COURT OF APPEALS
DECISION
DATED AND FILED

November 20, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1235-CR **Cir. Ct. No. 99-CF-706**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GEORGE B. GLEASON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: MICHAEL T. KIRCHMAN, Judge. *Affirmed.*

Before Deininger, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. George Gleason appeals a judgment convicting him of two counts of making threats to a judge. He also appeals an order denying his postconviction motions. The issues are: (1) whether there was sufficient evidence for the jury to find that Gleason made a "true threat"; (2) whether we should grant Gleason a new trial in the interest of justice because the jury

instructions were inadequate; (3) whether the circuit court erroneously exercised its discretion in allowing "other acts" evidence; and (4) whether the two counts of which Gleason was convicted were multiplicitous. We affirm.

¶2 Gleason contends there was insufficient evidence to support the jury's finding that he made a "true threat." When reviewing the sufficiency of the evidence, we will not substitute our judgment for that of the trier of fact "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). We do not consider evidence that might support other theories of the crime, but decide only whether the theory of guilt the trier of fact accepted is supported by the evidence. ***Id.*** at 507-08.

¶3 The evidence was sufficient for the jury to find that Gleason made a "true threat." Colleen Berent testified that Gleason had come to her residence and told her that he was very upset with various people, including a judge he knew from a pending case, the police, and a probation agent. She testified that Gleason said he was planning a war, that he was sharpening a machete in preparation for the war, and that he was planning to "lop off some heads." Berent said that Gleason planned "to kill or hurt judges and DA's and additional other groups of people," and had made preparations to do so, including buying ammunition and food. She testified that Gleason told her he planned to do this sometime around Thanksgiving, and that it was almost Thanksgiving when he said this. She also testified he "was very intense in his appearance," which scared her. Finally, she explained that she felt compelled to involve the police because she thought Gleason "really was going to follow through and hurt people." Sheena Murphy, a teenager who lived with Berent, was also present during part of that conversation.

Murphy testified that she heard Gleason say that he had guns and knives in his van and that he was going to "kill judges and some lawyers and officers." She also testified that Gleason scared her when he said this.

¶4 In addition to the testimony of Berent and Murphy, the State introduced evidence that Gleason had driven to and parked near the rural home of an assistant district attorney very early one morning, that he left a letter at the home of a probation agent, and that he obtained another probation agent's home phone number and called her. Taken in its entirety, this evidence is sufficient to support the jury's finding that Gleason made a "true threat" to harm, as opposed to some other, more innocuous statement.

¶5 Gleason contends that he is entitled to a new trial in the interest of justice because the jury instructions were flawed. He asks us to exercise our discretionary power of reversal under WIS. STAT. § 752.35 (2001-02),[1] arguing that the inadequate jury instructions prevented the real controversy from being fully tried.

¶6 The circuit court gave a modified version of the pattern jury instruction, WIS JI—CRIMINAL 1240. That pattern instruction has since been found inadequate by the supreme court. *See* ***State v. Perkins***, 2001 WI 46, ¶2, 243 Wis. 2d 141, 626 N.W.2d 762. The jury was instructed as follows:

> The first element requires [that] the defendant threatened to cause bodily harm to Ramona Gonzalez in Count I/Dennis G. Montabon in Count II.

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

> To determine whether George Gleason threatened to cause bodily harm to Ramona Gonzalez in Count I/Dennis G. Montabon in Count II, you must first look to what the defendant said and determine whether the statement is a true threat. Every person has a right to criticize any public official, including a judge. That right includes using language that is "vehement, caustic, unpleasantly sharp, vituperative, abusive, or inexact."
>
> A true threat is not such a criticism, is not idle or careless talk, is not exaggerated political opinion. You must not find the defendant guilty unless you're satisfied beyond a reasonable doubt that the defendant's statement was not merely vehement, caustic, unpleasantly sharp, vituperative, abusive, or inexact, but was a statement which a reasonable person would have understood to be a serious expression of intent, determination, or purpose to harm.

¶7 Gleason argues that this modified instruction is flawed under ***Perkins*** because it does not use a "reasonable person" standard. We disagree. The jury was specifically instructed that it should use a reasonable person standard. The jury was instructed that it should not find Gleason guilty unless it found that he made "a statement which a *reasonable person* would have understood to be a serious expression of intent, determination, or purpose to harm" (emphasis added). Gleason also contends that the instruction was flawed because it did not use a speaker-and-listener-based reasonable person standard, which is the standard adopted by the supreme court in ***Perkins***. ***Id.***, ¶29. While it is true that the instruction given did not expressly use "speaker-and-listener" language, we agree with the State that the instruction communicated that concept by use of the "reasonable person" standard. Therefore, we decline to exercise our discretionary authority to order a new trial.

