COURT OF APPEALS
DECISION
DATED AND FILED

April 24, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3224-CR **Cir. Ct. No. 00-CF-1726**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN YANG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: MORIA G. KRUEGER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Vergeront, P.J., Roggensack and Lundsten, JJ.

¶1 LUNDSTEN, J. John Yang appeals the hate crime penalty enhancement portion of his judgment of conviction. Yang was tried before a jury

and was convicted of misdemeanor battery, party-to-a-crime. WIS. STAT. §§ 940.19(1) and 939.05 (1997-98).[1] The jury also found Yang liable for hate crime penalty enhancement, WIS. STAT. § 939.645, thereby increasing his crime from a Class A misdemeanor to a felony punishable by a maximum of two years of imprisonment. WIS. STAT. § 939.645(2)(b). The circuit court withheld sentence and imposed four years' probation. Yang argues that the jury instructions given impermissibly allowed the jury to find him liable for hate crime penalty enhancement absent a finding that Yang was aware the victim had been selected because of the victim's race. We agree and vacate the hate crime penalty enhancement portion of Yang's judgment of conviction and remand for resentencing on the battery conviction.[2]

Background

¶2 Yang was tried before a jury, along with two codefendants. Trial testimony showed that at about 3:00 a.m. on a summer night a black male, Jay Jay Anjewel, was attacked by a group composed mostly of Asian males. Anjewel testified at trial that he was leaving a Madison convenience store on his bicycle when he was stopped by four Asian men who asked what he was doing there. He

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] We note that the commonly used shorthand, "hate crimes," is a misnomer. ***State v. Mitchell***, 169 Wis. 2d 153, 194-95, 485 N.W.2d 807 (1992) (Bablitch, J., dissenting), *rev'd*, 508 U.S. 476 (1993). Yang repeatedly argues he should not be held liable for hate crime penalty enhancement if he did not share, or was unaware of, the "racial animus" harbored by his co-actors. Framed this way, Yang's argument misses the mark. Neither animosity nor hate is an element of the hate crime penalty enhancer. Proof of racial animosity may support a finding of discriminatory racial selection, but proof of animosity is not required. The Wisconsin hate crime penalty enhancement statute is directed at discriminatory acts, even where the actor harbors no animus towards the victim's status. *See* ***Mitchell***, 508 U.S. at 487.

said the Asian men called him a "dirty nigger" and "dirty nigger, mother fucker, all those kinds of words and stuff." The men threw Anjewel's bicycle to the ground and began grabbing, slapping, and hitting Anjewel. Anjewel testified that more Asian men and at least one Asian female joined the group surrounding him and that members of the group continued to kick and punch him. Anjewel estimated the group at fifteen to twenty people, none of whom he had met before.

¶3 Anjewel identified defendant Yang as one of the men who joined the attack after it began. He estimated that Yang was about the ninth person to join in the beating and that racial slurs continued after Yang's participation began. Anjewel and other witnesses testified that some Asians in the group yelled to stop it and some tried to hold others back. The beating ended abruptly when those involved started to run away.

¶4 The jury found Yang guilty of misdemeanor battery, party-to-a-crime, and made a separate finding that he was liable for hate crime penalty enhancement.

Discussion

¶5 The resolution of this case starts and ends with the jury instructions. Yang argues that the instructions impermissibly allowed the jury to impose hate crime penalty enhancement liability on him without any finding that Yang was aware that the victim, Anjewel, had been targeted because of Anjewel's race. The State argues that Yang was properly held liable for hate crime penalty enhancement because the evidence was sufficient to show that Yang "intentionally aided in the battery and knew that one of his co-actors had selected Mr. Anjewel as a battery victim based on Mr. Anjewel's race." We agree with Yang.

¶6 The State's argument contains two assumptions: (1) the jury was instructed on aider and abettor liability with respect to the hate crime penalty enhancer, and (2) the jury was told it could find Yang liable for hate crime penalty enhancement *only* if Yang assisted in the battery knowing one of his co-actors had selected the victim because of the victim's race. Neither assumption withstands scrutiny.

¶7 The trial court began its instructions by telling the jury that Yang and his codefendants had been charged "as party to the crime of battery." The court then said: "[T]hey are also charged as having intentionally selected the person against whom the crime was committed in whole or in part because of their belief or perception regarding the victim's race …."

¶8 When the jury was instructed on the elements, it was instructed on party-to-a-crime liability as an aider and abettor with respect to the crime of battery. The jury was told it should first determine whether it was satisfied beyond a reasonable doubt that the defendant committed battery or intentionally aided and abetted the commission of battery. The jury was told that if it found Yang or a codefendant guilty of battery as a party-to-a-crime, it should then proceed to answer the following question with respect to such defendant or defendants:

> "Was the victim of the crime of battery intentionally selected because of his race by the defendant or another person who committed the battery?"
>
> Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that Jay Jay Anjewel was intentionally selected in whole or in part because of his race by the defendant or another person who committed the battery.
>
> If you are satisfied beyond a reasonable doubt that Jay Jay Anjewel was selected in whole or in part because of

> his race by the defendant ... or by another person who committed the battery, you should answer the question "yes" as to that defendant.

