COURT OF APPEALS
DECISION
DATED AND FILED

May 7, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2616-CR **Cir. Ct. No. 2006CF2156**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEPHEN A. FREER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] Stephen Freer appeals the judgment convicting him of disorderly conduct as a repeat offender in violation of WIS. STAT.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) and (3) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

§§ 939.62(1)(a) and 947.01, and the portion of the circuit court's order denying his motion for postconviction relief. He contends that he is entitled to reversal of the conviction and a new trial on the ground that he suffered compelling prejudice from evidence presented to support a charge that was dismissed at the close of evidence. We conclude that there was no prejudicial spillover from the evidence supporting the vacated charge and therefore Freer did not suffer compelling prejudice. Accordingly, we affirm the judgment of conviction and the order of the circuit court.

BACKGROUND

¶2 Freer was tried for disorderly conduct in violation of WIS. STAT. § 947.01, telephone harassment in violation of WIS. STAT. § 947.012, and two counts of felony bail jumping in violation of WIS. STAT. § 946.49(1)(b).[2] The charges stemmed from two incidents. The first occurred on August 26, 2006, during the Orton Park Festival, when Freer entered the driveway between two houses across the street from the park and urinated on a bush at the side of one of the houses. This led to an altercation with the houses' owners, one of whom was Truly Remarkable Loon. The second occurred two days later on August 28 when Freer left Loon a voice mail. The felony bail jumping counts were brought because Freer was out on bail for other offenses and was alleged to have violated the conditions of his bail by committing disorderly conduct and telephone harassment.

[2] The complaint also charged Freer with four counts of misdemeanor bail jumping, in violation of WIS. STAT. § 939.46(1)(a), but those counts were dismissed before trial.

¶3 Before trial defense counsel moved unsuccessfully to dismiss the telephone harassment charge and related bail jumping charge as unsupported by the evidence.[3] At trial the entire voice mail was played for the jury. At the close of the State's case defense counsel moved for a directed verdict on the telephone harassment charge. The circuit court granted the motion dismissing the telephone harassment charge and the related bail jumping charge. Defense counsel then moved for a mistrial on the disorderly conduct charge and the related bail jumping charge on the ground that Freer was unduly prejudiced by the admission of the phone message, which, he asserted, was admissible only to prove the telephone harassment charge. The circuit court denied the motion for a mistrial, and the disorderly conduct charge and related bail jumping charge went to the jury. The jury found Freer guilty of disorderly conduct but not guilty of bail jumping.

¶4 In postconviction proceedings defense counsel again argued that the court should grant a new trial on the disorderly conduct charge[4] because Freer suffered compelling prejudice from the evidence supporting the telephone harassment charge. The circuit court denied the motion, finding that the evidence would have been admissible with respect to the disorderly conduct charge as "other acts" evidence, and, also concluding that, in view of the other evidence presented, it was neither inflammatory nor prejudicial and certainly not compellingly prejudicial.

[3] The State charged Freer with telephone harassment in violation of WIS. STAT. § 947.012(1)(a) by, "with intent to threaten, … mak[ing] a telephone call and threaten[ing] to inflict physical harm to property…." Defense counsel argued that the message contained only threats to obtain Loon's property via a lawsuit.

[4] From hereon, we use the terms "telephone harassment charge" and "disorderly conduct charge" to include the bail jumping count associated with each offense.

DISCUSSION

¶5 On appeal Freer renews his argument that he is entitled to a new trial on the disorderly conduct charge on the grounds that he suffered compelling prejudice from the evidence relating to the telephone harassment charge. His argument relies on the doctrine of retroactive misjoinder, as recognized in ***State v. McGuire***, 204 Wis. 2d 372, 556 N.W.2d 111 (Ct. App. 1996). Under the doctrine of retroactive misjoinder, joinder that was initially proper may be rendered improper by later developments, such as dismissal of one of the counts. ***Id.*** at 379. In order to obtain relief under this doctrine a defendant must show he or she has suffered compelling prejudice. ***Id.*** A defendant has suffered compelling prejudice if there is prejudicial spillover from evidence that was admitted to prove a dismissed count. ***Id.*** In determining whether there has been prejudicial spillover, we consider three factors:

> (1) whether the evidence introduced to support the dismissed count is of such an inflammatory nature that it would have tended to incite the jury to convict on the remaining count; (2) the degree of overlap and similarity between the evidence pertaining to the dismissed count and that pertaining to the remaining count; and (3) the strength of the case on the remaining count.

