COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1292-CR **Cir. Ct. No. 2012CM3316**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN D. HARRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARY E. TRIGGIANO and LINDSEY CANONIE GRADY, Judges. *Affirmed*.

¶1 CANE, J.[1] John D. Harris appeals a judgment of conviction for battery and disorderly conduct in a domestic violence case, and an order denying postconviction relief. Harris argues there is insufficient evidence to uphold the disorderly conduct conviction because the trial court used the wrong date in the jury instruction on disorderly conduct and there is no evidence that he ransacked the victim's apartment or held a knife to her throat, that a jury instruction error demands a new trial in the interest of justice, and that he deserves a ***Machner*** hearing on his claim that trial counsel was ineffective for not objecting to the erroneous jury instruction.[2] This court disagrees with Harris' arguments and affirms the judgment and order.

BACKGROUND

¶2 Harris was charged with misdemeanor battery, theft, disorderly conduct while armed, and two counts of intimidating a victim, all as a repeater. Harris was also charged in a separate complaint with two additional counts of intimidating a victim as a repeater based on two jail phone calls he made to the victim. All the counts were joined for trial. The jury convicted Harris on the two additional intimidation counts and he does not appeal those convictions. The charges stemmed from a domestic violence dispute with his girlfriend, Susan M. Harris lived with Susan M. in her apartment. On June 15, 2012, shortly after midnight, Susan M. called 911 after a fight with Harris. She told the dispatcher Harris had been beating her up, took all her money, that he trashed and destroyed

[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.

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

her home, threatened to kill her, almost killed her, and threatened to kill her if she reported this to police. Police responded to the call, but left after they determined Harris had left the premises. According to the criminal complaint, Susan M. told police that Harris had hit her and thrown an ashtray at her on June 10, 2012 but she did not report this to police because she did not think he would harm her further.

¶3 On June 16, 2012, after the police left and just before 3:00 a.m., Susan M. woke up when Harris put a knife to her throat and repeatedly threatened to kill her. He told her if she sent him to jail, he would have someone else kill her. Harris ordered her back to sleep. When Susan M. woke up in the morning, she called 911 at 7:50 a.m. saying she was in a domestic abuse situation the night before, and that if police did not hurry, Harris was going to kill her. The police arrived and Susan M. told police the same things that she had reported in the 911 calls. The police located and arrested Harris, who pled not guilty to all charges.

¶4 Harris' case was tried to a jury in October 2012. Police officer Robert Crawley testified that when he arrived at Susan M.'s apartment on June 16, the apartment looked ransacked and trashed. Susan M. told him that Harris had been fighting with her all night, and had put a knife to her throat and repeatedly threatened to kill her. Crawley testified that Susan M. was crying when they arrived, begging for help, and she was very upset and very fearful. Susan M. told Crawley that Harris would have someone else kill her if she reported the incident to police. Susan M. attempted to find the knife Harris had used but could not do so. Crawley noticed that Susan M. had bruises on her face and body. The State entered into evidence photos taken of Harris showing bruises on her face and arms.

¶5 The State also played both 911 tapes for the jury where Susan M.'s voice at times was trembling, she seemed to be emotional and crying. In addition, the State played the jail telephone conversations between Harris and Susan M. from June 22 and June 26. In those conversations, Harris is angry with Susan M. for putting him in jail, and references a letter where he told Susan M. what she needed to do to get the charges against him dismissed. Harris and Susan M. talked about how she would hide to avoid coming into court to testify against him, and that if she did not testify, the State would have to dismiss the charges and release him from jail. Throughout the calls, Harris yelled at her, swore at her, and called her names. She promised she would do as he instructed.

¶6 The State had a difficult time serving Susan M. with a subpoena. Eventually, they just slipped the subpoena under her apartment door. Susan M. showed up late to the trial after learning that the State was going forward with the case against Harris. At trial, her explanations about the night of the domestic incident had drastically changed. She testified that she had ransacked her own apartment because she was mad about Harris seeing other girls, she was mad because Harris wanted to move out, and because she was drunk. She said Harris did not cause her bruises, but that she got them a few days earlier when she confronted a man who was trying to break into her apartment building. She did not report this attempted burglary to police because she had "been robbed before, [and it] never did any good." When the prosecutor questioned Susan M. about what she told police and what she said on the 911 calls, her response was that she did not remember saying those things, she did not remember Harris having a knife, she did not remember him threatening to kill her, and that she may have made statements accusing Harris of these things "out of anger" but that she did not

remember him doing the things she told the police about. Susan M. admitted that it was her voice on the 911 calls and that she sounded upset.

¶7 The prosecutor also questioned Susan M. about two letters she wrote dated June 18, 2012, but that the prosecutor had just received on the day the trial started. One letter was addressed to Harris apologizing for lying to police and telling him not to worry because if Susan M. got subpoenaed, she would not show up for court. The second letter was addressed "to whom it may concern" and retracted all of her statements to police. Susan M. wrote in the second letter that all her claims of domestic violence on June 16, 2012 were false, that "Harris did not cause me any injuries at any time," and that he was never abusive in any way.

