COURT OF APPEALS
DECISION
DATED AND FILED

November 4, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-1181-CR **Cir. Ct. No. 03CM001502**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES E. MILLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Dane County: DAVID T. FLANAGAN, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, J.[1] James E. Miller was found guilty by a jury of lewd and lascivious behavior in violation of WIS. STAT. § 944.20(1)(b). The trial court entered a judgment of conviction after denying Miller's postconviction

[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.

motions for a directed verdict and a judgment notwithstanding the verdict. Miller appeals the judgment of conviction and the orders denying his postconviction motions. Miller grounds his appeal on insufficiency of the evidence and error by the trial court in finding that § 944.20(1)(b) was not unconstitutionally broad and vague. We conclude the evidence was sufficient to support the jury's verdict against him; we further conclude the trial court did not err in its ruling on the constitutionality of § 944.20(1)(b). We affirm the judgment and orders.

FACTS

¶2 On Saturday, March 29, 2003, at approximately 11:15 a.m., City of Madison police officer Jason Sweeney was on patrol at Olin Park; Olin Park is a public park consisting of a boat launch, wooded conservatory and large shelter rented out for parties and other public events. Olin Park has two parking lots, a north lot used primarily for the boat launch, and a southern, smaller lot that connects to the conservatory. Testimony at trial established that there is a thoroughfare connecting the two parking lots, a "loop" which winds up and around the shelter, located at the top of a hill. A playground is near the shelter. The "loop" is, in essence, a circle in which you enter and exit from the same road; the road is one-way. This "loop" is the sole means of ingress and egress via land, is frequently traveled and is one in which the public parks their cars to view the state capitol and to use the playground.

¶3 While on patrol this particular Saturday, Sweeney observed numerous parked cars in the large turn area near the shelter. Sweeney testified that citizens and Madison park employees had complained about the regular occurrence of overt sexual activity in this area. Sweeney began monitoring these cars for any such activity.

¶4 Sweeney observed a 1989 Nissan Sentra parked on the side of the road, approximately 150-200 feet from the playground. The car was a small, two-door model sitting low to the ground; the car windows were not tinted. Upon approaching the vehicle on foot, Sweeney looked inside and observed a man, later identified as Miller, with his pant's zipper undone and his semi-erect penis sticking out being held by Miller's left hand. With his other hand, Miller was observed pouring mouthwash onto his penis and rubbing it around. At that time it was bright outside and Sweeney had no difficulties observing Miller's activities inside the car. Sweeney noted that if a family intended to use the playground, they would have to pass by Miller's car.

¶5 Miller was subsequently charged with lewd and lascivious behavior in violation of WIS. STAT. § 944.20(1). A jury found Miller guilty and the trial court denied Miller's motion for directed verdict. Miller then moved for judgment notwithstanding the verdict, which was also denied. Miller appeals.

DISCUSSION

¶6 WISCONSIN STAT. § 944.20 prohibits lewd and lascivious behavior and provides

> (1) Whoever does any of the following is guilty of a Class A misdemeanor:
>
> (a) Commits an indecent act of sexual gratification with another with knowledge that they are in the presence of others; or
>
> (b) Publicly and indecently exposes genitals or pubic area.
>
> (2) Subsection (1) does not apply to a mother's breast-feeding of her child.

Miller argues that the State failed to produce sufficient evidence supporting a finding of guilt beyond a reasonable doubt on elements one and two of § 944.20(1)(b)[2], that he exposed his genitals and that he did so publicly. In essence, Miller challenges the sufficiency of the evidence presented at trial on these two elements.

¶7 We will uphold a conviction unless the evidence viewed most favorably to the State and the conviction is so lacking in probative value that no reasonable jury could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Once the jury considers the evidence and draws the inferences necessary to support guilt, we cannot reject those inferences unless the evidence is incredible as a matter of law. ***Id.*** at 506-07. If any possibility exists that the jury could have drawn the appropriate inferences from the trial evidence to find guilt, we may not overturn the verdict. ***Id.*** at 507.