Id. at 379-80.

¶6 The parties disagree as to which standard of review should apply to this case. Freer argues we should apply a de novo standard of review, contending that we implicitly did so in ***McGuire***.[5] The State contends the proper standard is

[5] In ***State v. McGuire***, 204 Wis. 2d 372, 556 N.W.2d 111 (Ct. App. 1996), the question of the proper standard of review was not before this court. In ***McGuire*** the issue of prejudicial spillover did not arise until the appeal, when one of the convictions was vacated. ***Id.*** at 376-77 & n.1. We analyzed the application of the three factors and concluded the defendant had not shown (continued)

an erroneous exercise of discretion, citing ***State v. Locke***, 177 Wis. 2d 590, 597, 502 N.W.2d 891 (Ct. App. 1993) (evaluation of prejudice to result from failure to sever joined counts is matter of circuit court's discretion). There appears to be no Wisconsin case addressing the standard of review in retroactive misjoinder cases. Rather than resolving the question on this appeal, we will assume without deciding that a de novo standard of review applies. Applying this standard, we conclude Freer has not suffered compelling prejudice.

¶7 We now turn to the first ***McGuire*** factor—whether the evidence on the telephone harassment charge was so inflammatory as to incite the jury to convict Freer on the disorderly conduct charge. In weighing this factor we consider only the evidence that was admissible on the telephone harassment charge but would not have been admissible on the disorderly conduct charge. ***McGuire***, 204 Wis. 2d at 381. The parties dispute whether the evidence of the voice mail and Loon's testimony about it would have been admissible in the disorderly conduct case. The State argues, and the circuit court agreed, that the evidence would have been admissible as "other acts" evidence to prove that Freer's urinating so close to Loon's house was not an accident and that he had a motive for wanting to disturb Loon. Freer responds that the evidence is inadmissible as a matter of law to prove absence of mistake or motive, because proof of a subjective mental state is not required to prove disorderly conduct. Freer also argues that the evidence is not relevant to Freer's intent or motive on the day of the festival because the message was left two days after the incident. We do not resolve this dispute because we conclude that, even if the evidence was

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prejudicial spillover. ***Id.*** at 381. Freer's contention that our review was in fact de novo is based on the fact that we resolved the issue ourselves rather than remanding.

inadmissible in the disorderly conduct case, it was not so inflammatory as to incite the jury to convict Freer.

¶8 Freer argues that the language used in the voice mail is inflammatory because it invites negative inferences about Freer's character. He argues that there is a danger that the jury concluded that, if Freer was capable of using the kind of language he used in the voice mail, he would have also used profanity, made an obscene gesture, and raised his fist during the August 26 incident. The relevant excerpts from the August 28 voice mail are as follows:

> I hope to reach a meeting of the minds with you, but the people who I—they're upset with what's happened this past weekend, and they're gonna go ahead … they're claiming that you're a pedophile child molester. I heard that on Saturday, and you reaffirmed that by your overreaction when you called the police on Sunday.
>
> [T]hey're going to go ahead and publish everything under the Truly Remarkable Loon, your remarkable affinity with children…. Your false charges, your—I'm counterclaiming. I'm going after your balls,[6] sir, the way—the nerve.
>
> You're a remarkable German fascist, actually. I can tell that, the way you have a bias toward people of dark complexion, long hair and so forth.
>
> So I'll see you in court, Mr. Remarkable. And I'll go for your house. … So you're a perjurer and you're a molester of children, sir, and you should be worried.
>
> ….
>
> All right. So call me back. … You lousy rat, fascist. Ugh, disgusting.

