COURT OF APPEALS
DECISION
DATED AND FILED

July 24, 2008

David R. Schanker
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2007AP2021-CR
2007AP2024-CR
2007AP2027-CR

Cir. Ct. Nos. 2006CM2840;
2006CM2843;
2006CM2841

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

2007AP2021-CR
STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

VICTORIA LEE TRAPPE,

DEFENDANT-RESPONDENT.

2007AP2024-CR
STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

ANTHONY MICHAEL WELDA,

DEFENDANT-RESPONDENT.

2007AP2027-CR
STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

TIMOTHY ROBERT WAGNER,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Rock County: JAMES P. DALEY, Judge. *Reversed.*

¶1 BRIDGE, J.[1] The State of Wisconsin appeals the dismissal of hate crime penalty enhancers to charges of disorderly conduct. The State contends that there are sufficient facts contained in the complaints to support application of a hate crime enhancer as provided in WIS. STAT. § 939.645(1)(2)(a). It contends further that the penalty enhancers, when combined with the underlying charges of disorderly conduct under WIS. STAT. § 947.01, are not multiplicitous. We agree and therefore reverse.

BACKGROUND

¶2 The following facts are taken from identical complaints filed against the three defendants. City of Janesville police officers were dispatched to a residence at 4316 Woodcrest in Janesville to investigate a reported disturbance.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

One of the officers observed a group of ten to fifteen people in the yard in front of the residence. The police officer made contact with Victoria Trappe, who stated that the disturbance was about "niggers" on her property without her permission and stated that the officers needed to "get these niggers off my property." The officer told Trappe to watch her language and to go back onto her porch, which she did. As she was walking back to her porch, she continued to yell the word "niggers" and stated that someone was going to end up "getting taken care of." Standing at the end of the driveway to the residence were two people who later identified themselves as Fredrick Lockhart and Tyrone Douglas, both of whom are African Americans.

¶3 Also present on the property were two men who identified themselves as Timothy Wagner and Anthony Welda. The officer questioned the men about the events leading up to the call to the police. Wagner responded that there was an argument over some words that were spoken. He stated that he had been at the 4316 Woodcrest residence explaining to his friends how the "niggers" in Beloit had damaged his truck. The officer told Wagner that "niggers" was a word he should not use, to which Wagner replied that is "bullshit" and that he uses the word "niggers" throughout his conversation and that he will do so any time he likes.

¶4 Welda told the officer that he, Wagner and others had been talking about the "niggers" in Beloit when two children,[2] both African American,

[2] The complaint states that Welda referred to these two individuals as "children," and states further that one of the individual's father referred to them as "women." We use the term "women" throughout the remainder of the opinion.

overheard them. Welda stated that two black males then confronted the individuals at the Trappe residence about the use of the word "niggers" and that during the course of the confrontation Wagner retrieved a confederate flag from his truck and waved it around the two men.

¶5 A second officer spoke with Lockhart, who stated that he had been visiting at a residence nearby when his daughter and daughter-in-law came back to the home stating that some men at 4316 Woodcrest had called them "niggers." Lockhart stated that he and Douglas went to the residence at that address to ask the men why they were calling the women "niggers." Lockart stated that while they were speaking to the men at the residence, Trappe came out of the home and asked why they were at the residence. Lockhart stated that he told her that he did not appreciate the men calling his daughters "niggers" and that there were no "niggers" around here and that they should stop using the word. Lockart said that Trappe then told him, "You are acting like a nigger now. Get off my property[,] nigger."

¶6 Trappe, Wagner and Welda were charged with disorderly conduct in violation of WIS. STAT. §§ 947.01 with a hate crime penalty enhancer under WIS. STAT. § 939.645(1) and (2)(a). The defendants moved to dismiss the hate crime enhancer and the circuit court granted the motion. The State sought leave to appeal the court's ruling, which we granted. The cases are consolidated on appeal.

DISCUSSION

¶7 The defendants raise two issues on appeal. First, Trappe and Wagner contend there are insufficient facts contained in the complaint to support the application of the hate crime penalty enhancer. Second, Welda contends that

the charge of disorderly conduct and the increased penalty under the hate crimes law are multiplicitous.

Sufficiency of the Complaint

¶8 The sufficiency of a criminal complaint is a question of law which we review independently. ***State v. Adams***, 152 Wis. 2d 68, 74, 447 N.W.2d 90 (Ct. App. 1989).

¶9 "The complaint is a written statement of the essential facts constituting the offense charged." WIS. STAT. § 968.01(2). It may be made on information and belief. ***Id***. A written complaint must contain minimum facts which are themselves sufficient, or allow reasonable inferences, for a neutral judicial officer to establish probable cause. ***State ex rel. Evanow v. Seraphim***, 40 Wis. 2d 223, 226, 161 N.W.2d 369 (1968). If a reasonable inference can be made from the complaint to establish probable cause, the complaint is sufficient. ***State v. Manthey***, 169 Wis. 2d 673, 688-89, 487 N.W.2d 44 (Ct. App. 1992). To be sufficient, the complaint must be only minimally adequate. ***Adams***, 152 Wis. 2d at 73.

¶10 Generally, a complaint is sufficient if it answers the following questions: "(1) Who is charged?; (2) What is the person charged with?; (3) When and where did the alleged offense take place?; (4) Why is this particular person being charged?; and (5) Who says so?" ***Adams***, 152 Wis. 2d at 73-74 (citation omitted). Trappe and Wagner dispute whether the fourth question was satisfactorily answered in the complaint as it relates to the application of the hate crime enhancer.

