COURT OF APPEALS
DECISION
DATED AND FILED

October 7, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **WIS. STAT. § 808.10 and RULE 809.62.**

Appeal No. 2014AP612-CR

Cir. Ct. No. 2013CM311

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADAM J. GAJESKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: TAMMY JO HOCK, Judge. *Affirmed*.

¶1 CANE, THOMAS, Reserve Judge.[1] Adam Gajeski appeals a judgment of conviction for misdemeanor theft. He challenges the sufficiency of

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

the evidence to support his conviction, contending there is no evidence or reasonable inference to support a finding that he intended to permanently deprive his wife, Lydia Gajeski, of her cell phones.[2] The judgment is affirmed.

BACKGROUND

¶2 Adam Gajeski was charged with battery, disorderly conduct, misdemeanor intimidation of a victim, and misdemeanor theft stemming from an incident on December 14, 2012. The jury found Adam guilty of misdemeanor intimidation of a victim and misdemeanor theft; he was acquitted of battery and disorderly conduct. The sole issue raised on appeal is whether the evidence at trial was sufficient to convict Adam of misdemeanor theft.

¶3 The facts in this case are contested; however, challenges to the sufficiency of the evidence require that the evidence be considered in a light most favorable to the State. ***Genova v. State***, 91 Wis. 2d 595, 623, 283 N.W.2d 483 (Ct. App. 1979).

¶4 Lydia and Adam separated in October 2012 and were beginning the process of filing for divorce. On December 14, 2012, police responded to a call Lydia's sister made on Lydia's behalf. Lydia's sister told the police she received an email requesting that she call 911 because Lydia was involved in a disturbance and her husband had taken her phones. Once the police arrived at Lydia's home, Lydia gave a written statement.

¶5 According to this statement, Lydia and Adam attended one of their children's winter concerts together the morning of December 14. Adam was

[2] For clarity, Adam and Lydia are referred to by their first names.

planning to pick up Lydia later that day to attend another winter concert. Meanwhile, Lydia ran errands with a friend and brought their oldest child home from school sick. Lydia reported when she called Adam and told him their daughter had come home sick, Adam became upset and wanted to know who had driven Lydia to the school. Lydia hung up on Adam after he began swearing at her.

¶6 Adam drove to Lydia's house, where he confronted her in front of two of their children. He continued to swear while demanding to know who had been helping Lydia, and asking why he should have to help her if she had friends who would drive her to the school to pick up the children. Lydia attempted to call the police, and instructed her oldest child to do so several times during the argument. However, Adam backed Lydia into a corner, put her in a headlock, and threw her to the ground, taking her cell phone from her. Lydia had an emergency cell phone in the living room, which Adam also took. Lydia repeatedly asked for her phones, but Adam left, taking the phones with him.

¶7 After speaking with Lydia, officer Jacob Nowak called Adam. Adam admitted he took Lydia's phones. Nowak ordered Adam to bring the phones to the De Pere Police Department and specifically told Adam not to go to Lydia's house. Adam agreed to meet Nowak at the police station to turn over the phones. After waiting an hour and a half with no sign of Adam, Nowak called Adam and learned he delivered the phones to Lydia himself against Nowak's instructions. Nowak returned to Lydia's house; she confirmed that Adam had returned her phones.

¶8 By the time of the August 6, 2013 jury trial, Adam and Lydia had reconciled and were living together again. Lydia testified at trial, as did their

oldest daughter. Both recanted their versions of events as conveyed to officer Nowak. During her testimony, Lydia denied that Adam became aggressive, and stated she was extremely upset at the time and had "probably embellished" the incident. Lydia further testified that she was not on her medications in December of 2012, which caused her to have "almost hallucinations." The State read portions of Lydia's written statement, and confirmed that Lydia had given the statement and signed it on December 14, 2012. The State also elicited testimony from Lydia regarding her reconciliation with Adam.

¶9 During deliberations, the jury submitted a single question to the judge. The question read, "In the theft count, please define permanent possession of property." The court instructed the jury to use "common sense and the ordinary common usage of the words to determine the definition of those words."

DISCUSSION

¶10 A review of a sufficiency of the evidence claim is very narrow, and great deference is given to the trier of fact's conclusion. ***State v. Hayes***, 2004 WI 80, ¶57, 273 Wis. 2d 1, 681 N.W.2d 203. In determining whether there is sufficient evidence to support a conviction:

> [A]n appellate court may not substitute its 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).

¶11 The criminal complaint alleges Adam "did intentionally take and carry away the movable property of Lydia A Gajeski, without consent and with

intent to permanently deprive the owner of possession of the property, contrary to sec. 943.20(1)(a)&(3)(a) WIS. STAT." Adam concedes he intentionally took and carried away Lydia's property without her consent. However, he argues there is no evidence that he acted with the requisite intent to permanently deprive Lydia of possession of her cell phones.