¶8 Miller does not dispute the facts. Rather, Miller argues that the undisputed facts fail to establish beyond a reasonable doubt he was guilty of lewd and lascivious behavior. We disagree.

¶9 We first note that Miller fails to apply the proper legal analysis for determining whether the evidence was sufficient to support the verdict. Instead,

[2] To establish lewd and lascivious behavior, the State must prove (1) that the defendant exposed, i.e. exhibited to the view of another person or persons, his or her genitals or pubic area; (2) that the defendant exposed his or her genitals or pubic area publicly, that is, not in a hidden manner but open to view; and (3) that the defendant exposed his or her genitals or pubic area indecently. "Publicly" means in such a place or manner that the person knows or has reason to know that the conduct is observable by or in the presence of other persons." WIS JI—CRIMINAL 1544.

Miller engages in an extended discussion of the facts in an attempt to show that under his view of what "public" and "exhibit" mean in the context of WIS. STAT. § 944.20(1)(b), it was unreasonable for the jury to find, and for the court to uphold, that Miller engaged in an indecent act in public by exhibiting his genitals. The proper approach to analyzing this case is to determine whether, based on WIS JI—CRIMINAL 1544, the evidence was sufficient to establish that Miller exhibited to another person his genitals publicly and that the exposure of his genitals was indecent. We do that here.

¶10 We first examine WIS JI—CRIMINAL 1544 to place our discussion in context. Lewd and lascivious behavior under WIS. STAT. § 944.20(1)(b) consists of three elements: (1) the defendant exposed his genitals, "expose" meaning to exhibit to the view of another person or persons; (2) the defendant exposed his genitals publicly, that is, not in a hidden manner, but open to view; "publicly" means in such a place or manner that the person knows or has reason to know that the conduct is observable by or in the presence of other persons; and (3) the defendant exposed his genitals indecently.

¶11 Miller argues the evidence of record cannot support a finding of guilt beyond a reasonable doubt because the evidence fails to establish he exposed his genitals to the public. More specifically, relying on two out-of-state cases, ***State v. Broad***, 61 Haw. 187, 600 P.2d 1379 (1979), and ***Commonwealth v. Ferguson***, 384 Mass. 13, 422 N.E.2d 1365 (1981), Miller contends that his parked vehicle, albeit in a public park in broad daylight, was a private place at the time of his indecent acts and arrest. Miller bases this argument on several factors: the only witness to the indecency was the arresting officer, who approached the vehicle for the singular purpose of viewing any possible indecency; the only way by which the officer could observe the indecent acts performed by Miller was by being in

close proximity to Miller's vehicle; and "there was reasonable doubt that the general public would be in such a position" to observe Miller while performing his indecent acts as the public walked past his parked vehicle.

¶12 Viewed most favorably to the State, we conclude the evidence is more than sufficient to support the jury's verdict in this case. Sweeney testified that as he approached the car, he had a clear view of Miller's penis; that he saw Miller's zipper was undone with his penis sticking out; that Miller's penis was semi-erect; that Sweeney had a clear view into the car; that the car had no tinted windows or other obstructions; that the car sat low to the ground; and that it was bright outside. Miller's car was parked on the side of a main, frequently traveled public road in a public park near a playground. The behavior at issue occurred in the middle of a public park at lunchtime on a sunny Saturday. The evidence supports the inference that Miller knew or had reason to know that by parking in a public parking lot of a public park and by exposing his genitals there, his genitals would be "open to view" to other persons. Indeed, that is precisely what occurred here.

¶13 Miller attempts to distinguish the facts of this case where the person observing the indecent exposure was a police officer looking through Miller's car window to determine whether illicit activity was in progress from the typical case of a pedestrian passerby who inadvertently observes a person sitting in his vehicle indecently exposing himself. Miller's distinction is without a difference. The police officer that observed Miller's actions is a member of the public and may also be a victim of a crime. Miller's arguments to the contrary are without merit. Indeed, Miller's car was parked in a location and at a time of day such that any citizen could have walked up to the window of his car and observed the same

conduct as observed by the police officer. The fact that the person observing the indecent conduct was a police officer is of no consequence.

