear end holding [the child]. That is what she told me. I never saw that. They say I was there because I don't remember actually doing—I don't remember coming home.

¶11 Following the close of evidence, the jury was instructed on WIS JI—CRIMINAL 1284 Stalking – § 940.32(2), including the statutory definition of simple stalking, the State's burden of proof, and the four elements of simple stalking. The circuit court then instructed the jury on WIS JI—CRIMINAL 1284A Stalking – Yes or No Question – § 940.32(2m) and (3), regarding whether Jones had a previous conviction for battery against the same victim, within a seven-year period. The jury was presented with a verdict form whereby the jury had to first determine whether it found Jones guilty of simple stalking. If it did, only then was the jury required to answer questions about Jones' previous conviction for battery.

¶12 The jury ultimately found Jones guilty of stalking, and it answered three separate sub-questions finding that Jones had a previous conviction for battery, with the same victim, within seven years. The jury also convicted him of bail jumping. The circuit court entered a judgment of conviction on the stalking conviction under WIS. STAT. § 940.32(3)(b).

¶13 Jones subsequently filed a motion for postconviction relief, seeking a new trial on the stalking conviction. Jones argued the evidence was insufficient to prove that he was "convicted of a prior violent felony, as defined in WIS. STAT. § 939.632(1)(e)1." Jones contended "the legislature [did] not authorize charging Jones with a higher Class F felony Stalking under [WIS. STAT.] § 940.32(3)(b) for a prior misdemeanor battery." Moreover, Jones argued the jury instructions and

verdict form "told the jury to decide whether Jones was convicted of misdemeanor battery and defined misdemeanor battery as a prior 'violent felony.'" Jones also claimed his trial counsel was ineffective for failing to request a cautionary instruction regarding the prior battery conviction, because it was actually other acts evidence rather than an element of the offense.

¶14 The State conceded Jones was incorrectly charged with the Class F felony because the prior misdemeanor battery conviction did not qualify under WIS. STAT. § 939.632(1)(e)1. as a "violent crime." However, the State argued Jones was "convicted of stalking and the clerical error regarding the enhancer was harmless …." The State asserted that Jones "would have been convicted of stalking … even if he was not charged with the enhancer for a previous violent crime." It noted the jury had been required to find Jones guilty of simple stalking "prior to moving on to the supplemental question of whether the enhancer applied." The State further argued that even if Jones had not been charged with the enhanced Class F felony stalking charge, his prior battery against the victim would have been admissible as other acts evidence. As a remedy, the State recommended the circuit court dismiss the enhancer and amend the judgment of conviction to a simple stalking charge as a Class I felony, as a repeater. The State argued that, at most, the court should re-sentence Jones.

¶15 The circuit court denied Jones' motion for a new trial. However, the court vacated his conviction for the Class F stalking charge and directed a verdict on a Class I charge of stalking. The court found no structural error because "if Jones had been charged properly, the jury would have reached the same questions in reaching a verdict." The court also found the evidence of the prior battery conviction would have been admissible as other acts evidence. Finally, the court found that Jones' counsel was not ineffective, but it found the verdict "on a lesser

charge is a significant factor for the Court's consideration at sentencing." Therefore, the court ordered a new sentencing hearing. Jones now appeals the denial of his request for a new trial.

DISCUSSION

¶16 On appeal, Jones reiterates the argument that he is entitled to a new trial because he was "improperly charged and as a result, improper evidence was admitted and the jury was improperly instructed." He also claims his trial attorney was ineffective "when he litigated the case with the mistaken belief that Jones was properly charged."

¶17 We review the admission or exclusion of evidence for an erroneous exercise of discretion. ***State v. Warbelton***, 2009 WI 6, ¶17, 315 Wis. 2d 253, 759 N.W.2d 557. A circuit court also has broad discretion in choosing how to instruct a jury. ***State v. Lenarchick***, 74 Wis. 2d 425, 455, 247 N.W.2d 80 (1976). Grounds for reversal do not exist when the overall meaning communicated by the instructions is a correct statement of the law. ***Finley v. Culligan***, 201 Wis. 2d 611, 620, 548 N.W.2d 854 (Ct. App. 1996). The circuit court also has significant discretion in crafting the special verdict. *See* ***Runjo v. St. Paul Fire & Marine Ins. Co.***, 197 Wis. 2d 594, 602, 541 N.W.2d 173 (Ct. App. 1995). We will not interfere with the circuit court's exercise of discretion as long as all issues of ultimate fact are covered by appropriate verdict questions. ***Fischer v. Wisconsin Patients Comp. Fund***, 2002 WI App 192, ¶7, 256 Wis. 2d 848, 650 N.W.2d 75. In addition, if a circuit court applies a mistaken view of the law, we will not reverse if a proper legal analysis supports the circuit court's conclusion. ***State v. Bauer***, 2000 WI App 206, ¶5, 238 Wis. 2d 687, 617 N.W.2d 902.