¶11 The penalty enhancer requires proof the defendant "[i]ntentionally select[ed] the person against whom the crime … is committed … in whole or in part because of the actor's belief or perception regarding the race … of that person …." WIS. STAT. § 939.645(1)(b). Both Trappe and Wagner contend that the complaint fails to allege facts sufficient to support an inference that they selected victims on the basis of race. We disagree.

¶12 Trappe argues that the complaint does not assert that she interacted in any manner with the two African American women who claimed they had been called "niggers" by Welda and Wagner. She also contends that she did not have any interaction with Lockhart and Douglas until after she heard a discussion outside her residence. She argues that she did not select the two men in the sense that she physically went out and looked for them. Instead, she asserts that the two men were not invited and were not welcome on her property. From this, we infer that Trappe contends that she was addressing them as trespassers rather than as black men.

¶13 We are not persuaded that the complaint is insufficient with respect to Trappe's interaction with Lockhart and Douglas. The complaint alleges that the men approached Trappe and told her that they "did not appreciate" the use of the word "niggers," and in the course of telling one of them to leave, she called him a "nigger." From these facts it is entirely reasonable to infer that Trappe selected Lockhart to call "nigger" because of his race. The complaint is thus sufficient to establish probable cause for application of the penalty enhancer as to her.

¶14 Wagner argues that the complaint does not set forth facts establishing that he selected the two African American women as victims based on their race.[3] He apparently contends, consistent with his statement to the police officer, that his use of the word "nigger" was not directed at the women, but that they simply overheard his remarks. However, as noted above, the complaint alleges that the father of one of the women stated that she told him that as they walked by the two men, the men called the women "niggers." This presents a different version of the facts than the version that Wagner advances, and it is reasonable to infer from these facts that Wagner selected the women he called "niggers" because of the women's race.

¶15 Wagner also argues that the complaint does not indicate how far away the women were when this happened, which of the men uttered the slur and how loud the men were talking when the slur was uttered. The majority of these complaints go to Wagner's assertion that the two women simply overheard the racial slur, which we have discussed above. As for Wagner's claim that the complaint does not state which of the men uttered the slur, the complaint alleges that both men used the word "nigger." We therefore reject Wagner's arguments that the complaint is insufficient to establish probable cause for application of the penalty enhancer as to him.

[3] Wagner also briefly argues that he did not select Lockhart and Douglas as victims based on their race. The State focuses its argument regarding the sufficiency of the complaint as it relates to Wagner's interaction with the two women, and not as it relates to Lockhart and Douglas. We therefore assume for purposes of our analysis that it is this interaction which the State claims supports the application of the hate crimes penalty enhancer.

¶16 For the above reasons, we conclude that there are sufficient facts alleged in the complaint against both Trappe and Wagner "to justify bringing into play the further steps of the criminal process." *See* ***State ex rel. Cullen v. Ceci***, 45 Wis. 2d 432, 442, 173 N.W.2d 175 (1970). We therefore reject the challenges to the sufficiency of the Trappe and Wagner complaints.

Multiplicity

¶17 Whether a multiplicity violation exists in a given case is a question of law subject to independent appellate review. ***State v. Davison***, 2003 WI 89, ¶15, 263 Wis. 2d 145, 666 N.W.2d 1 (2003).

¶18 Multiplicity arises when a defendant is charged in more than one count for a single offense, which constitutes a violation of the double jeopardy provisions of the state and federal constitutions. ***Id.***, ¶34. Under the established methodology for determining whether charges are multiplicitous, the court must first determine if the charges are identical in law and fact. ***Id.***, ¶43. If it is determined that they are *not* identical in law and fact, the court must still determine whether the legislature intended multiple offenses to be brought as a single count. ***Id.***, ¶44. It is the defendant's burden to show a clear legislative intent that cumulative punishments are not authorized. ***Id.***, ¶45.

¶19 Disorderly conduct requires proof that the defendant engaged in "violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance." WIS. STAT. § 947.01. As noted above, the penalty enhancer requires proof that the defendant "[i]ntentionally select[ed] the person against whom the crime … is committed … in whole or in part because of the

actor's belief or perception regarding the race … of that person …." WIS. STAT. § 939.645(1)(b). Welda concedes that the charge of disorderly conduct and the increased penalty under the hate crimes law are not identical in law and fact. Thus, the first step in the multiplicity analysis has been met.

¶20 We then turn to the second step in the analysis as to whether there exists a clear legislative intent that cumulative punishments are not authorized. "[W]e analyze four factors to determine legislative intent: (1) the applicable statutory language; (2) the legislative history and context of the statute; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishment for the conduct." ***Davison***, 263 Wis. 2d 145, ¶50 (citations omitted).

¶21 Although Welda recites these factors, he offers no authority or reasoning in support of his contention that the legislature intended something other than what the plain language of the statutes provides. The statutes set out one punishment for the act (the disruptive speech), and an enhanced punishment for victim selection based on race. We conclude that Welda has not met his burden of showing that the legislature did not intend cumulative punishments in the present case. Accordingly, we reject Welda's multiplicity challenge.

¶22 For the above reasons we reverse the circuit court's orders dismissing the penalty enhancer charge.

By the Court.—Orders reversed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.