¶8 Harris elected not to testify. The trial court's jury instructions mistakenly listed "Saturday, June 15, 2012" as the date for the disorderly conduct count. The correct date, Saturday, June 16, 2012, was listed in the jury instructions for the theft, and one of the intimidation counts.[3] During deliberations, the jury sent a question to the trial court asking if on the disorderly conduct count, "is the correct day of the week for June 15, 2012, Saturday?" The trial court answered: "Please rely on your collective memories of the evidence produced at trial."

[3] The State charged the battery from June 10, 2012, not June 16, 2012. Harris does not challenge the battery conviction. Thus, we focus only on the disorderly conduct conviction.

There were four intimidation counts charged and all of them had the correct dates listed in the jury instructions: one on June 15, 2012, relating to Harris trying to dissuade Susan M. from calling the police before midnight; one on June 16, 2012 relating to Harris trying to dissuade Susan M. from calling the police after he put a knife to her throat just before 3:00 a.m. on June 16, 2012; one from the jail phone call on June 22, 2012; and one from the jail phone call on June 26, 2012.

¶9 The jury convicted Harris of battery and disorderly conduct, but did not find that he was armed. The jury found Harris not guilty of theft and two intimidation charges. Harris filed a postconviction motion asking for a new trial, but the trial court denied the motion without a hearing.

DISCUSSION

A. *Sufficiency of the Evidence*.

¶10 Harris argues the evidence is not sufficient to support the disorderly conduct conviction because the trial court used the incorrect date—"Saturday, June 15th, 2012"— instead of June 16th when it instructed the jury. The trial court found that the incorrect date in the instruction did not affect the jury's verdict. Harris also contends on appeal that there was not any evidence to show that Harris ransacked the apartment or that he held a knife to Susan M.'s throat.

¶11 In reviewing sufficiency of the evidence claims, we give great deference to the jury's conclusion. ***State v. Hayes***, 2004 WI 80, ¶57, 273 Wis. 2d 1, 681 N.W.2d 203. Our review is narrow: we may not substitute our 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." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). To prove disorderly conduct, the State must show: (1) that Harris engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct, and (2) Harris did so under circumstances in which that conduct tends to cause or provoke a disturbance. *See* ***State v. Schwebke***, 2002 WI 55, ¶24, 253 Wis. 2d 1, 644 N.W.2d 666.

1. Use of incorrect date.

¶12 This court determines that the trial court's use of "Saturday, June 15th, 2012" as the date of the disorderly conduct offense was an insignificant scrivener's error. First, June 15, 2012 was not a Saturday; rather, it was a Friday. Thus, clearly the 15 was a typographical error. Moreover, the trial court used the correct date (June 16th) for the disorderly conduct charge when it read the complaint to the jury during *voir dire*, and the trial court used the correct date (June 16th) in the jury instructions for the theft and intimidation charge from that date. Second, the jury caught and apparently resolved the discrepancy as evidenced by the question it submitted to the trial court during deliberations. By reaching a verdict convicting on the disorderly conduct, the jury, by reasonable inference, concluded that the 15th in the disorderly conduct instruction was a typographical error.

2. No evidence of ransacking or knife.

¶13 Harris contends there was no evidence produced at trial that he ransacked Susan M.'s apartment or held a knife to her throat. He bases this contention on the fact that Susan M. recanted these allegations at trial. Harris also apparently believes that these are the only facts that could support his disorderly conduct conviction. Harris is wrong.

¶14 Although Susan M. recanted her accusations against Harris, the jury was free to disregard her trial testimony and accept as true the statements she made to police on June 16, 2012. *See* ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985) (jury is arbiter of witnesses' credibility and resolves conflicts in the evidence; it may rely on either version of a witnesses' testimony when the witness makes contradictory statements). Moreover, the jury heard

testimony from officer Crawley about Susan M.'s statements. They heard Crawley describe the disarray of the apartment and that Susan M. was crying, begging for help, and very fearful. The jury also heard Susan M.'s 911 calls where she reported that Harris had trashed her apartment, had been beating her up, had threatened to kill her, and held a knife to her neck making threats. The jury also heard the jail house phone calls where Harris pressured Susan M. to not testify against him and to "hide" from the process servers. A reasonable jury could conclude that Susan M. recanted under pressure from Harris and decided that the recantation was not the truth.[4]

¶15 This court is satisfied that there was sufficient evidence to support Harris' disorderly conduct conviction and the jury's verdict will not be disturbed.

B. *Jury Instruction.*

¶16 Harris next asks this court to reverse his disorderly conduct conviction in the interest of justice under WIS. STAT. § 752.35 because the trial court erred in creating the disorderly conduct jury instruction. Specifically, he contends that the trial court erroneously added the words "indecent, profane, boisterous or unreasonably loud" without evidentiary support to do so; that the instruction's failure to define "otherwise disorderly conduct" was unconstitutionally vague under ***State v. Givens***, 28 Wis. 2d 109, 135 N.W.2d 780

[4] This court is not persuaded by Harris' argument that the State cannot use the same evidence, namely the jail phone calls, to support both the disorderly conduct charge and an intimidation of witness charge. Harris does not support this argument with any supporting authority and this court therefore rejects it. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980) (Arguments not supported by references to legal authority will not be considered.).