¶18 Our review of issues concerning ineffective assistance of counsel is a mixed question of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). The underlying findings of fact will not be overturned unless clearly erroneous. ***Id.*** Whether counsel's performance was deficient and prejudicial are questions of law that we review independently. ***Id.***

¶19 Jones argues that a previous conviction for a violent crime is an element of the charged offense of stalking under WIS. STAT. § 940.32(3)(b). *See* ***Warbelton***, 315 Wis. 2d 253, ¶61. Jones further argues a conviction for misdemeanor battery is not a violent crime as set forth in WIS. STAT. § 939.632(1)(e)1. Jones contends proper instructions and verdict forms would have required the jury to decide whether the State had proven the element requiring a prior conviction for a violent offense, which was impossible because Jones did not have a prior conviction for a violent crime. We need not determine whether the jury instructions and verdict forms were defective in this case because we conclude any error was harmless.

¶20 Wisconsin statutes delineate three degrees of stalking, depending on the presence of aggravating facts. WIS. STAT. § 940.32; *see also* ***Warbelton***, 315 Wis. 2d 253, ¶39. The underlying offense of simple stalking, a Class I felony, is set forth at § 940.32(2). If any of five aggravating facts are present, the stalking may elevate to a Class H felony under § 940.32(2m). If the actor has a previous conviction for a violent crime as defined in WIS. STAT. § 939.632(1)(e)1., with the same victim within seven years, the offense is elevated to a Class F felony under § 940.32(3)(b). ***Warbelton***, 315 Wis. 2d 253, ¶24. The three tiers of stalking offenses indicate that the legislature intended stalking to be an aggravated crime—with increasing punishments if the elevating factors are present—when the perpetrator has a history of violent or obsessive behaviors. ***Id.***, ¶¶29-30, 38.

¶21 WISCONSIN STAT. § 940.32(2) sets forth the relevant elements of the underlying offense of simple stalking:

> (a) The actor intentionally engages in a course of conduct directed at a specific person that would cause a reasonable person under the same circumstances to suffer emotional distress or to fear bodily injury to or the death of himself or herself or a member of his or her family or household.
>
> (b) The actor knows or should know that at least one of the acts that constitute the course of conduct will cause the specific person to suffer serious emotional distress or place the specific person in reasonable fear of bodily injury or to the death of himself or herself or a member of his or her family or household.
>
> (c) The actor's acts cause the specific person to suffer serious emotional distress or induce fear in the specific person of bodily injury to or the death of himself or herself or a member of his or her family or household.

¶22 Jones concedes that the State offered the evidence of his prior battery conviction for an acceptable purpose—i.e., as direct evidence to show the victim's fears of Jones were reasonable. Citing WIS. STAT. §§ 904.01 and 904.03, Jones nevertheless insists that "agreeing that the evidence was *offered* for an acceptable purpose does not mean that the evidence was relevant or that the danger of unfair prejudice did not outweigh the probative value of that element [sic]."

¶23 We conclude Jones' prior battery conviction was relevant because it was direct evidence that related to an element of stalking: a reasonable person in the same circumstances as the victim—having previously been kicked in the face while holding her infant son—would have feared bodily harm to herself or her child. *See* WIS. STAT. § 940.32(2)(a). Because the evidence of Jones' prior battery conviction was relevant as direct evidence of the victim's fear of Jones, the

circuit court correctly determined that the jury would have heard that evidence even if Jones had been charged initially with simple stalking under § 940.32(2).

¶24 We specifically reject Jones' suggestion that the circuit court was required, as a matter of law, to exclude the relevant prior conviction on the grounds that the prejudicial impact of the jury hearing about the prior conviction outweighed the probative value of the evidence. We do not discern Jones to make a developed argument that this evidence was unfairly prejudicial. But as mentioned, the evidence was highly probative to show that Jones was convicted of actions that made the victim fearful of bodily injury, and that Jones continued to engage in a course of conduct that made her fearful of bodily injury both to herself and her child. The probative value of this evidence was heightened given the victim's denials at trial that she was fearful. Moreover, because Jones' prior battery was one of domestic violence, the circuit court also properly held that greater latitude must be given to admit such evidence, under WIS. STAT. § 904.04(2)(b)1.

¶25 Jones insists the State offered "no evidence to show any continuing criminal activity, violent behavior or abuse … between the [prior] acts and the charged offense." Jones argues the victim testified that the prior convictions "resulted from a rough patch in the marriage when Jones had a drinking problem[,]" and that "she didn't remember the details." Jones also contends the victim "testified consistently throughout the trial that she was not afraid for her safety" because of the prior convictions, and that Jones did not threaten her safety.