¶12 On appeal, both parties cite the law of other jurisdictions. While an examination of case law from other jurisdictions can be helpful when there is little case law in our own state on an issue, it is not helpful here. For example, the parties use California law, where the intent to commit theft ostensibly mirrors our own, as that state requires the "intent to permanently deprive the owner of possession." ***People v. Avery***, 27 Cal. 4th 49, 54, 38 P.3d 1 (Cal. 2002). However, California case law has developed an alternative way to fulfill the intent element: by proving there was intent to deprive the owner of a major portion of the possession's value or enjoyment. *See* ***id.*** at 58. There is no case law to that effect in Wisconsin. Therefore, the parties' arguments regarding whether "[Adam] deprived [Lydia] of her phones at … the peak of their value" are unpersuasive.[3]

¶13 Despite the limited case law with facts similar to those in this case, there is Wisconsin case law that deconstructs the dispositive issue of intent. Determining intent is a notoriously difficult task. *See* ***Sartin v. State***, 44 Wis. 2d 138, 145, 170 N.W.2d 727 (1969) (quoting ***Strait v. State***, 41 Wis. 2d 552, 559, 164 N.W.2d 505 (1969) ("The difficulty with a case like the instant one … is that often there is no direct evidence going to the issue of intent…. 'If intent required

[3] The State also cites a case from Georgia. This too is unsuitable for comparison as Georgia's statute on theft does not require the state to prove intent to permanently deprive. *See* GA. CODE ANN. § 16-8-2.

definite and substantive proof, it would be almost impossible to convict, absent facts disclosing a culmination of the intent.'"). Our supreme court therefore instructed that "[t]he mind of an alleged offender … may be read from his acts, conduct, and inferences fairly deducible from all the circumstances." ***Id.***[4] Further, "[w]hen there are no circumstances to prevent or rebut the presumption, the law presumes that a reasonable person intends all of the natural and probable and usual consequences of his [or her] deliberate acts." ***Genova***, 91 Wis. 2d at 613-14, n.19.

¶14 Adam contends the record is devoid of any evidence from which the jury could form a reasonable inference that he had any intent other than to temporarily possess the phones in order to prevent Lydia from calling the police. He argues the temporary nature of his intent to possess is apparent from the brief amount of time that Lydia was without her phones; his admission to the police that he took the phones and his willingness to return them; and from the domestic nature of the dispute, which he alleges sets it apart from typical stranger-to-stranger theft scenarios.[5] Adam also cites cases that distinguish taking and *using*

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[4] The jury instructions on the theft count echoed this language: "You cannot look into a person's mind to find knowledge and intent. Knowledge and intent must be found, if found at all, from the Defendant's acts, words, and statements, if any, and from all of the facts and circumstances in this case bearing upon knowledge and intent."

[5] Adam argues,

> This was a dispute between spouses that tangentially involved marital property. There was no reason to believe Lydia would not get the phones back once things calmed down and, in fact, she did get them back within two to three hours. This was *not*, moreover, a burglary, robbery, or other stranger to stranger incident that, by its context alone, would allow a jury to reasonably infer an intent to permanently deprive.

Why Adam believes this scenario—a taking by one spouse from another—cannot establish, "by its context alone," intent to permanently deprive is a mystery to this court. Adam's argument seems to suggest Lydia lacked independent rights over her property.

another's property from taking with intent to permanently deprive, alleging his own case is more similar to the former category. *See* ***People v. Carr***, A134689, 2013 WL 5375653 (unpublished Cal. Ct. App. Sept. 26, 2013) (Court compared defendant's temporary taking of a cell phone for emergency use to "joyriding" and held it did not constitute theft). Adam himself points out that he never used Lydia's phones—they were not taken, as in ***Carr*** because he needed to temporarily use them in an emergency; rather, he took them with the specific purpose of depriving Lydia of her ability to use her cell phones. Thus, Adam's argument is unpersuasive.

¶15 The State counters Adam's arguments, responding that an examination of Adam's conduct and the circumstances surrounding the taking unquestionably provided the jury with enough evidence to infer Adam had the intent to permanently deprive Lydia of possession of her phones. As the State correctly points out, "[i]ntent is a state of mind existing at the time a person commits an offense." ***Sartin***, 44 Wis. 2d at 145. The State argues Adam's state of mind at the time of taking could be surmised from the sum of his actions: he physically took the phones from Lydia; he refused her requests to return them; he left with her property; and he kept her property until he was ordered to return it by the police. These facts provided an adequate basis for the jury's finding of Adam's intent at the time of taking to deprive Lydia of permanent possession of the phones.

¶16 This court will not substitute its judgment for the jury's, "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." ***Poellinger***, 153 Wis. 2d at 507. Here, it is undisputed Adam deliberately took Lydia's phones away from her and away from

her house. The consequences of taking another person's property are practically banal in their inevitability: the owner is going to call the police, submit a theft report, and charges will be filed. The domestic nature of this dispute does not change the facts, or the reasonable inferences arising from the facts. Adam and Lydia's relationship has no bearing on the jury's ability to find that Adam acted with intent in taking Lydia's phones, and that he did not intend to return them, but only did so under police direction. The jury could have reasonably inferred Adam intended to permanently deprive Lydia of her property at the time of the taking because of these deliberate actions, and thus concluded Adam "intend[ed] all of the natural and probable and usual consequences of his deliberate acts." *See* ***Genova***, 91 Wis. 2d at 613-14, n.19. In addition, the jury's question regarding the definition of permanent possession indicates its specific consideration of the very element disputed in this case.

¶17 Given the narrow standard of review, this court is satisfied the jury could form a reasonable inference that Adam intended to permanently deprive Lydia of possession of her cell phones. Thus, there was sufficient evidence to support Adam's theft conviction and the jury's verdict will not be disturbed.

By the Court.—Judgment affirmed.

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