(1965); and the instruction used the incorrect date of June 15, 2012 instead of June 16, 2012.

¶17 The trial court rejected all three arguments, ruling that the jury instruction properly tracked the criminal complaint and the pattern jury instruction and any deviations were insignificant, the instruction was not unconstitutional, and the incorrect date did not affect the jury's verdict.

¶18 WISCONSIN STAT. § 752.35 permits this court to provide relief in the interest of justice if we are convinced "that the real controversy has not been fully tried." This court's power of discretionary reversal should only be exercised in exceptional cases. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). This court determines that Harris' case is not one of those exceptional cases.

¶19 Harris' first complaint is that the trial court created an erroneous jury instruction because it added the words "indecent, profane, boisterous or unreasonably loud" to part of the disorderly conduct instruction even though the complaint never mentioned this type of disorderly conduct and even though he claims there was no evidence to support it. A trial court has broad discretion with jury instructions. ***State v. Wolter***, 85 Wis. 2d 353, 369, 270 N.W.2d 230 (Ct. App. 1978). The jury instructions must "fully and fairly inform the jury of the rules of law applicable to the case" and be based on the evidence. ***State v. Dix***, 86 Wis. 2d 474, 486, 273 N.W.2d 250 (1979). This court will not order a new trial due to an erroneous instruction if the instruction was harmless—that is, it is clear beyond a reasonable doubt a rational jury would have convicted the defendant absent the error. ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189.

¶20 This court determines that the instruction the trial court gave was supported by the evidence and it was not prejudicial. In drafting the disorderly conduct instruction, the trial court included the various methods by which disorderly conduct can be committed:

> Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you, beyond a reasonable doubt, that the following two elements were present:
>
> First, the defendant engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct.
>
> Second, the conduct of the defendant under the circumstances as they then existed tended to cause or provoke a disturbance.

The evidence at trial and reasonable inferences from the evidence supported this jury instruction. Susan M. reported conduct supporting each method in her 911 calls and to the police who came to investigate. Both the 911 calls and the officer's testimony were entered into evidence. Further, even if the various methods had been omitted, and that instruction *only* said "the defendant engaged in *violent* conduct" this court concludes, Harris would still have been convicted. Accordingly, any error was harmless.

¶21 Harris' second complaint is that the jury instruction's use of "otherwise disorderly conduct" was unconstitutionally vague based on ***Givens***. This court disagrees. Harris misreads ***Givens***. In ***Givens***, the supreme court held the disorderly conduct statute's use of the phrase "otherwise disorderly conduct," without further definition, gave adequate notice and was not unconstitutionally vague. ***Id.***, 28 Wis. 2d at 115. ***Givens*** explained that the legislature used the phrase "otherwise disorderly conduct" as a catchall phrase to "mean conduct of a type not previously enumerated but similar thereto in having a tendency to disrupt

good order and to provoke a disturbance." ***Id.*** Accordingly, the trial court's use of "otherwise disorderly conduct" in Harris' jury instructions was not unconstitutionally vague.

¶22 Harris' last complaint about the substance of the jury instruction is that the trial court used the incorrect date—June 15, 2012 instead of June 16, 2012. As previously discussed in this opinion, this court determined that this date discrepancy was a scrivener's error, did not adversely affect the jury, and therefore cannot create an exceptional issue that would call for a discretionary reversal in this case.

C. *Ineffective Assistance*.

¶23 Harris' final contention is that the trial court erred when it denied his ineffective assistance claim without having a ***Machner*** hearing. Specifically, Harris argues he was denied effective assistance of counsel because his attorney did not object to the disorderly conduct jury instruction.

¶24 A postconviction court considering an ineffective assistance claim initially decides whether the defendant has made sufficient factual allegations to warrant a ***Machner*** hearing. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). To establish ineffective assistance, a defendant must show both that: (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The circuit court must hold an evidentiary hearing on an ineffective-assistance claim only if the defendant "'alleges sufficient material facts that, if true, would entitle the defendant to relief.'" ***State v. Love***, 2005 WI 116, ¶26, 284 Wis. 2d 111, 700 N.W.2d 62 (quoted source omitted). If the postconviction motion does not assert sufficient facts, or presents only conclusory allegations, or

if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may deny the claim without a hearing. ***Id.*** We review *de novo* whether a defendant is entitled to an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).

¶25 The jury instruction here fully and fairly advised the jury about the rules of law applicable to this case. It followed the pattern jury instruction, and although the language deviated slightly from the pattern instruction, any deviations were insignificant and did not affect the jury's decision on the disorderly conduct charge. Therefore, there was no reason for Harris' attorney to object to the jury instruction, and, as a result, the postconviction court did not err when it denied Harris' motion on this basis without a ***Machner*** hearing.

By the Court.—Judgment and order affirmed.

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