¶26 However, we have held that "[WIS. STAT.] § 940.32 … does not require that the defendant threaten the victim." ***State v. Sveum***, 220 Wis. 2d 396, 412, 584 N.W.2d 137 (Ct. App. 1998). Furthermore, to be relevant, evidence does

not have to determine a fact at issue conclusively; the evidence needs only to make the fact more probable than it would be without the evidence. ***State v. Hartman***, 145 Wis. 2d 1, 14, 426 N.W.2d 320 (1988). Here, the circumstances of the prior battery conviction could reasonably lead a jury to infer the victim was fearful for her safety.

¶27 In addition, although the circuit court analyzed the issues under a harmless error test, WIS. STAT. § 939.66(1) allows a defendant to be convicted for either the crime charged or a crime that does not require proof of any other fact in addition to those which must be proved for the crime charged. As mentioned previously, the jury was instructed that it first must find Jones guilty of simple stalking before it could consider whether Jones had a previous conviction for battery.[2] Although the prior misdemeanor battery conviction was concededly not admissible as a violent crime under WIS. STAT. § 940.32(3)(b), the circuit court properly directed the entry of a conviction on the lesser offense of simple stalking under § 940.32(2). *See* ***Dickenson v. State***, 75 Wis. 2d 47, 51-52, 248 N.W.2d 447 (1977).[3] As the court properly found, "the admission of Jones' prior battery conviction against the alleged victim was not in error, even if Jones had been properly charged."

[2] In this regard, we note the jury in ***Warbelton*** was also instructed to first satisfy itself that the elements of simple stalking were established before it could consider whether the defendant had a previous conviction for a violent crime. ***State v. Warbelton***, 2009 WI 6, ¶13, 315 Wis. 2d 253, 759 N.W.2d 557.

[3] In his reply brief to this court, Jones did not attempt to address ***Dickerson v. State***, 75 Wis. 2d 47, 51-52, 248 N.W.2d 447 (1977), or the issue of whether WIS. STAT. § 940.32(2) is a lesser included offense of § 940.32(3)(b). We therefore deem these issues admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶28 The State also presented strong, independent evidence from which a jury could infer Jones' guilt of stalking, irrespective of the prior conviction. The jury heard Jones' voicemails and saw his text messages. Various witnesses also testified that the victim told them she moved out of the marital home because she feared for her safety, but mainly for her child's safety. Other witnesses testified the victim "feared for her life," and was fearful Jones would find out where she worked and "would come to her work site …." Weighing the totality of the credible evidence that supported the verdicts, the jury could find Jones guilty of stalking beyond a reasonable doubt. Any error in admitting the challenged evidence was harmless. Because we conclude any error in admitting the evidence of Jones' prior battery conviction was harmless, we need not reach other issues, including whether the prior conviction was otherwise admissible as other acts evidence.

¶29 Finally, Jones argues his attorney was ineffective for erroneously believing that Jones' misdemeanor battery conviction supported the charged offense requiring proof of a prior violent crime under WIS. STAT. § 940.32(3)(b). Jones contends his counsel did not object to arguments made by the State in opening statements and closing arguments referencing Jones' prior convictions. Additionally, counsel did not object to the jury instructions or verdict forms. Jones also claims his attorney failed to seek a cautionary instruction regarding the admissibility of Jones' prior conviction as other acts evidence.

¶30 Regardless of whether Jones' attorney should have discovered that Jones was improperly charged with a Class F stalking offense under WIS. STAT. § 940.32(3)(b), there was no prejudice because the circuit court vacated Jones' conviction for the Class F felony stalking and directed a verdict on the lesser charge of simple stalking. As discussed previously, the evidence of Jones' prior

conviction would have been admitted even if Jones had not been charged with the Class F felony. Moreover, because the evidence of the prior battery conviction related directly to an element of stalking, any request for a cautionary instruction on other acts evidence was inapplicable.

¶31 In addition, Jones was not prejudiced by his attorney's failure to object to the jury instructions and verdict forms. The jury was instructed to first determine whether it found Jones guilty of stalking before it answered questions about Jones' previous battery conviction, and the jury was presented with a similar verdict form. The jury found Jones guilty of simple stalking. The circuit court vacated the Class F felony and directed a verdict on the lesser charge of stalking. As the court properly observed at the postconviction hearing, if Jones would have been charged with simple stalking, the jury would have received the same stalking instruction under WIS. STAT. § 940.32(2), and the jury would have been asked if Jones was guilty of stalking in reaching a verdict. Accordingly, Jones' ineffective assistance of counsel claims must fail.

By the Court.—Judgment and order affirmed.

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