¶14 Miller also argues that the exposure was concealed, that he did not intend for others to view him and that the exposure occurred at a time and place where he had a reasonable expectation of privacy. First of all, WIS. STAT. § 944.20(1)(b) does not require a finding of intent. Thus his argument that he did not intend for others to view him is irrelevant. In addition, the evidence of record supports the inference that the indecent exposure occurred at a time and place where Miller had no reasonable expectation of privacy. As discussed earlier, Miller was sitting in his car while parked in a public parking lot in a public park on a sunny, late winter day in a place where anyone attempting to access the park must pass his car. Although the evidence shows that no one else was walking around in the park when Miller committed the indecent acts, § 944.20(1)(b) simply requires the State to prove that Miller's genitals were exposed or exhibited to the view of one or more persons. In this case, that person was a police officer. We conclude the evidence was sufficient for the jury to find Miller guilty of lewd and lascivious behavior under § 944.20(1)(b).

¶15 Miller next argues that the trial court's decisions on the motion for a directed verdict and the motion for judgment notwithstanding the verdict were "both too broad and too vague to meet the standards of law." It is not clear whether Miller is arguing that the WIS. STAT. § 944.20 standards for the term "public" are vague and overbroad or if the trial court's decisions on his motions are vague and overbroad. In any event, we reject his arguments.

¶16 At first blush, Miller appears to argue that the trial court's decision itself was vague and overbroad. However, Miller provides no legal authority that

a trial court decision must be written with a certain degree of specificity in order to be valid. Certainly, a clear and understandable written decision by a trial court is desirable. However, we decline to address issues inadequately briefed or unsupported by legal authority. ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶17 We turn to the other possible argument, that WIS. STAT. § 944.20(1) is vague and overbroad as applied to Miller. Whether a statute is unconstitutionally vague is a question of law. ***State v. Pittman***, 174 Wis. 2d 255, 276, 496 N.W.2d 74 (1993). A vagueness challenge must satisfy a two-prong test:

> The first prong of the vagueness test is concerned with whether the statute sufficiently warns persons 'wishing to obey the law that [their] ... conduct comes near the proscribed area.' The second prong is concerned with whether those who must enforce and apply the law may do so without creating or applying their own standards.

Id. (citations omitted). A statute is not unconstitutionally vague "simply because in some particular instance some type of conduct may create a question about its impact under the statute." ***State v. Smith***, 215 Wis. 2d 84, 91-92, 572 N.W.2d 496 (Ct. App. 1997) (citation omitted). Furthermore, 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, 88-89, 267 N.W.2d 216 (1978). However, there is a strong presumption a legislative enactment is constitutional and the party challenging the constitutionality of a statute must establish beyond a reasonable doubt that the statute is unconstitutional. ***State v. Chvala,*** 2004 WI App 53, ¶9, 271 Wis. 2d 115, 678 N.W.2d 880.

¶18 Miller does not address either above-mentioned standard of review in his appellate brief, providing no discernable arguments concerning the supposed vagueness or overbreadth of WIS. STAT. § 944.20(1). Again, ordinarily we will not address issues inadequately briefed or unsupported by legal authority. *See* ***Pettit***, 171 Wis. 2d at 646. In addition, the Attorney General was not served with notice of Miller's constitutional objection to § 944.20(1). *See* WIS. STAT. § 806.04(11). Failure to serve the Attorney General with notice of allegations that a statute is unconstitutional deprives the court of jurisdiction to hear the matter. *See* ***Bollhoffer v. Wolke,*** 66 Wis. 2d 141, 144, 223 N.W.2d 902 (1974). We conclude we lack jurisdiction to address this issue.

CONCLUSION

¶19 The record contains sufficient evidence to support the jury's verdict that Miller was guilty beyond a reasonable doubt of lewd and lascivious behavior contrary to WIS. STAT. § 944.20(1). We therefore affirm the judgment and orders of the trial court.

By the Court.—Judgment and orders affirmed.

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