In keeping with the instructions, the jury was given a verdict in the following form:

> We, the Jury, having been duly empaneled and sworn to try the issues in the above entitled action, find the defendant, John Yang, guilty of battery as party to the crime.
>
> _____
> Foreperson
>
> Answer the following question only if you have found the defendant guilty:
>
> Was the victim of the crime of battery intentionally selected because of his race by John Yang or another person who committed the battery?
>
> Yes _____ No _____
>
> _____
> Foreperson

¶9 Thus, once the jury found Yang guilty of battery as party-to-a-crime, it had three options: first, find that Yang personally selected Anjewel because of Anjewel's race; second, find that "another person who committed the battery" selected Anjewel because of Anjewel's race; and, third, find no such intentional selection. We conclude that the State's argument—that we may affirm Yang's hate crime penalty enhancement because the evidence was sufficient to show that Yang intentionally aided in the battery *and knew* that one of his co-actors had selected Mr. Anjewel as a battery victim based on Mr. Anjewel's race—conflicts

with the jury instructions which plainly informed the jury it could impose penalty enhancer liability *regardless* of Yang's awareness of discriminatory selection.[3]

¶10 The State provides no discernible defense of the very real possibility that the jury found Yang liable for penalty enhancement solely because it found that one of his co-actors selected Anjewel because of Anjewel's race. The State argues generally that it is possible, under a "natural and probable consequence" theory of party-to-a-crime liability, to hold an aider and abettor liable for penalty enhancement even if the aider and abettor is unaware of the discriminatory selection. The State, however, does not rely on this theory because Yang's jury was not instructed on this theory of liability.

¶11 In its initial brief, the State observed:

> It is an interesting (and closer) question whether a defendant may be liable as a party to a hate crime for aiding and abetting an accomplice who, unbeknownst to the defendant, selected the victim based on race, religion, or some other impermissible factor. But that is not the question presented by this case.

(Footnote omitted.) In light of the jury instructions in this case, which did indeed permit liability to be imposed if one of Yang's co-actors, unbeknownst to Yang, selected Anjewel based on Anjewel's race, we requested supplemental briefing on the following question: "May a person be found liable for 'hate crimes' penalty enhancement if that person aids and abets a crime but is unaware that the victim

[3] The State does not argue that Yang waived his objection to the jury instructions. At the jury instruction conference, defense counsel objected to the addition of the "or another person who committed the battery" language. Defense counsel specifically complained that the instruction proposed by the prosecutor would permit the jury to convict on the hate crimes penalty enhancer without any finding that the defendant had an awareness of intentional selection based on race.

has been intentionally selected in whole or in part because of a status listed in [the hate crime penalty enhancement statute]?" We interpret the State's answer to this question to be "yes" as a general proposition and "no" under the instructions in this case. The State argues that hate crime enhancer liability is possible under the scenario posed in our question using a "natural and probable consequence" theory of party-to-a-crime liability, but at the same time readily admits Yang's jury was not instructed on this theory of liability.[4]

¶12 The State's supplemental brief appears to contest our description of the disconnect between the party-to-a-crime battery instruction and the hate crime penalty enhancement instruction. The State directs our attention to ***State v. Ivy***, 119 Wis. 2d 591, 350 N.W.2d 622 (1984), where, according to the State, "the supreme court rejected the defendant's argument that the jury instructions were erroneous because there was no connecting link between the aiding and abetting instruction and the armed robbery instruction." However, ***Ivy*** does not undermine our interpretation of the instructions given to Yang's jury.

¶13 In ***Ivy***, the defendant argued there was an insufficient link between the party-to-a-crime instruction and the *armed* element of the armed robbery instruction. The link was arguably insufficient because the party-to-a-crime instruction used the term "crime," rather than "armed robbery," and the defendant argued that the jury might have interpreted the "crime" to be "robbery," rather than "armed robbery." ***Id.*** at 604. The supreme court rejected the defendant's argument, concluding that the instructions as a whole conveyed to the jury that the

[4] We do not comment on the State's argument that an aider and abettor of a battery may in some instances be held liable for hate crime penalty enhancement under a "natural and probable consequence" theory of party-to-a-crime liability.

term "crime" referred to the charged crime, "armed robbery." ***Id.*** at 604-05. The instructions here are not comparable. Nothing in Yang's jury instructions linked the hate crime penalty enhancement to the party-to-a-crime instruction.[5]

¶14 In view of the actual jury instructions in this case, the hate crime penalty enhancement portion of Yang's conviction cannot stand. The State's only argument, that the evidence was sufficient to support a jury finding that Yang participated in the beating knowing that Anjewel had been selected because of his race, does not comport with the instructions. Because the theory that Yang was aware of discriminatory selection was not submitted to the jury, and because the State does not suggest that harmless error analysis can save the penalty enhancer portion of Yang's conviction, *cf.,* ***State v. Harvey***, 2002 WI 93, ¶¶35-38, 254 Wis. 2d 442, 647 N.W.2d 189 ("All other constitutional errors—including an erroneous jury instruction completely omitting an element of the offense—are subject to the harmless error rule," ***id.*** at ¶37), we will not uphold Yang's hate crime penalty enhancer verdict based on a theory of liability not presented to the jury. *See* ***State v. Wulff***, 207 Wis. 2d 143, 152, 557 N.W.2d 813 (1997) (stating the general rule that courts do not affirm convictions based a theory not presented to the jury).[6]

[5] The State indicated in its supplemental brief that it felt constrained from offering a more extended defense of its view of the jury instructions because the question posed in our order for supplemental briefing did not request argument on the instruction itself. As former Chief Justice Heffernan said in a different context, "such deference is gratifying," ***State v. Koput***, 142 Wis. 2d 370, 386 n.12, 418 N.W.2d 804 (1988), but if the question posed in an order for supplemental briefing contains an assumption with which a party disagrees, that party should feel free to express its disagreement.

[6] We do not suggest that the record in this case supports a harmless error argument.

¶15 For the above reasons, we vacate the hate crime penalty enhancement portion of Yang's judgment of conviction and remand for resentencing on Yang's battery conviction.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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