COURT OF APPEALS
DECISION
DATED AND FILED

September 26, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2253-CR **Cir. Ct. No. 00-CM-397**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY P. ZOELLICK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: JACQUELINE R. ERWIN, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Timothy P. Zoellick appeals a judgment of the circuit court convicting him of one count of disorderly conduct contrary to WIS. STAT. § 947.01 and one count of bail jumping contrary to WIS. STAT.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All other references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

§ 946.49(1)(a), both as a habitual criminal. Zoellick presents the following four issues: (1) the evidence presented was insufficient to sustain his conviction for disorderly conduct; (2) other acts evidence was improperly admitted; (3) the trial court failed to give a limiting instruction for the other acts evidence; and (4) the jury did not unanimously find that he committed a crime while free on bail. We affirm.

Background

¶2 While free on bond, Zoellick was arrested after driving past Julie Jones's home on January 9, 2000. The bond, which Zoellick signed on January 4, 2000, required that he refrain from committing any other crimes. Zoellick was charged with one count of disorderly conduct and one count of bail jumping.

¶3 At trial, Jones testified to a number of contacts between she and Zoellick. First, the State introduced evidence of encounters Jones had with Zoellick between March 9, 1989, and April 10, 1989. Jones described an incident where Zoellick looked into her living room late at night on March 9, 1989. In response, Jones called the police, who apprehended Zoellick. Jones testified to other encounters with Zoellick over the next thirty days, including instances where Zoellick drove slowly past her home and work at five to ten miles an hour, walked by her store slowly while grinning at her, and drove by her house seven times during one day and four times late at night on each of two consecutive nights. Jones testified to a total of forty-five encounters with Zoellick between March 9, 1989, and April 10, 1989.

¶4 In addition, Jones described two verbal encounters she had with Zoellick in 1989. The day after he was looking into her house, Jones testified that Zoellick came into the store where Jones worked. Jones told Zoellick to "leave us

alone and do not come back in again" to the store. Jones testified that she was very upset and that it was evident that she was upset during this encounter. On the other occasion, Zoellick approached Jones in a supermarket and said "Hi." Jones testified that she told him:

> "Leave me alone." And I was angry and said to leave me and my family and my friends alone. And he said, "Why can't we be friends"? And I said, "You know very well why." And I was getting very upset, I kept moving my cart … and he finally left me alone.

¶5 Jones further testified about five contacts she had with Zoellick between late spring 1999 and January 9, 2000, that formed the basis of the complaint against Zoellick. On one occasion, Zoellick stared at her for "minutes" while she was at the public library. On another occasion, Zoellick walked in the same direction as Jones on the opposite side of the street, staying approximately parallel to or eight to ten feet ahead of her at all times for five or six blocks. On three other occasions, including on January 9, 2000, Zoellick drove slowly by Jones's house, at about five to ten miles an hour, looking at her and grinning. Jones called the police after the January 9, 2000, incident. Zoellick did not present any witnesses on his behalf.

Discussion

A. Whether the Evidence was Sufficient to Sustain a Conviction for Disorderly Conduct

¶6 Zoellick contends that the evidence presented at trial was insufficient to sustain a conviction for disorderly conduct. Zoellick argues that his conduct was mere presence in a public place and, therefore, cannot constitute disorderly conduct. He further argues that Jones was hypersensitive to his mere presence and, thus, his conduct was not disorderly.

¶7 We may not reverse a conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). "[A]n appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law." ***Id.*** at 507.

¶8 WISCONSIN STAT. § 947.01 reads: "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." Thus, disorderly conduct is conduct that tends to cause or provoke a disturbance. "Tend to cause or provoke a disturbance" is further defined by WIS JI—CRIMINAL 1900:

> It is not necessary that an actual disturbance must have resulted from the defendant's conduct. The law requires only that the conduct be of a type that tends to cause or provoke a disturbance, under the circumstances as they then existed. You must consider not only the nature of the conduct but also the circumstances surrounding that conduct. What is proper under one set of circumstances may be improper under other circumstances. This element requires that the conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance.

(Footnote omitted.) The importance of context to a disorderly conduct charge was further highlighted in ***State v. Schwebke***, 2001 WI App 99, 242 Wis. 2d 585, 627 N.W.2d 213: "It is the combination of conduct and circumstances that is crucial in applying [§ 947.01] to a particular situation." ***Id***. at ¶23.

