COURT OF APPEALS
DECISION
DATED AND FILED

February 8, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP2374-CR **Cir. Ct. No. 2010CM2417**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES M. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.[1] James M. Johnson appeals from a judgment of conviction for violating a temporary restraining order (TRO). Johnson argues that

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

the evidence was insufficient to convict him, the complaint was frivolous and untimely, and the judge prejudiced the jury with his explanation of reasonable doubt. All of Johnson's arguments are without merit, and we thus affirm the conviction.

¶2 Jean Klajborn[2] obtained a TRO against Johnson, her former employee, due to his alleged harassment of her. Subsequently, Johnson left a message on Klajborn's work telephone, telling her that he had just received a citation for disorderly conduct[3] and asking her to call him and give him the phone number for the West Allis police department. When Klajborn heard the message, she called the police, and a complaint was filed for Violation of Temporary Restraining Order—Harassment, WIS. STAT. § 813.125(3) and (7). The jury convicted Johnson of violating the TRO.

¶3 Johnson lists five arguments on appeal, which address three issues. First, Johnson argues that the evidence was insufficient for the jury to convict him (arguments one and five). Second, Johnson argues that the complaint was "frivolous" and "late" (arguments two and three). Third, Johnson argues that the trial judge prejudiced the jury against Johnson during voir dire (argument four). We address each issue in turn.

[2] The complaint refers to Jean Klajbor. At the trial, the witness identified herself as Jean Klajborn.

[3] The citation alleged that Johnson left packages at the residence of Jean Klajborn.

Sufficiency of Evidence for Conviction

¶4 The jury's verdict will be upheld unless, viewing the evidence most favorably to the conviction, it is "inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt." ***State v. Allbaugh***, 148 Wis. 2d 807, 809, 436 N.W.2d 898 (Ct. App. 1989) (quoting ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982)).

¶5 Johnson argues that the evidence was insufficient to convict him because the voice mail message recording was incomplete, the voice mail message itself was not harassing or intimidating, and he did not realize that the voice mail message would violate the TRO. At trial, Johnson objected to the admission of the recording of the voice mail message. The recording lacked Klajborn's greeting, but Klajborn identified it as the message Johnson had left on her work phone. Furthermore, Deputy Pete Freyer testified that he had listened to the voice mail message on Klajborn's telephone when he responded to her call. Finally, Johnson himself admitted, in his own argument to the jury, that he had called Klajborn.

¶6 The admission of evidence is within the discretion of the trial court. ***Ansani v. Cascade Mountain, Inc.***, 223 Wis. 2d 39, 45, 588 N.W.2d 321 (Ct. App. 1998). The trial court's findings of facts are upheld unless clearly erroneous and not supported by the record. *See* ***Gerth v. Gerth***, 159 Wis. 2d 678, 682, 465 N.W.2d 507 (Ct. App. 1990). Furthermore, this court may assume that a missing finding was determined in favor of the trial court's determination. *See* ***Hintz v. Olinger***, 142 Wis. 2d 144, 149, 418 N.W.2d 1 (Ct. App. 1987).

¶7 The trial court admitted the recording of Johnson's voice mail message over Johnson's objection. Johnson argued that the recording was "clearly incomplete," with "too much fuzziness" and "clear void spots." However,

Klajborn confirmed that the recording was "the very same voice mail" as that left by Johnson on her work telephone, only lacking her voice mail greeting. The trial court received the recording into evidence, noting that Klajborn had testified that she could hear the voice mail and that it was accurate "other than the initial greeting being deleted." The trial court's admission of the tape implies a finding of adequate sound quality, and the record supports this finding.

¶8 Regarding the nature of the voice mail message and its violation of the TRO, the TRO itself states that Johnson is to "avoid contact that harasses or intimidates the petitioner," contact defined as including contact by phone. Klajborn testified, and the audio recording showed, that Johnson called her to ask for the phone number to the West Allis police department. Klajborn testified that she felt harassed by the message and that "[i]t just seemed like he wanted some reason to make contact, but there was no valid reason for it." Johnson argues that there is "no way" he would have left a voice mail message identifying himself and asking about the disorderly conduct case if he had known that such a message would violate the TRO. The jury heard Johnson's testimony, heard Klajborn's testimony, heard the message itself, and had before it instructions explaining what it means to violate a TRO. The jury found that Johnson had violated the TRO by leaving the voice mail message. We will not overturn the jury's finding when it had ample evidence before it to support its conclusion.

Sufficiency and Timeliness of Complaint

¶9 Johnson argues that the complaint was "frivolous" and that it was "late" because it was not filed until five months after he left the message. Johnson waived these objections by not raising them before or at trial. WIS. STAT. § 971.31(2). However, even if we look at the substance of these arguments, they

are without merit. By "frivolous," Johnson seems to mean that his own actions, or the allegations in the complaint, did not rise to a violation of the TRO. We have addressed that argument above in our discussion of the sufficiency of the evidence. Regarding the timeliness of the complaint, Johnson argues that if Klajborn "had a concern about the voice mail message, why did she wait five months to file the complaint?" In fact, Klajborn called the police the same day she heard the message. While the complaint was filed five months later, the statute of limitations for a misdemeanor such as the violation of a TRO is three years. WIS. STAT. § 939.74(1). The complaint was filed well within the statute of limitations.

Trial Court's Remarks to Jury During Voir Dire

¶10 Johnson argues that the trial court prejudiced the jury against him when, during voir dire, the trial court explained the reasonable doubt standard as follows:

> That burden [of proof] is upon the state and specifically on the shoulders of Assistant District Attorney Hirt. Mr. Johnson bears no burden of proof at all. He doesn't have to do anything. He doesn't have to ask any questions, he doesn't have to call any witnesses, whatever.
>
> Can all of you accept those principles that we have here in American law? Are any of you going to require Mr. Johnson to come forward and present any sort of defense? Only if you are convinced beyond a reasonable doubt, not just a—well, I think he is but beyond a reasonable doubt should you then render a verdict of guilty. If you're not convinced beyond a reasonable doubt, your verdict must be not guilty.

¶11 Johnson takes the statement "well, I think he is" out of context, implying that the trial court told the jury that the trial court thought Johnson was guilty. When read in context, it is clear that the trial court gave the potential jurors a thorough, unbiased explanation of the reasonable doubt standard. Far from

prejudicing the potential jurors against Johnson, the trial court emphasized to the panel that the state has a very heavy burden of proof.

By the Court.—Judgment affirmed.

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