[6] Defense counsel asserted that Freer's statement "I'm going for your balls" was a threat to compromise Loon's source of income—his juggling balls—through court action. The State does not appear to have disputed this.

(Footnote added.)

¶9 The name calling and threats to sue contained in the voice mail are obnoxious behavior. However, we are satisfied they are not the type of behavior that would so arouse the jury's passions that it would for this reason convict on the disorderly conduct charge.

¶10 We also disagree with Freer that Loon's testimony about the impact of the voice mail on him would provoke the jury's desire to punish Freer. When asked at trial about how he felt after hearing the voice mail, Loon stated:

> I was extremely angry. I can't imagine a worse crime to be accused of than being a pedophile and a child molester. And as a family entertainer, as a children's entertainer, that could be devastating for me if it was made publicly. Even if there was no foundation to the charge, just the accusation of it, I would never take my children to someone—to see someone, a performer, who had even been accused of it. It was the most horrific violation of myself [sic] that—except perhaps a physical violation, but it was extremely humiliating. It made me angry.

Loon's reaction of anger and humiliation is what one would expect from such a phone message. Like the voice mail itself, the impact on Loon was not so extreme as to provoke the jury to punish Freer by finding him guilty of disorderly conduct.

¶11 We next address the second factor—the overlap and similarity of evidence of the two charges. Freer argues that the evidence supporting the telephone harassment charge was inadmissible to prove the disorderly conduct charge, but, at the same time, it involved conduct that was "not completely dissimilar" from the disorderly conduct charge. As indicated in paragraph 7, *supra*, we will assume that the evidence was not admissible to prove the disorderly conduct charge. However, we conclude that the second factor does not favor Freer.

¶12 Prejudicial spillover is likely to occur only in situations where evidence supporting the vacated count would be inadmissible for the remaining count and *is presented in such a way as to indicate that the jury used that evidence in reaching a verdict on the remaining count. See* ***United States v. Rooney***, 37 F.3d 847, 856 (2d Cir. 1994).[7] Conversely, when the evidence from the vacated and remaining counts "arise from completely distinct fact patterns and … can be easily compartmentalized, we normally will have undiminished faith that a jury has followed the court's instructions and has evaluated each count on the specific evidence attributed to it." ***Id.*** This case involves the latter situation.

¶13 In this case the jury was specifically instructed to disregard the voice mail. We presume that a jury follows the instructions given to it. ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). Additionally, the jury acquitted Freer of the bail jumping charge related to the disorderly conduct charge. This significantly lowers the likelihood that the jury was unable to consider evidence for separate charges separately.

¶14 Furthermore, the telephone harassment charge and the disorderly conduct charge arise from entirely separate sets of facts. The disorderly conduct charge is supported by evidence of Freer urinating, making an obscene gesture, making a threatening gesture and using profane language in front of several people on August 26. The telephone harassment charge was supported by evidence that Freer made a phone call to Loon two days later. There is no factual overlap

[7] Because Wisconsin's criminal joinder and severance statute, WIS. STAT. § 971.12, is derived from the Federal Rules of Criminal Procedure, we may look to federal cases for guidance on joinder issues. ***McGuire***, 204 Wis. 2d at 380 n.5 (citing ***State v. Leach***, 124 Wis. 2d 648, 670, 370 N.W.2d 240 (1985)).

between the evidence. To the extent Freer argues that the evidence is similar in that in both incidents Freer engaged in obnoxious, rude, or hostile behavior, this is too broad a category of "similarity" to bear the risk of confusing the jury.

¶15 Finally, we turn to the third factor—the strength of the State's case on the remaining count. Freer's argument that the State's disorderly conduct case was weak rests on the fact that the testimony of the four witnesses to the incident was not completely consistent. We disagree that this is a ground for finding the State's case was weak. It is to be expected that when four different people see the same event, they will recount the event in different terms. The jury was instructed to determine whether Freer engaged in "violent, abusive, indecent or profane conduct under circumstances in which such conduct tended to cause or provoke a disturbance…."[8] The testimony, though not identical as to specific details, was sufficient for a reasonable jury to find this beyond a reasonable doubt.

