COURT OF APPEALS
DECISION
DATED AND FILED

August 25, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0292-CR **Cir. Ct. No. 03CM000123**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER M. ANTONICCI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed*.

¶1 ANDERSON, P.J.[1] Christopher M. Antonicci appeals from a judgment of conviction for disorderly conduct in violation of WIS. STAT. § 947.01 and an order denying his postconviction motion. On appeal, he argues that (1) his

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

conduct in following Richard Firth did not constitute disorderly conduct under § 947.01; (2) § 947.01 is unconstitutionally overbroad; and (3) § 947.01 is unconstitutionally vague as applied. We conclude that § 947.01 was appropriately applied to Antonicci's conduct and that the statute is neither overbroad nor vague as applied. Accordingly, we affirm the judgment and order of the trial court.

BACKGROUND

¶2 In the spring of 2002, Richard Firth met Rebecca Raml at work. They went out approximately three times. After the third date, Raml told Firth that he should be wary of her former boyfriend, Antonicci. From this conversation, it seemed to Firth that Antonicci may not have believed that his relationship with Raml was over.

¶3 Subsequently, Antonicci began to contact Firth. Antonicci first called and sent a letter to Firth, warning him to stop seeing Raml and that Firth should be afraid. According to Firth, he received ten to twelve threatening phone calls from Antonicci and several threatening notes at his home and at work. In response, Firth obtained a restraining order against Antonicci on July 1, 2002.

¶4 On the evening of October 15, 2002, Antonicci called Raml on his way home from a job. From the conversation, he believed that Raml had been talking to someone else. As he was driving home on Interstate 43, Antonicci observed a vehicle pass him and recognized it as Firth's vehicle. Apprehensive that Firth was going to meet Raml, Antonicci decided to follow the car.

¶5 Firth was driving on Interstate 43 when he noticed in his rearview mirror that he was being followed by a black Chevy Blazer. Firth noticed the car because he knew that Antonicci drove a similar car, and he was suspicious that

this car was Antonicci's. Firth exited Interstate 43 to get something to eat. The Chevy Blazer followed him.

¶6 Firth drove into a gas station. He chose the gas station because, by that time, he believed it was probably Antonicci's Blazer following him. He thought that Antonicci wanted to speak with him and that the gas station would be a good well-lit public place to let it happen. Antonicci also stopped his car. Antonicci did not enter the gas station, but merely parked his car on the side of the road and turned off his headlights. When Firth returned to his vehicle, he drove around the area, trying to stay on major roads. Firth estimated that he drove down seven to eight different roads spanning approximately five to ten miles. Antonicci continued to follow him.

¶7 Eventually, Firth unintentionally pulled onto a dead-end street, where he turned his car around. When Antonicci pulled into the street, almost blocking Firth's car, Firth was able to verify that Antonicci was the driver of the black Chevy Blazer. Firth then called 911. At that point, Antonicci went in the opposite direction.

¶8 On January 16, 2003, the State charged Antonicci with misdemeanor disorderly conduct, WIS. STAT. § 947.01. After a bench trial at which both Firth and an officer who investigated the 911 call testified, the court convicted Antonicci of the charge. Antonicci filed a postconviction motion arguing, as he does in this appeal, that (1) Antonicci's conduct did not fit the definition of disorderly conduct, (2) the disorderly conduct statute was unconstitutionally overbroad as applied, and (3) the disorderly conduct statute was unconstitutionally vague as applied. The trial court denied Antonicci's postconviction motion. This appeal follows.

DISCUSSION

¶9 *Statutory Claim.* We begin by addressing Antonicci's argument that the application of WIS. STAT. § 947.01 to his behavior was inappropriate because his conduct did not fit within the ambit of the statute. Statutory interpretation and the application of the statute to a particular set of facts are questions of law that we review de novo. ***State v. Franklin***, 2004 WI 38, ¶5, 270 Wis. 2d 271, 677 N.W.2d 276.

