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DISTRICT I

January 4, 2018

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You are hereby notified that the Court has entered the following opinion and order:

2017AP294-CR	State of Wisconsin v. Darvon M. Gibson (L.C. # 2015CF1732)
2017AP295-CR	State of Wisconsin v. Darvon M. Gibson (L.C. # 2016CF718)

Before Kessler, Brash and Dugan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Darvon M. Gibson appeals judgments of conviction entered after a jury found him guilty of two counts of trafficking a child and one count of sexual intercourse with a child sixteen years old or older. He claims that the circuit court erred when it responded to a jury inquiry by supplying a dictionary definition for a word in the pattern jury instruction for trafficking a child.

Upon our review of the briefs and records, we conclude at conference that these matters are appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).¹ We summarily affirm.

In two consolidated circuit court cases, the State charged Gibson with two counts of trafficking a child and one count of sexual intercourse with a child sixteen years old or older. *See* WIS. STAT. §§ 948.051(1), 948.09. During the course of the jury trial, Gibson conceded that he had sexual intercourse with A.S., a seventeen-year old girl, and focused his defense on the allegation in each of the two cases that he trafficked a child.

The evidence presented to the jury reflected no dispute between the parties that in April 2015, Gibson, A.S., and J.B., a fourteen-year-old girl, all used a hotel room rented by Gibson. According to A.S., the three of them took suggestive photographs of the two girls and then uploaded the pictures to a dating website, listing Gibson's telephone number as the girls' contact number.² J.B. and A.S. both testified that while in the hotel room they had "dates" involving sexual activity with men for a price and that Gibson acted as the girls' "protector." A.S. said that Gibson held the money collected for the "dates" and that she never received any of it.

Gibson testified on his own behalf. He admitted that the cell phone number posted with the girls' pictures on the dating website was his, and he admitted that he took some of the photographs of J.B. and A.S. that were posted on the website. He maintained, however, that the

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² Other witnesses testified that the website A.S. described is frequently used by prostitutes to solicit business.

girls prostituted themselves without his knowledge, and he denied having any suspicion that they were engaged in prostitution until he was asked to leave the hotel based on the activity going on in his room.

The circuit court instructed the jury in conformity with WIS JI—CRIMINAL 2124 regarding the elements of trafficking a child in violation of WIS. STAT. § 948.051. In pertinent part, the circuit court told the jury that before it could convict Gibson of the offense, the State must prove beyond a reasonable doubt that he knowingly “provided [a child] for the purpose of commercial sex acts.” *See* WIS JI—CRIMINAL 2124.

On the third day of deliberations, the jury asked for the definition of the term “provided.” Neither WIS. STAT. § 948.051, nor WIS JI—CRIMINAL 2124, includes a definition of that term. Gibson urged the circuit court to respond to the jury’s inquiry solely by rereading the pattern jury instruction for trafficking a child. The circuit court noted, however, that the jurors “have been struggling with this for three days” and that some assistance seemed warranted beyond the instructions they had already received. After consulting online dictionaries and considering the arguments of counsel, the circuit court instructed the jury in writing that: “provide means to supply or make available.” The jury subsequently returned three guilty verdicts. Gibson appeals.

A circuit court has broad discretion in deciding how to instruct the jury and may exercise that discretion “regarding both the language and emphasis of the instruction.” *State v. Steffes*, 2013 WI 53 ¶22 n.7, 347 Wis. 2d 683, 832 N.W.2d 101. We will sustain a discretionary decision if the circuit court examined the relevant facts, applied a correct standard of law, and reached a conclusion that a reasonable judge could reach. *See State v. Edmunds*, 229 Wis. 2d 67, 74, 598

N.W.2d 290 (Ct. App. 1999). “Only if the jury instructions, as a whole, misled the jury or communicated an incorrect statement of law will we reverse and order a new trial.” *State v. Laxton*, 2002 WI 82, ¶29, 254 Wis. 2d 185, 647 N.W.2d 784.

In this case, Gibson’s sole claim is that the circuit court erroneously exercised its discretion by supplementing the pattern jury instruction with a dictionary definition of the word “provide.” When a relevant word is not statutorily defined, WIS. STAT. § 990.01(1) offers a general rule of construction. See *State v. Grady*, 175 Wis. 2d 553, 558, 499 N.W.2d 285 (Ct. App. 1993). Pursuant to § 990.01(1): “All words and phrases shall be construed according to common and approved usage; but technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning.” If a relevant word is not a technical term of art, a court may consult a non-specialized dictionary to determine the word’s common and approved usage. See *Grady*, 175 Wis. 2d at 558. Because many words have multiple meanings, “the applicable definition depends upon the context in which the word is used.” *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶49, 271 Wis. 2d 633, 681 N.W.2d 110.