¶16 Loon's wife, Tracie Tudor, testified that she was at the back of the driveway with her husband and next-door neighbor, Sally Debroux, when she noticed Freer about thirty feet away, urinating on the shrubbery at the corner of Debroux's house. Tudor stated that, as she saw this, there were many people in the area due to the Orton Park Festival taking place directly across the street. She yelled "[n]o, oh, no" and her husband and Debroux also yelled for Freer to stop.

[8] The disorderly conduct statute, WIS. STAT.§ 947.01, provides:

> Disorderly Conduct. Whoever, in a public or private place, engages 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 is guilty of a Class B misdemeanor.

Tudor testified that Freer continued to urinate and raised his middle finger. At that point, Tudor said she was going to call the police and pulled out her cell phone to call them. She testified that the incident made her feel intimidated and angry and that she "felt violated that this person would be urinating in our driveway during our neighborhood event, never mind any other time."

¶17 Debroux testified that she was standing in the driveway between her house and her neighbors' house when she heard Tudor say "[o]h, no." Debroux turned and saw Freer standing in the driveway, urinating on a bush at the corner of her house. She and her neighbor yelled at Freer to stop. She said there was "some verbal exchange" between Freer and the other people at the scene—including Loon and her husband, who had come from the porch down to the driveway—but she did not remember specifics. She testified the incident made her feel "[u]ncomfortable, violated, angry, [and] worried."

¶18 Richard Slone, Debroux's husband, testified that he was inside his house or on his porch when he heard his wife and next-door neighbor yelling. When he came outside, he saw Freer urinating on a bush at the corner of his house. He said he did not remember exactly what words were used, but that he said something to Freer like "[g]et out of here, what are you doing." Freer mumbled some things, appeared intoxicated, and was "somewhat belligerent … just about being there." Slone stated that the incident made him feel "really pretty horrible and also made [him] feel threatened…."

¶19 Loon testified that he was at the back of the driveway when he saw Freer between thirty and forty feet away, urinating on a bush at the corner of his neighbors' house. Loon said that he yelled "[w]hat the hell are you doing" and "[s]top; you know, show some respect." Loon then walked up to Freer. Freer

raised his middle finger, zipped his pants, then raised his middle finger again while raising his other hand in a fist. Loon asked Freer why he did not use one of the portable toilets across the street and Freer responded that the lines were too long and he could not wait. Loon testified Freer then became increasingly belligerent and "was yelling at all of us to fuck off, fuck you … all this obscene language." When Loon's wife got out her cell phone to call the police, Freer walked away.

¶20 While the witnesses recounted what they saw in different ways, they testified to essentially the same incident. They all saw Freer standing in the driveway between their two houses, which were right across from a busy park, urinating on a bush, and they all found the conduct highly disturbing. There was no evidence presented refuting the witnesses' testimony in this regard. This is sufficient to allow a reasonable jury to find that Freer had engaged in "violent, abusive, indecent or profane" conduct constituting disorderly conduct. It was not necessary that each witness testify to Freer swearing and gesturing. However, merely because every witness did not testify to the specifics to this conduct does not mean the jury could not be satisfied that it happened. Two of the four witnesses testified that Freer raised his middle finger at them. Three witnesses testified to a verbal exchange, and one testified that Freer swore during the exchange. There was no evidence presented contradicting any of this testimony. Thus, the State's case on the disorderly conduct charge was quite strong. Consequently, the third ***McGuire*** factor does not favor Freer.

¶21 We conclude there was not prejudicial spillover from the evidence admitted to support the telephone harassment charge sufficient to constitute compelling prejudice. Thus, Freer is not entitled to a new trial on the disorderly conduct charge.

By the Court.—Judgment and order affirmed.

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