¶10 WISCONSIN STAT. § 947.01 states as follows: "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." The State must prove two elements to convict a defendant under this statute. ***State v. Douglas D.***, 2001 WI 47, ¶15, 243 Wis. 2d 204, 626 N.W.2d 725. First, it must prove that the defendant engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud, or similar disorderly conduct. ***Id.*** Second, it must prove that the defendant's conduct occurred under circumstances where such conduct tends to cause or provoke a disturbance. ***Id.*** An objective analysis of the conduct and circumstances of each particular case must be undertaken because what may constitute disorderly conduct under some circumstances may not under others. *See* ***State v. A.S.***, 2001 WI 48, ¶33, 243 Wis. 2d 173, 626 N.W.2d 712.

¶11 Antonicci argues that his "passively following" another individual in his car does not satisfy either prong of the disorderly conduct statute. First, he asserts that his conduct "was not of the type contemplated by the 'otherwise disorderly' clause of [WIS. STAT. §] 947.01." Antonicci observes that the

"otherwise disorderly" provision has been interpreted to proscribe "*substantial* intrusions which offend the normal sensibilities of average persons or which constitute *significantly* abusive or disturbing demeanor in the eyes of reasonable persons." He then claims that while his conduct was very disturbing to Firth, it was not of a type, when evaluated objectively, that would be abusive or disturbing to others.

¶12 In objectively evaluating Antonicci's conduct, we are to consider the context in which the conduct occurred. *See* ***A.S.***, 243 Wis. 2d 173, ¶33; ***State v. Schwebke***, 2002 WI 55, ¶¶24, 30, 253 Wis. 2d 1, 644 N.W.2d 666, *cert. denied*, 537 U.S. 1090 (U.S. Wis. Dec. 16, 2002) (No. 02-6140). When viewed in its context, Antonicci's conduct becomes more than what Antonicci claims was just "passive following." Antonicci had a history of harassment against Firth. He had sent letters, left notes, and made many phone calls, all of which included thinly veiled threats against Firth. Indeed, Antonicci had a restraining order in place against him relating to Firth. Further, in this particular instance, the events did not take place in broad daylight, but rather late at night, with Antonicci following Firth on multiple roads in multiple directions. Given all of the circumstances of the case, we conclude that Antonicci's conduct would offend the sensibilities of the reasonable person and is exactly the type of conduct contemplated by the "otherwise disorderly" provision of WIS. STAT. § 947.01.[2]

[2] Antonicci also appears to argue that his conduct does not fall under the ambit of the statute because he did not possess the requisite intent. However, as he notes later in his brief, the disorderly conduct statute does not contain an intent element. *See* ***State v. Schwebke***, 2002 WI 55, ¶39, 253 Wis. 2d 1, 644 N.W.2d 666.

¶13 Second, Antonicci submits that the disorderly conduct statute was not satisfied because "the incident between Antonicci and Firth was of a private nature." Recently, in ***Schwebke***, 253 Wis. 2d 1, ¶30, our supreme court discussed whether the disorderly conduct statute encompasses conduct that does not implicate the public directly, but rather tends to cause a disturbance or disruption that is personal or private in nature.

¶14 There, Schwebke was charged with fourteen counts of disorderly conduct arising from mailings and telephone calls directed at four individuals. ***Id.***, ¶2. On appeal, Schwebke asserted that such personal and private annoyance is insufficient to support a conviction of disorderly conduct. ***Id.***, ¶25. Schwebke claimed that the supreme court had traditionally upheld disorderly conduct convictions only where there had been a threat to public order or public peace. ***Id.***, ¶28. The court rejected his argument, explaining:

