COURT OF APPEALS
DECISION
DATED AND FILED

May 22, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2013AP2209-CR
2013AP2210-CR

Cir. Ct. Nos. 2011CF176
2011CF311

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL P. WORZALLA,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Portage County: JON M. COUNSELL, Judge. *Affirmed in part; reversed in part and causes remanded with directions*.

Before Lundsten, Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Daniel Worzalla appeals related judgments convicting him of defamation, stalking, and two counts of bail jumping, as well as an order denying his motion for postconviction relief. The charges were based

upon allegations that Worzalla had engaged in a campaign to discredit or harm the reputation of the woman who had served as the social worker in a child protective services (CHIPS) case opened during his divorce. Worzalla raises five issues on appeal, claiming that: (1) the defamation statute was unconstitutionally applied to him; (2) the stalking statute was unconstitutionally applied to him; (3) there was insufficient evidence to support the stalking charge; (4) the sentences imposed were unduly harsh; and (5) counsel provided ineffective assistance by failing to argue that Worzalla's actions were protected free speech.

¶2 As we will explain below, we conclude that the stalking statute was not unconstitutionally applied to Worzalla, and that the conviction on that count was supported by sufficient evidence. Therefore, counsel did not provide ineffective assistance with respect to the stalking count, which also formed the basis for the bail jumping charges. However, we accept the State's concession that the defamation count was unconstitutionally applied to Worzalla. Accordingly, we affirm the stalking and bail jumping convictions and reverse the defamation conviction. Because the circuit court imposed consecutive sentences in a global sentencing structure, we will remand for resentencing on all the remaining counts. *See* ***State v. Sherman***, 2008 WI App 57, ¶¶11-12, 310 Wis. 2d 248, 750 N.W.2d 500. It is therefore unnecessary to address Worzalla's sentence challenge on this appeal.

BACKGROUND

¶3 S.R. was assigned in 2008 to take over as the social worker for a divorce-related CHIPS case involving Worzalla's children. Over the following years, Worzalla had ongoing disagreements with S.R. on a variety of issues

pertaining to the children. Worzalla was particularly upset that S.R. recommended that the children be allowed to move out of state with their mother.

¶4 On June 15, 2011, Worzalla contacted the Wisconsin Rapids Police Department seeking to obtain any information they had about S.R. In response to an open records request, the police department provided Worzalla with copies of three police reports involving S.R., her ex-husband, and her teenage son—one classified as a "parent/child dispute;" one classified as a "telephone abuse-nuisance," and one classified as "welfare checks"—along with a "contact history report" that listed two traffic citations and a number of other incidents in which S.R. was a victim or witness.

¶5 On June 21, 2011, Worzalla hand-delivered envelopes containing copies of S.R.'s police contact sheet and the police reports involving her family to several of S.R.'s coworkers and supervisors at the Portage County Health and Human Services Department. Worzalla also attempted to deliver the same materials to the judge handling his divorce case, but court personnel refused to accept the submission because it was an ex parte communication.

¶6 On June 23, 2011, S.R. petitioned for a harassment injunction and obtained a temporary restraining order (TRO) that directed Worzalla to "immediately surrender all personal information regarding the petitioner or her child that is in his possession and cease any further distribution of that personal information." S.R. testified at the injunction hearing that she was aware that Worzalla had made personal attacks on other community services providers in the past, and said that it "was devastating to learn that information regarding [her] minor child was distributed in an effort to personally attack [her own] reputation." She described Worzalla's conduct as "extremely upsetting" and "intimidating" and

said she had been emotionally distraught since the incident. The court subsequently issued a four-year injunction granting the same relief as in the TRO.

¶7 On June 29, 2011, Worzalla spoke with a regional administrator for the Wisconsin Department of Children and Families who had oversight authority over Portage County's statutory compliance for several child welfare programs. Worzalla told the administrator that he wanted S.R. to lose her license, and said that he had medical records and information about S.R. that he would like to fax to the administrator. The administrator explained that her office did not handle personnel matters, and advised Worzalla about the grievance procedure in Portage County; Worzalla never followed through on that process.

¶8 Based upon Worzalla's distribution of the police reports involving S.R.'s family to her coworkers, and his attempted distribution of S.R.'s medical records to a supervisor, the State on July 7, 2011, filed the stalking and defamation case that is the primary subject of this appeal. A condition of Worzalla's bond was that he have no direct or indirect contact with S.R., her residence, or her place of employment, unless he had a scheduled appointment.