¶9 If the conduct constitutes a threat, the threat must be a "true threat." *See* ***State v. A.S.***, 2001 WI 48, ¶22, 243 Wis. 2d 173, 626 N.W.2d 712. The test for a "true threat"

> employs an objective reasonable person standard and defines a "true threat" as follows:
>
> > A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered.

Id. (quoting ***State v. Perkins***, 2001 WI 46, ¶29, 243 Wis. 2d 141, 626 N.W.2d 762).

¶10 Zoellick cites ***City of Oak Creek v. King***, 148 Wis. 2d 532, 436 N.W.2d 285 (1989), which states that "[m]ere presence absent any conduct which tends to cause or provoke a disturbance does not constitute disorderly conduct." ***Id***. at 544. However, the evidence here demonstrates that Zoellick exhibited conduct above and beyond mere presence in each of his encounters with Jones in 1999 and 2000. Zoellick stared at Jones; he left the library at the same time she did and matched her pace for six blocks; and three times he drove slowly past her house, looking at her and grinning. When these actions are viewed in the context of Zoellick's history of imposing his attention on Jones, the actions go above and beyond "mere presence." Each of these activities was directed at Jones. Contrary to Zoellick's assertion, he was not merely "being present at the library … or driving down the street."

¶11 Next, Zoellick contends that Jones was hypersensitive to his activities. Zoellick argues, "[a]bsent the alleged history between Jones and Zoellick, nothing about Zoellick's physical conduct as alleged in this case comes close to [offending a reasonable person]." However, we review sufficiency of the evidence claims in light of the evidence actually presented, not in light of the evidence a defendant contends should have been presented. Viewing the evidence presented in a light most favorable to the State, we conclude that a jury, acting reasonably, could have found guilt beyond a reasonable doubt.

B. Whether Other Acts Evidence was Properly Admitted

¶12 Zoellick next argues that the trial court improperly admitted evidence of Jones's encounters with Zoellick in 1989 as other acts evidence. "A trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has a reasonable basis and was made in accordance with accepted legal standards and in accordance with the facts of record." ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992) (quoting ***Lievrouw v. Roth***, 157 Wis. 2d 332, 348, 459 N.W.2d 850 (Ct. App. 1990)) (citations omitted). The question on review is not whether this court would have admitted the evidence in question. Instead, if the circuit court "examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach," we affirm its decision. ***State v. Sullivan***, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998).

¶13 The State responds that the 1989 evidence was admitted as direct evidence, not as other acts evidence. The State points out that the trial court determined that the 1989 evidence was not other acts evidence because the totality of the circumstances is an element of the disorderly conduct charge. Therefore,

the State argues the evidence is admissible as direct evidence of the "circumstances" element of disorderly conduct.

¶14 Zoellick's only response to this basis for admission is that the 1989 evidence is not relevant because it is too old and because the offense of disorderly conduct employs a reasonable person standard, making the victim's personal circumstances irrelevant. Zoellick's arguments are meritless. Zoellick's prior contacts with Jones are not too old to be relevant for the very reason Jones was reasonably concerned, as Zoellick had previously and unambiguously directed his unwanted attention at Jones and this history showed the current contacts were not innocent chance encounters. "Circumstances" is plainly intended to encompass the history of relevant contacts between the parties. Because Zoellick presents no argument refuting the proposition that the prior contacts were admissible as direct evidence of the charged crime, we affirm on that basis.

¶15 Moreover, even if we concluded that the 1989 evidence was other acts evidence subject to WIS. STAT. § 904.04(2), the 1989 evidence would still be admissible. Section 904.04(2) reads:

> OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In addition to the enumerated exceptions found in § 904.04(2), a valid basis for the admission of other acts evidence is to furnish the context of the crime if necessary to the full presentation of the case. In ***State v. Chambers***, 173 Wis. 2d 237, 496 N.W.2d 191 (Ct. App. 1992), this court stated:

> Section 904.04(2), Stats., does not prohibit the admission of other crimes evidence if "*offered for other purposes, such as* proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." (Emphasis added.) We hold, as did the courts interpreting Rule 404(b) of the Federal Rules of Evidence, that the listing of circumstances under sec. 904.04(2) for which the evidence is relevant and admissible is not exclusionary but, rather, illustrative. Also, as did the federal courts, we hold that an "accepted basis for the admissibility of evidence of other crimes arises when such evidence 'furnishes part of the context of the crime' or is necessary to a 'full presentation' of the case ...."