Here, the context for the term at issue is WIS. STAT. § 948.051 and its pattern jury instruction, WIS JI—CRIMINAL 2124. Gibson acknowledges that in this context, “the word ‘provide’ is not a technical term.” Nonetheless, he argues that the circuit court erred by giving the jury a dictionary definition of the word.

We are satisfied that the dispute in this case is controlled by our decision in *Grady*. There, a jury was required to determine whether the defendant feloniously discharged a firearm into a building, and we upheld a circuit court’s decision granting the jury’s request for a definition of the nontechnical word “into.” See *id.*, 175 Wis. 2d at 556, 558-60. To determine

the propriety of the circuit court's response, we compared it to the entries for the word "into" found in a non-specialized dictionary. *See id.* at 558-59. Upon doing so, we concluded that the circuit court's response "conformed with the 'common approved usage' of the word 'into,' and was well within the ambit of [the circuit court's] discretion to instruct the jury on the applicable legal principles." *Id.* at 560. In light of Gibson's concession that "provide" is a nontechnical term, *Grady* teaches that the circuit court in this case acted within its discretion by turning to a non-specialized dictionary for a definition of the term. *See id.* at 558-59.

Further, the circuit court selected a definition that was neither misleading nor a misstatement of law. The circuit court first considered entries in Dictionary.com defining "provide" as "to make available, furnish, to supply or equip, to afford, or yield." *See Provide*, Dictionary.com, www.dictionary.com/browse/provide? (last visited Nov. 29, 2017). The circuit court next considered entries in Merriam-Webster.com, which defines the transitive verb "provide" as "to supply or make available (something wanted or needed)"; and "to make something available to."³ *See Provide*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/provide> (last visited Nov. 29, 2017). The latter source also offers examples of usage: "provided new uniforms for the band" and "provide the children with free balloons." *See id.* After considering the various dictionary entries, the circuit court gave the jury

³ Merriam-Webster.com also includes definitions of "provide" when used as an intransitive verb, that is, a verb that does not require a direct object to complete the verb's meaning. *See* H. RAMSEY FOWLER & JANE E. AARON, *THE LITTLE BROWN HANDBOOK* 177 (5th ed. 1992). The circuit court stated that the word "provide" was not used as an intransitive verb in the jury instruction and definitions for that use "would not make sense in this context."

a definition of the term “provide” found on Merriam-Webster.com.⁴ The definition conformed with the word’s common and approved usage as reflected in the dictionaries and was relevant to the facts that the jury was required to assess. Accordingly, the circuit court properly exercised its “broad discretion in instructing the jury.” See *Grady*, 175 Wis. 2d at 560 (citation omitted).

Gibson asserts that this “case is distinguishable from the facts in *Grady*” because here, unlike in *Grady*: (1) the jury “sent out the note on [the] third day of deliberations”⁵; and (2) the jury was required to resolve “a real factual question regarding whether or not Mr. Gibson was ‘providing’ the girls or they were engaging in prostitution themselves.” These are distinctions without a difference. Both cases involve a deliberating jury laboring over the meaning of a relevant, nontechnical word in the jury instructions. In *Grady*, we approved defining the word for the jury after concluding that the circuit court selected a definition that hewed to the word’s common meaning as reflected in a non-specialized dictionary. We see nothing meaningful that militates against applying the same reasoning here.

Upon the foregoing reasons,

IT IS ORDERED that the judgments are summarily affirmed.

⁴ Gibson does not suggest that Merriam-Webster.com is something other than a dictionary or that Merriam-Webster.com is an inappropriate resource for defining nontechnical terms. A search through Westlaw’s case law database reflects well over a thousand citations to Merriam-Webster.com by courts around the country, including multiple citations by Wisconsin courts. See, e.g., *Veto v. American Family Mut. Ins. Co.*, 2012 WI App 56, ¶15, 341 Wis. 2d 390, 815 N.W.2d 713 (recognizing the resource as one that offers “[s]tandard dictionary definitions”); *State v. Luedtke*, 2015 WI 42, ¶2 n.2, 362 Wis. 2d 1, 863 N.W.2d 592.

⁵ We observe that our decision in *State v. Grady*, 175 Wis. 2d 553, 499 N.W.2d 285 (Ct. App. 1993), does not reveal how long the jury deliberated before requesting a definition.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Acting Clerk of Court of Appeals