¶9 On October 6, 2011, Worzalla gained entrance to a secured area of the human services offices where S.R. worked, by posing as the significant other of a cousin who had an appointment, when he himself did not have an appointment. Staff called the police, who promptly arrested Worzalla. As a result of this incident, the State filed the bail jumping charges that are now before us as a companion case.

¶10 On May 15, 2012, Worzalla faxed to S.R. at her place of employment a copy of a letter that he contemporaneously sent to the newly assigned judge in the harassment injunction case. The letter contained numerous

false allegations,[1] including that S.R. had slapped one of Worzalla's children; that S.R. had exposed herself to Worzalla in the presence of one of the children; that S.R. drank a bottle of vodka nearly every day, came to work with alcohol on her breath, and had been in a drug and alcohol rehab facility three times; and that S.R. had attempted to run her ex-husband over with a car. Based upon this fax, as well as Worzalla's appearance at S.R.'s place of employment, the State on June 8, 2012, filed an amended information expanding the timeframe for the stalking charge from June 14, 2011, to May 15, 2012.

DISCUSSION

¶11 The State concedes that Worzalla's defamation conviction must be vacated. The State explains that, under the rationale set forth in ***Garrison v. Louisiana***, 379 U.S. 64 (1964), a conviction for defamation here required proof that Worzalla acted with actual malice. According to the State, the jury was not given an actual malice instruction and the evidence presented at trial does not support an actual malice finding. This concession is appropriate and, therefore, we vacate Worzalla's defamation conviction.

¶12 As we noted above, the State's concession means that the only two issues we must resolve are whether there was sufficient evidence to support the stalking conviction and whether the stalking statute was unconstitutionally applied to Worzalla.

[1] Although we are overturning the defamation conviction on constitutional grounds, it is plain from the jury's verdicts that it accepted as credible S.R.'s testimony that none of the allegations in the fax are true.

Sufficiency of the Evidence

¶13 Generally, we review the sufficiency of the evidence by comparison to the instructions actually given to the jury, so long as those instructions conform to the statutory requirements of the charged offense. ***State v. Beamon***, 2013 WI 47, ¶22, 347 Wis. 2d 559, 830 N.W.2d 681. In doing so, "we give great deference to the trier-of-fact and do not substitute our judgment unless the evidence, viewed most favorably to the verdict, is so lacking in probative value and force that no reasonable fact-finder could have found guilt beyond a reasonable doubt***." State v. Routon***, 2007 WI App 178, ¶17, 304 Wis. 2d 480, 736 N.W.2d 530.

¶14 Here, the circuit court properly instructed the jury that, in order to convict Worzalla of stalking, the State needed to prove beyond a reasonable doubt that, between June 14, 2011, and May 15, 2012:[2] (1) Worzalla intentionally engaged in a course of conduct directed at S.R.; (2) the course of conduct would cause a reasonable person under the same circumstances to suffer serious emotional distress; (3) S.R. did, in fact, suffer serious emotional distress; and (4) Worzalla knew or should have known that at least one of his actions would cause S.R. to suffer serious emotional distress. *See* WIS. STAT. § 940.32(2) (2011-12)[3] and WIS JI—CRIMINAL 1284. The court further instructed the jury that a "course

[2] Worzalla argues for the first time in his reply brief that some of the evidence presented, though within the dates in the jury instruction, was outside of the charging window. He bases that claim on an assertion made in the fact section of his brief-in-chief that the State never filed an amended information with respect to the stalking count. That assertion appears to be contrary to the record, which contains a filed-stamped copy of a second amended information. In any event, because Worzalla never challenged the jury instruction setting forth the charging window, and did not timely or adequately develop his challenge to the charging window before this court, we deem any argument that some of the evidence was outside the charging window to have been forfeited.

[3] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

of conduct" means a series of two or more acts showing a continuity of purpose, specifically defined to include such things as: appearing at the victim's workplace or contacting the victim's employer or coworkers; sending material by any means to the victim; sending material by any means to an employer or coworker of the victim for the purpose of disseminating information about the victim; or delivering an object to an employer or coworker of the victim with the intent that the object be delivered to the victim; and that suffering "serious emotional distress" means to feel "terrified, intimidated, threatened, harassed, or tormented." *See* WIS. STAT. §§ 940.32(1)(a)3. and 7. and 940.32(1)(d) and WIS JI—CRIMINAL 1284.