Id. at 255 (quoting ***State v. Shillcutt***, 116 Wis. 2d 227, 236, 341 N.W.2d 716 (Ct. App. 1983)).

¶16 The 1989 evidence provides context to Zoellick's conduct in 1999 and 2000 and explains why Zoellick's later conduct constituted a threat. Viewed in isolation, the 1999 and 2000 conduct might appear innocuous. Excluding evidence of Jones's prior encounters with Zoellick would prevent the State from presenting reasons why Zoellick's conduct was disorderly, thus preventing the State from making a full presentation of the case. Under ***Chambers***, the 1989 evidence is admissible other acts evidence.

C. Whether the Failure of the Trial Court to Give a Limiting Instruction Constitutes an Error Warranting Reversal

¶17 Zoellick contends that the trial court failed to give an other acts limiting instruction. He contends this omission requires reversal of his convictions. We conclude that no reversible error existed on three grounds: (1) Zoellick's trial counsel's failure to object to the trial court's failure to read the limiting instruction waived this issue on appeal; (2) no limiting instruction was necessary because no other acts evidence was introduced; and (3) even if other acts evidence was introduced, the absence of a limiting instruction was harmless.

¶18 Zoellick's trial counsel initially requested a limiting instruction, but later abandoned her request and did not object to the absence of such an instruction. While discussing whether to give the limiting instruction, the following exchange took place:

> THE COURT: So what language would you suggest? I mean, this is a Whitty instruction, and [this is] not a Whitty issue. It was –
>
> [Defense counsel]: Simply that evidence that there was – one moment – Okay. Your Honor, actually, I guess that is something we could address through argument as opposed to having the jury instructed on it.

Failure to object at the instruction conference waives Zoellick's right to claim error in the jury instructions. *See* ***State v. Schumacher***, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988); WIS. STAT. § 805.13(3) ("Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict.").

¶19 Further, even if defense counsel had objected to the limiting instruction, no instruction was necessary because the 1989 evidence as discussed above constituted direct evidence of disorderly conduct.

¶20 Finally, even if we concluded that the 1989 evidence was other acts evidence, the failure to give a limiting instruction constituted harmless error. "The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction. A reasonable possibility is a possibility sufficient to undermine our confidence in the conviction." ***State v. Williams***, 2002 WI 58, ¶50, 253 Wis. 2d 99, 644 N.W.2d 919 (citations omitted). When determining whether error is harmless, the reviewing court considers the entire record. ***State v. Patricia A.M.***, 176 Wis. 2d 542, 556-57, 500 N.W.2d 289 (1993).

¶21 The limiting instruction would have allowed the jury to consider the 1989 evidence to provide context to Zoellick's conduct in 1999 and 2000, while prohibiting the jury from considering the 1989 evidence to conclude that Zoellick has a certain character and that Zoellick acted in conformity with that character. The absence of the limiting instruction does not undermine our confidence in the verdict.

D. Whether the Jury Unanimously Found that Zoellick Committed a Crime While Free on Bail

¶22 Finally, Zoellick argues that the jury did not unanimously find him guilty of bail jumping. He contends that because the jury did not specify which of the five incidents constituted disorderly conduct, there is no way to determine if the jury found him guilty of disorderly conduct after January 4, 2000, when he signed the bail bond. Therefore, he argues that the bail jumping charge should be reversed. We disagree.

¶23 Zoellick could only be guilty of bail jumping if he committed a crime while free on bail. Zoellick signed his bail bond on January 4, 2000. Only one of the five incidents in 1999 and 2000 occurred after January 4, 2000. Thus, in order for his conviction to stand, the jury had to have found that his conduct on January 9, 2000, was disorderly.

¶24 The trial court instructed the jury:

> The second count charges that the defendant did on January 9, 2000, at the City of Watertown, Jefferson County, Wisconsin, having been charged with a misdemeanor and having been released from custody under Chapter 969 of the Wisconsin Statutes, intentionally fail to comply with the terms of his bond, contrary to [946.49] of the Statutes.

We assume juries follow jury instructions. *See* ***Johnson v. Pearson Agri-Sys., Inc.***, 119 Wis. 2d 766, 776, 350 N.W.2d 127 (1984). The instructions clearly direct that, to find Zoellick guilty of bail jumping, the jury must find that his conduct on January 9, 2000, constituted a crime.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4 (1999-2000).