

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 24, 2010

A. John Voelker
Acting 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. 2010AP551-CR

Cir. Ct. No. 2009CM375

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KURT D. SCHMIDT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for St. Croix County:
HOWARD W. CAMERON, JR., Judge. *Affirmed.*

¶1 BRUNNER, J.¹ Kurt Schmidt appeals a judgment of conviction for disorderly conduct. Schmidt argues the conviction is not supported by sufficient

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

evidence. He also asserts the admission of digital copies of voice recordings left on his ex-wife's answering machine violated the best evidence rule. We affirm.

BACKGROUND

¶2 On May 1, 2009, Heather Landin, Schmidt's ex-wife of approximately two months, went to the library with her daughters. A few minutes after they returned home, Landin's oldest daughter ran outside, shaking and visibly upset after listening to voice messages on the home answering machine. Landin recognized Schmidt's voice on the messages.

¶3 In the first message, Schmidt spoke angrily about how his rights had been violated. He then spoke in a disconnected way about the state of the world, spirituality, God, and Landin's choices, at one point saying, "But I can tell you, and I can tell you with very [sic] strength and assurance, you better beware, because the times are at hand now, okay. They are. And you have to question your own personal assurance and insurance." Landin testified the message frightened her, and her daughters became upset and had to leave the room.

¶4 In the second message, Schmidt spoke in a female voice, identified himself as "Linda Longstaff," and then falsely told Landin her stepmother had died. Schmidt blamed Landin, stating, "Her illness has finally taken over and the plan that you had to dispose of her has (inaudible)." The third and final message was quickly cut off because the answering machine was full. Together, the messages lasted approximately sixteen minutes.

¶5 The messages exacerbated Landin's fear of her ex-husband. Before receiving the messages, Landin had boarded her windows with plywood and installed bolt locks on all access doors to prevent Schmidt from entering the house.

The day Schmidt left the messages, the divorce property settlement was finalized, with Schmidt receiving less than he requested. Landin subsequently called the police.

¶6 Deputy Michael Welch listened to the messages and captured them by holding a recorder close to the machine. He then produced a copy by burning the recording onto a compact disc, which was subsequently admitted without objection at Schmidt’s trial for disorderly conduct.

DISCUSSION

¶7 Schmidt first argues the evidence presented at trial was insufficient to convict him of disorderly conduct. On appeal, we may not reverse a conviction unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶8 The disorderly conduct statute criminalizes “violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance” WIS. STAT. § 947.01. The statute “proscribes conduct in terms of results which can reasonably be expected therefrom, rather than attempting to enumerate the limitless number of antisocial acts which a person could engage in that would menace, disrupt or destroy public order.” *State v. Zwicker*, 41 Wis. 2d 497, 508, 164 N.W.2d 512 (1969). The statute does not punish a person for conduct that might possibly offend some hypercritical individual, but proscribes substantial intrusions which offend “the normal sensibilities of average persons or

which constitute significantly abusive or disturbing demeanor in the eyes of reasonable persons.” *Id.*

¶9 Schmidt claims his conduct does not fall within the statute’s ambit for three reasons. First, he claims the messages were not the type that cause or provoke a disturbance. In *State v. Schwebke*, 2002 WI 55, ¶25, 253 Wis. 2d 1, 644 N.W.2d 666, a defendant who anonymously sent disturbing mailings to several people raised a similar argument, which our supreme court rejected. The court concluded the mailings “constituted conduct that not only caused disturbances to the lives of the recipients, but ... was of the type that would be disruptive to peace and good order in the community.” *Id.*, ¶32. The messages here were of a similar nature, badly frightening Landin and her children. Schmidt’s conduct also affected friends and relatives, as one daughter wanted to leave and had a friend pick her up. Landin’s father also spent the night at Landin’s house.

¶10 Schmidt next argues the evidence was insufficient because “the messages never threatened to disrupt the peace, order, or safety of the community.” Conduct that causes a purely private disturbance is nonetheless prohibited if there is some risk that the disturbance will spill over into the public. *Id.*, ¶31. Although directed solely at Landin, Schmidt’s messages caused fear in both Landin and her children. The messages included false statements about others, including allegations that Landin had caused her stepmother’s death. Further, the messages were antagonizing enough that Landin felt she needed to involve the police. Based on this evidence, a reasonable trier of fact could conclude Schmidt’s conduct caused, or created a risk of, a public disturbance.

¶11 Schmidt’s third and final sufficiency-of-the-evidence argument is that the messages would offend only a “hypercritical” individual described in *Zwicker*. Schmidt paints a portrait of Landin as paranoid and unreasonable, but the facts established at trial do not support this characterization. The obvious emotional turmoil of the divorce aside, there was no evidence Landin or her daughters were overly sensitive. Regardless, a reasonable person of ordinary temperament could view the messages as abusive, disturbing, and—given their length and tone—ultimately threatening.

¶12 Schmidt also argues admission of the recorded answering machine messages violated the best evidence rule, which requires the use of the original recording. *See* WIS. STAT. § 910.02. To raise a challenge under the best evidence rule, Schmidt must have preserved the issue for appeal. *See State v. McClanahan*, 54 Wis.2d 751, 755, 196 N.W.2d 700 (1972). Although Schmidt argues he properly preserved the issue by accusing Landin of planting Schmidt’s voice on the recording during cross-examination, Schmidt did not object to the recordings at trial. Consequently, the circuit court had no opportunity to consider Schmidt’s best-evidence claim, and we will not consider it for the first time on appeal. *See id.*

By the Court.—Judgment affirmed.

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