¶8 Gleason argues that the circuit court improperly admitted "other acts" evidence. He challenges both the admission of statements he made at the post office about Timothy McVeigh and testimony that he had followed probation

agents and court officers.[2] To determine whether the circuit court properly admitted this "other acts" evidence, we use a three-step analysis. First, we look to see whether the "other acts" evidence is offered for an acceptable purpose under WIS. STAT. § 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ***State v. Sullivan***, 216 Wis. 2d 768, 772, 576 N.W.2d 30 (1998). Next, we look to see whether the other acts evidence is relevant. ***Id.***; *see* WIS. STAT. § 904.01. Third, we look to see whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence. ***Sullivan***, 216 Wis. 2d at 772-73; *see* WIS. STAT. § 904.03.

¶9 After reviewing the transcript of the circuit court's oral decision, we conclude that the circuit court properly exercised its discretion in admitting the evidence. The evidence was admissible to prove that Gleason had the subjective mental purpose to threaten the judges, one of the elements of the crime. WISCONSIN STAT. § 904.04(2) allows other acts evidence to be admitted to show intent. The evidence was relevant because it made it more likely than it would have been without the evidence that Gleason's words were intended as true threats. It shows that the threats were made in the context of a larger effort by

[2] Terry Larsen, a post office employee, testified at trial that Gleason had come to the post office with a friend and, while waiting to lodge a complaint about a delivery problem, began to talk about the Oklahoma City bombing. Gleason said that the bombing was justified and that the parents of the children killed were responsible for having their children in the building. Gleason also said, "It's too bad Tim McVeigh isn't here." The State also introduced testimony showing that Gleason had parked near the rural home of an assistant district attorney very early one morning, that he had phoned a probation agent at her parents' home, and that he had left a letter at the front door of another probation agent's home.

Gleason to intimidate the judicial system and law enforcement. The context in which Gleason's threats were made bears significantly on whether the statements were truly expressions of an intent to harm, as opposed to more innocuous statements or exaggerations made, perhaps, to express anger without an intent to act on them. So, too, the circuit court properly exercised its discretion in concluding that the evidence should not be excluded because its probative value was substantially outweighed by the danger of unfair prejudice. Because the context in which Gleason's statements were made was crucial to the jury's understanding of Gleason's intent, the evidence, while prejudicial, simply filled the picture in for the jurors without showing Gleason to be involved in criminal activity or other highly prejudicial acts.

¶10 Finally, Gleason contends that the charges against him violate his constitutional right to be free from double jeopardy because they are multiplicitous. Charges are multiplicitous if they are identical in law and in fact. *See* ***State v. Anderson***, 219 Wis. 2d 739, 746, 580 N.W.2d 329 (1998), *modified in part by* ***State v. Davison***, 2003 WI 89, ¶35, 263 Wis. 2d 145, 666 N.W.2d 1. Gleason was convicted of two counts of threatening a judge, a violation of WIS. STAT. § 940.203 (1997-98), so the offenses are identical in law. Our inquiry thus focuses on whether the offenses are different in fact. They are different in fact if each count requires proof of an additional fact that the other does not. ***Anderson,*** 219 Wis. 2d at 750. Stated differently, "[c]harged offenses are not multiplicitous if the facts are either separated in time or of a significantly different nature." ***Id.*** at 749. "The offenses are significantly different in nature if each requires 'a new volitional departure in the defendant's course of conduct.'" ***Id.*** at 750 (citation omitted).

¶11 Gleason contends that the two charges are identical in fact because, while he expressed a desire to harm both judges, the two charges rest on a single act, his statements to Colleen Berent. We reject this argument for two reasons. First, we agree with the State that the two counts in this case are not identical in fact because each requires proof of a fact that the other does not: the identity of different victims. Second, the two counts are not identical in fact because Gleason made an intentional decision to threaten two different judges, each of which required a new volitional act on Gleason's part. *See* ***State v. Rabe***, 96 Wis. 2d 48, 68, 291 N.W.2d 809 (1980) ("[W]here the crime is against persons rather than property, there are, as a general rule, as many offenses as individuals affected.").

By the Court.—Judgment and order affirmed.

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