¶15 As to the first element, the State presented evidence of four separate acts collectively satisfying the definition of a "course of conduct" directed at S.R.: (1) disseminating information about S.R. contained in police records to her coworkers; (2) attempting to disseminate additional information about S.R. contained in medical records to a regional administrator with statutory oversight over her employer, with the expressed intention of having S.R.'s license revoked; (3) appearing at the victim's place of employment without any legitimate purpose, in violation of bond conditions; and (4) faxing a letter containing false and derogatory allegations about the victim to the victim's place of employment, with the intention that the letter be delivered to the victim.

¶16 As to the second element, Worzalla argues that "the distribution of publicly available materials, in conjunction with a legal case … [to] a party to that case" would not cause a reasonable person under the same circumstances to suffer serious emotional distress. That argument, however, mischaracterizes both the nature of the information being disseminated and the circumstances under which it was being disseminated.

¶17 First, neither S.R. nor her coworkers were parties to Worzalla's divorce case—which was the only relevant case pending at the time the course of conduct began. Rather, S.R. was a witness in the divorce case by virtue of her job as a social worker. Second, not all of the information disseminated falls into the category of "publicly available." For instance, the false allegations contained in the faxed letter were not shown to be based upon any public documents, and Worzalla has provided no explanation as to how he obtained the copies of S.R.'s presumably confidential medical records that he attempted to send to the regional administrator. Third, a great deal of the publicly available information about S.R. and her family that Worzalla disseminated or attempted to disseminate had no bearing whatsoever on his divorce case. This included a police report that focused solely on S.R.'s son, as well as the contact sheet listing multiple cases in which S.R. was a victim or witness. Fourth, not all of Worzalla's conduct was limited to disseminating information; he also showed up at S.R.'s place of employment, where he lied to get past security.

¶18 In sum, while Worzalla may have been motivated to engage in his course of conduct based upon things that happened in the divorce case, it does not follow that his actions were taken "in conjunction with" that case. Even if some of the information in the police reports might have had some limited impeachment value for the divorce case, Worzalla had no upcoming proceedings at which such information could have been presented in court; he did not submit the materials in any formal grievance procedure; and sending the materials to S.R.'s coworkers served no legitimate purpose. Given the personal nature of the materials being distributed and the fact that some of them targeted S.R.'s family member, the manner in which the materials were distributed to S.R.'s coworkers and supervisors, the alarming nature of the false allegations that Worzalla included in

some of the materials, the intimidating effect of showing up at S.R.'s place of employment in violation of bond conditions while a harassment injunction was already in place, and S.R.'s own awareness of retaliatory actions that Worzalla had taken against other public service providers in positions similar to hers, a reasonable person in S.R.'s position would be justified in believing that Worzalla was harassing her because he was angry about the adverse positions she had taken in the CHIPS case.

¶19 As to the third element, two of S.R.'s supervisors observed that S.R. had "tears in her eyes," and was "shaking," "visibly upset," "shaken or stricken," and "very agitated," after learning about the materials that had been sent to her coworkers, and was "particularly emotional" about the fact that some of the documents involved private issues concerning her son. S.R. herself testified that she was "very much" upset by the materials sent to her coworkers, and further upset by Worzalla's subsequent appearance at her office and the faxed letter. Contrary to Worzalla's apparent belief, it was not necessary to show that S.R. was in fear for her physical safety in order to prove that she felt harassed or tormented to the point of serious emotional distress.

¶20 Finally, as to the fourth element, S.R.'s testimony at the hearing on the harassment injunction and the issuance of a TRO prohibiting him from disseminating personal information about S.R., were certainly sufficient to put Worzalla on notice that faxing additional allegations about S.R. to her place of employment would cause S.R. to suffer serious emotional distress. Thus, the evidence presented was sufficient for a jury to find beyond a reasonable doubt that all four elements of stalking had been proved.