> We certainly agree with Schwebke that, from our jurisprudence, the statute is appropriately applied in instances where conduct, under the circumstances, has a tendency to provoke a disruption to the public peace, public safety, or public order or is likely to cause a reaction from the community based on the fact that the public peace, public order, or public safety is being threatened. We conclude, however, that the disorderly conduct statute does not necessarily require disruptions or disturbances that implicate the public directly. The statute encompasses conduct that tends to cause a disturbance or disruption that is personal or private in nature, as long as there exists the real possibility that this disturbance or disruption will spill over and disrupt the peace, order or safety of the surrounding community as well. Conduct is not punishable under the statute when it tends to cause only personal annoyance to a person. *See* ***Douglas D.***, [243 Wis. 2d 204], ¶27. An examination of the circumstances in which the conduct occurred must take place, considering such factors as the location of the conduct, the parties involved, and the manner of the conduct.

Schwebke, 253 Wis. 2d 1, ¶30.

¶15 Based on this analysis, the court concluded that the disorderly conduct statute was appropriately applied to Schwebke's conduct. ***Id.***, ¶32. The court explained that in each instance the conduct at issue, in light of the circumstances, went beyond conduct that merely tended to annoy or cause personal discomfort in another person and was disruptive to peace and good order in the community. ***Id.***

¶16 As ***Schwebke*** teaches, the disorderly conduct statute does not require that the defendant's conduct directly implicate the public. Rather, the statute applies to conduct that is personal or private in nature, as long as there exists "the real possibility that this disturbance will spill over and disrupt the peace, order or safety of the surrounding community as well." ***Id.***, ¶30. Here, as in ***Schwebke***, Antonicci's conduct, in light of the circumstances created, went beyond conduct that merely tended to annoy or cause personal discomfort to another person and was of the type that created the "real possibility" of disrupting the peace, order and safety of the community. Antonicci followed Firth on public roads for a significant length of time and a substantial distance, waited at a gas station for him and, at one point, pulled in front of Firth nearly blocking his vehicle. In engaging in this disturbing conduct, Antonicci endangered the lives of other innocent motorists. Further, such circumstances obviously necessitate the involvement of the police and, in this instance, the police were contacted. Because we conclude that Antonicci's conduct constituted "otherwise disorderly" conduct that created a "real possibility" of disrupting peace and good order, we hold that WIS. STAT. § 947.01 was appropriately applied to Antonicci's conduct in this case.

¶17 *Constitutional Claims*. We now turn to the first of Antonicci's two constitutional arguments. Antonicci argues that the disorderly conduct statute is overbroad as applied because it infringes upon his constitutionally protected right

to travel. He maintains that to be constitutional the statute would need specific time, place or manner restrictions.

¶18 A statute or ordinance is overbroad when its language, given its normal meaning, is so sweeping that its sanctions may be applied to conduct which the state is not permitted to regulate. ***State v. Tronca***, 84 Wis. 2d 68, 89, 267 N.W.2d 216 (1978). However, there is a strong presumption that a legislative enactment is constitutional, and the party challenging the constitutionality of a statute must prove beyond a reasonable doubt that the statute is unconstitutional. ***Bachowski v. Salamone***, 139 Wis. 2d 397, 404, 407 N.W.2d 533 (1987). Whether a statute is unconstitutional as applied is a question of law that we review de novo. ***State v. Matthew A.B.***, 231 Wis. 2d 688, 709-10, 605 N.W.2d 598 (Ct. App. 1999).

¶19 We reject Antonicci's argument that because the disorderly conduct statute lacks specific time, place, and manner restrictions it sweeps in constitutionally protected conduct. In any overbreadth challenge to the constitutionality of a statute defining and prohibiting disorderly conduct, as to words spoken or conduct engaged in, the right to maintain the public peace must be considered along with the imperative to protect constitutionally assured personal freedoms. Here, the statute strikes the proper balance between the two. The language of the disorderly conduct statute is not so broad that its sanctions may apply to conduct protected by the constitutional right to travel. The mere "passive following" of another vehicle will not qualify for conviction. The statute does not proscribe activities intertwined with protected freedoms unless carried out in a manner which is violent, abusive, indecent, profane, boisterous or unreasonably loud, or conduct similar thereto, and under circumstances in which such conduct tends to cause or provoke a disturbance. *See* ***State v. Maker***, 48

Wis. 2d 612, 615-16, 180 N.W.2d 707 (1970). Prohibition of conduct which has this effect does not abridge constitutional liberty. ***State v. Zwicker***, 41 Wis. 2d 497, 509, 164 N.W.2d 512 (1969).

