COURT OF APPEALS
DECISION
DATED AND FILED

June 18, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2881-CR **Cir. Ct. No. 2014CM1052**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAVARREN D. ETIENNE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: JOHN W. MARKSON, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Lavarren Etienne appeals the circuit court's judgment convicting him, after a jury trial, of misdemeanor bail jumping. The

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 2013-14 version.

conviction was based on evidence that Etienne violated a bond term that prohibited him from having contact with a woman referred to as P.J. in this opinion.

¶2 Etienne argues that the evidence was insufficient to support one of the elements of this bail-jumping crime, namely, that Etienne's failure to comply with the bond term was intentional. Etienne also argues that the conviction violates his right to due process because his contact with P.J. was accidental and unavoidable.

¶3 I conclude that the evidence was sufficient to support the intent element, and I reject Etienne's due process argument. The judgment is affirmed.

Sufficiency Of The Evidence

¶4 I discuss the evidence in more detail below, but start with the well-established test for sufficiency of the evidence:

> [I]n reviewing the sufficiency of the evidence to support a conviction, an 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. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citations omitted).

¶5 Here, the jury was instructed that, in order to find that the intent element was met, the jury had to find

> that the defendant intentionally failed to comply with the terms of the bond. This requires that the defendant knew of the terms of the bond and knew that his actions did not comply with those terms.

See WIS JI—CRIMINAL 1795; *see also* WIS. STAT. § 946.49(1)(a).

¶6 Etienne does not dispute that he knew that his bond terms prohibited contact with P.J. Rather, the question as Etienne frames it is whether the evidence was sufficient to show that Etienne's contact with P.J. was intentional on his part, rather than accidental or initiated by P.J., as Etienne contends. Etienne further contends that he tried to remove himself from the situation, but P.J. would not let him leave. Thus, Etienne argues, he did not intentionally have contact with P.J.

¶7 Etienne's argument is not persuasive. He merely attempts to demonstrate that the most reasonable view of the evidence is that contact was accidental or was initiated by P.J. However, regardless whether Etienne's view of the evidence is reasonable or even the most reasonable, his sufficiency of the evidence challenge fails if there is another reasonable view of the evidence that supports a finding of guilt. And, as we shall see, the evidence supports an inference that, regardless why or how the encounter began, Etienne willingly and intentionally continued to engage in contact with P.J. when he could have chosen to break off contact and leave the scene.

¶8 The most pertinent evidence comes from two witnesses: a police officer and Etienne.

¶9 The officer testified that, on the day in question, he received a dispatch about a report of a domestic dispute between two people fighting inside a car. When the officer arrived on the scene, he observed Etienne inside the car and P.J. outside the car. When the officer asked if there was any kind of disturbance

going on, Etienne indicated that someone may have heard a phone conversation P.J. was having and interpreted that as a disturbance.

¶10 Etienne testified that he was sitting inside the car near a residence, in which his sister stayed, when P.J. made contact with him. Etienne explained that P.J. knew where his sister stayed, was regularly attempting to have contact with him, and apparently found him at his sister's on the day in question. Etienne testified that he told P.J. about the no-contact provision, and that P.J. expressed disbelief and anger about it. Etienne's description of the verbal exchange he and P.J. had about the provision, along with the other evidence described, strongly suggests that the two had some discussion or argument about it. Etienne testified that P.J. was kicking the car and yelling at him before the officer arrived. Etienne asserted that he was "trying to walk away from [P.J.]" but that P.J. "wouldn't let [him] walk away." Etienne did not explain how he could have been in the car and trying to "walk" away from P.J. at the same time, nor did he explain what P.J. had done to prevent him from leaving.

¶11 Based on this testimony, the jury could reasonably infer that, regardless why or how the encounter began, Etienne willingly continued to engage in contact with P.J. when he could have chosen to break off contact and leave the scene. Given Etienne's testimony, a reasonable jury could have found that Etienne willingly allowed P.J. to get into the car he was in; Etienne and P.J. began arguing; P.J. eventually got out of the car; and Etienne intentionally remained in P.J.'s presence even after she got out of the car and began yelling at him and kicking the car.

¶12 Etienne argues that there can be no reasonable inference that he and P.J. were ever in the car together. Putting aside whether this in-the-car-together inference was necessary to support a finding of guilt, I disagree.

¶13 Etienne asserts that the testimony showed that a caller who reported the disturbance said that two people were fighting in a car and that a female was outside the car kicking it. Etienne asserts that it is "unclear" how the caller could have seen P.J. both in the car and outside the car kicking it. According to Etienne, the caller's report was contradictory and should not be credited. I disagree that the caller was inconsistent. The testimony that Etienne cites does not show that the person reporting the disturbance said that two people were in the car fighting and that a woman was outside the car kicking it *simultaneously*. Rather, as already indicated, there is a reasonable inference that Etienne and P.J. were at some point inside the car together and that P.J. subsequently got out of the car.

¶14 In a last sufficiency-of-the-evidence-related argument, Etienne asserts that there is not a reasonable inference that he was present to observe P.J.'s phone conversation, which the officer testified Etienne claimed may have been the reason for the disturbance complaint. Putting aside whether this present-for-the-phone-conversation inference was necessary for a guilt finding, Etienne is plainly wrong. Under the circumstances, the most obvious way that Etienne might have known about such a phone conversation was by being in P.J.'s presence to hear it.

Due Process

¶15 Etienne argues that his conviction violates his right to due process because his contact with P.J. was accidental and unavoidable. He points to several cases that appear to address accidental or unavoidable contact in other no-contact contexts. Assuming without deciding that this case law applies to a bond term like

Etienne's, there is no due process violation here. Etienne's due process argument assumes that his view of the evidence is true. However, I must view the evidence in a light most favorable to the jury's verdict. And, as demonstrated, the evidence supports a finding that Etienne had contact with P.J. that was not accidental and that was avoidable.

¶16 Etienne also appears to argue that his conviction should be overturned on due process grounds because his testimony shows that, to the extent he willingly engaged in contact with P.J., he was simply trying to inform her of the no-contact provision, thus showing his intent to comply with it. There are at least three problems with this argument. First, Etienne does not demonstrate why it might be permissible for him to voluntarily extend his contact with P.J. for the purpose of informing her of the no-contact provision. Second, Etienne once again relies on parts of his own testimony that the jury was entitled to disbelieve, even if the jury credited other parts of Etienne's testimony. *See* ***Nabbefeld v. State***, 83 Wis. 2d 515, 529, 266 N.W.2d 292 (1978) (when a witness's testimony contains inconsistent assertions, the jury "may choose to believe one assertion and disbelieve the other"). Third, as already indicated, the evidence plainly supports an inference that Etienne spent more time in contact with P.J. than necessary to inform her of the no-contact provision.

By the Court.—Judgment affirmed.

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