Constitutional Challenge to the Stalking Conviction

¶21 Worzalla contends that the stalking statute is "unconstitutionally overbroad as applied to [him]." This phrasing is confusing. Although some cases use "overbroad as applied" language, a closer look at such cases reveals that, if they go on to address the merits, they address either an allegation of facial unconstitutionality based on overbreadth or an allegation that a statute is unconstitutional as applied to a particular party, or both of these different issues. *See e.g.*, ***State v. Johnson***, 108 Wis. 2d 703, 710-11, 324 N.W.2d 447 (Ct. App. 1982) (treating an "overbroad as applied" challenge as an unconstitutional-as-applied issue). Judge, now Justice, Sonia Sotomayor, then sitting on the Second Circuit Court of Appeals, explained that all overbreadth challenges are facial challenges:

> A party alleging overbreadth claims that although a statute did not violate his or her First Amendment rights, it would violate the First Amendment rights of hypothetical third parties if applied to them. *All overbreadth challenges are facial challenges*, because an overbreadth challenge by its nature assumes that the measure is constitutional as applied to the party before the court.

Farrell v. Burke, 449 F.3d 470, 498 (2d Cir. 2006) (citations omitted; emphasis added). It appears to us that "overbroad as applied" is a misnomer.

¶22 Here, it is clear that Worzalla means to argue that the stalking statute was unconstitutionally applied to him. Although he cites overbreadth case law, his more specific argument is that his particular actions were protected exercises of his right to free speech. The State similarly reads Worzalla's argument as an "as applied" challenge. Having clarified the nature of Worzalla's general constitutional argument, we reject his two supporting arguments.

¶23 Worzalla's first as-applied argument depends on his benign spin on the evidence. He asserts that he merely (1) made the statement that he wanted to see S.R. professionally disciplined, (2) disseminated public information, and (3) appeared at a public building where he had an appointment. These activities, according to Worzalla, are all protected by the First Amendment. This argument, however, is not persuasive because it is based on an incomplete summary that does not include Worzalla's far more menacing actions. Worzalla makes no attempt to compare his actual activities, in their full context, with applicable free speech standards.

¶24 Worzalla's second argument is that the stalking statute "was meant to regulate activity that includes actual threats to physical safety," and that his conduct does not meet this standard. For support, Worzalla points to cases in which the alleged conduct at issue involved physical threats. For example, he points to ***State v. Hemmingway***, 2012 WI App 133, 345 Wis. 2d 297, 825 N.W.2d 303 and ***State v. Ruesch***, 214 Wis. 2d 548, 571 N.W.2d 898 (Ct. App. 1997).

¶25 We first note that this second supporting argument speaks in terms of the conduct intended to be covered *by the stalking statute*, not in terms of whether Worzalla's alleged conduct is constitutionally protected. Only the latter is an unconstitutional-as-applied argument. Thus, we could stop here. However, we will assume that Worzalla means to argue that a physical threat is constitutionally required in the context of this case. If this is what Worzalla means to argue, the cases on which he relies do not support the proposition.

¶26 Assuming without deciding that the behavior in ***Hemmingway*** and ***Ruesch***, and other cases that Worzalla cites, constitute physical threats that are meaningfully different from Worzalla's harassing behavior, these cases do not

show that Worzalla's behavior fails to meet an applicable constitutional standard. At best, they show that Worzalla's behavior was different from the behavior at issue in those cases. This is not nearly enough to demonstrate that the stalking statute was unconstitutionally applied to Worzalla.

¶27 Before concluding, we note that the State contends we must reject Worzalla's as-applied challenge under ***Hemmingway***. In ***Hemmingway***, we addressed and rejected the defendant's argument that the stalking statute is facially unconstitutional because it is overbroad under the First Amendment. *See* ***Hemmingway***, 345 Wis. 2d 297, ¶¶1, 18. We decline to decide whether ***Hemmingway***'s overbreadth analysis requires rejection of Worzalla's as-applied challenge for two reasons. First, as we have demonstrated, Worzalla's as-applied challenge is easily rejected on other grounds. Second, we question whether ***Hemmingway*** must be read as broadly as the State contends it should be. Facial constitutionality was the issue in ***Hemmingway*** and, obviously, a statute that is facially constitutional may be applied unconstitutionally. Given this fact, it is not apparent why, if the State at some future date attempts to use the stalking statute to punish protected First Amendment activity, ***Hemmingway*** should or could prevent an as-applied challenge.

¶28 In conclusion, we affirm in part, reverse in part, and remand with directions to amend the judgment to vacate the defamation conviction and the sentence, and further direct that Worzalla be resentenced on the convictions we affirm.

By the Court.—Judgments and order affirmed in part; reversed in part and causes remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.