¶20 Furthermore, the application of the disorderly conduct statute to Antonicci's conduct did not abridge his constitutional right to travel. First, Antonicci does not have an absolute right to drive a car on the roads of Wisconsin; it is considered a privilege by the courts. *See* ***County of Fond Du Lac v. Derksen***, 2002 WI App 160, ¶7, 256 Wis. 2d 490, 647 N.W.2d 922, *review denied*, 2002 WI 121, 257 Wis. 2d 120, 653 N.W.2d 891 (Wis. Sept. 3, 2002) (No. 01-2870). Also, Antonicci's travel privileges in this instance were not suspended completely by the statute. He was free to ride a bus, walk, ride a bike or carpool to his destination on October 15, 2002. He was also free to drive his car wherever he wanted, he simply could not follow Firth.

¶21 Second, it is important to recognize that "victims also have a constitutional right to travel and that right includes the right to move freely about the sidewalks and streets of the community." ***Predick v. O'Connor***, 2003 WI App 46, ¶30, 260 Wis. 2d 323, 660 N.W.2d 1 (Anderson, J., concurring), *review denied*, 2003 WI 32, 260 Wis. 2d 753, 661 N.W.2d 101 (Wis. Apr. 22, 2003) (Nos. 02-0503, 02-0504); *cert. denied*, 124 S. Ct. 809 (U.S. Wis. Dec. 1, 2003) (No. 03-429). The victim's rights also include the right to privacy. ***Id.***, ¶31. Here, Antonicci's behavior clearly infringed on Firth's own constitutional rights to travel and to privacy. The application of the disorderly conduct statute to Antonicci's actions served to specifically, rightfully and definitively balance Antonicci's right to travel with Firth's right to travel, to move freely and to privacy. We, therefore, reject Antonicci's overbreadth argument.

¶22 Having rejected Antonicci's overbreadth claim, we turn to the second of Antonicci's constitutional arguments. Antonicci submits that the disorderly conduct statute is unconstitutionally vague as applied. He claims that the current harassment statutes, unlike the disorderly conduct statute, require a showing of intent to annoy or harass and are limited to particular types of communications. He reasons that because the disorderly conduct statute does not include such language, it cannot apply to the conduct at issue in this case without running into vagueness concerns. As we did in his overbreadth argument, we review his vagueness challenge de novo. *See* ***Matthew A.B.***, 231 Wis. 2d 688, 709-10.

¶23 We disagree with Antonicci's argument. Such vagueness concerns are not presented by the application of the disorderly conduct statute to Antonicci's conduct. Simply because a statute does not list out every specific instance how the statute may be violated does not mean that it is vague. Indeed, statutes are not required to do so. *See* ***State v. Courtney***, 74 Wis. 2d 705, 712, 247 N.W. 2d 714 (1976). Courts have held that "the great and varied number of offenses which come within the category of disorderly conduct defy precise definition in a statute." ***Zwicker***, 41 Wis. 2d 497, 508. Further, the statute does list six examples of conduct that do qualify, which can be used to determine what "otherwise disorderly" includes. WIS. STAT § 947.01. Antonicci thus had sufficient notice that his actions would be in violation of the disorderly conduct statute and his vagueness challenge is rejected.

CONCLUSION

¶24 In sum, we conclude that WIS. STAT. § 947.01 was properly applied to Antonicci's conduct. Further, any concerns with respect to overbreadth and

vagueness are without merit. Accordingly, we affirm the judgment of conviction and the order denying Antonicci's postconviction motion.

By the Court.—Judgment and order affirmed.

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