COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2551-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS L. FARR,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: WILLIAM D. JOHNSTON, Judge. *Affirmed.*

Before Eich, Vergeront and Roggensack, JJ.

PER CURIAM. Dennis L. Farr appeals from a judgment convicting him of two counts of extortion, using a dangerous weapon, contrary to §§ 943.30(1) and 939.63, STATS. In an opening brief filed by his attorney, Farr argues: (1) that his prosecution was barred by the constitutional prohibition against double jeopardy; (2) that reversal is warranted because of prosecutorial

vindictiveness and retaliatory prosecution; (3) that the evidence was insufficient to convict; (4) that his actions leading to the filing of the charges were privileged; and (5) that the trial court erroneously instructed the jury with respect to the weapons enhancer. We reject the arguments. We granted Farr's request to disregard his counsel's reply brief and to permit him to file his own. In that brief, in addition to rearguing several points in his counsel's brief, he attempts to raise several "new" arguments. We reject these arguments as well, and affirm the judgment.

The basic facts are not in dispute. In 1994, two Madison Gas and Electric workers went to Farr's home to disconnect his electrical service for non-payment. When their knock on the door went unanswered, they began work. Farr then came out of the house, carrying a rifle, and said to the workers: "If I were you, I would hook that back up." They did so and left immediately.

Shortly after this incident, an emergency detention petition was filed by Dane County. The matter went to trial and the petition was eventually dismissed after a jury verdict in Farr's favor. This prosecution was then commenced. The case went to trial in early 1995, resulting in a hung-jury mistrial. Farr was retried later that year, resulting in the convictions which he now appeals.

Double Jeopardy

Farr argues first that he has been subjected to double jeopardy because he has been twice prosecuted for the same underlying matter. Specifically, he claims that the favorable verdict in the involuntary commitment proceedings should have precluded further criminal prosecution.

Double jeopardy does not preclude the commencement of both civil and criminal proceedings arising from the same underlying matter. ***State v. Thierfelder***, 174 Wis.2d 213, 220-21, 224, 495 N.W.2d 669, 673 (1993). Mental commitment proceedings are civil, even when raised in the context of associated behavior alleged to be criminal. *See* ***State v. Carpenter***, 197 Wis.2d 252, 541 N.W.2d 105 (1995) (civil commitment proceedings for sexually predatory behavior following incarceration for same matter do not violate double jeopardy). We reject Farr's double-jeopardy argument.[1]

Prosecutorial Vindictiveness

Farr, pointing to the fact that, in addition to the commitment petition, the State filed, and then withdrew, a misdemeanor disorderly conduct charge prior to charging him with the instant felonies, argues that, when all this is considered along with his re-trial after the first hung jury, it is apparent that he was subjected to "serial prosecutions," which establish motives of retaliation and vindictiveness on the part of the prosecutor.

Defenses and objections based on alleged defects in the institution of criminal proceedings must be raised prior to trial or are deemed waived, ***Lampkins v. State***, 51 Wis.2d 564, 570, 187 N.W.2d 164, 167 (1971); and it has been held that a claim of prosecutorial misconduct alleges such a defect. ***United***

[1] Farr also argues double jeopardy arises from being charged with two counts of extortion with the weapons enhancer, one count for each MG&E employee. Specifically, he argues that he only spoke with one worker, and that the other worker was a mere bystander who remained unaffected by his actions. However, both workers were forced by his actions to remain on the scene in order to effectuate his directive to "hook that back up." As a result, both workers were affected by Farr's actions and the law is clear that there may be as many offenses charged as there are victims affected. ***State v. Rabe***, 96 Wis.2d 48, 66-69, 291 N.W.2d 809, 818 (1980).

States v. Nunez-Rios, 622 F.2d 1093, 1098-99 (2d Cir. 1980). Farr has waived the objection.[2]

Sufficiency of the Evidence

The core of Farr's appeal is that his actions and statements cannot sustain the charges brought. Section 943.30(1), STATS., makes it a felony to "either verbally or by any written or printed communication, maliciously threaten[] to … threaten[] or commit[] any injury to [another] person … with intent to compel the person … to do any act against the person's will…." Farr argues that he never "verbally" threatened either of the workers, and thus the evidence was insufficient to convict.

The test for overturning a jury's verdict is well established.

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the [jury] unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that no [jury], acting reasonably, could have found guilt beyond a

[2] On the merits, we agree with the State that Farr has not established prosecutorial vindictiveness. Farr suggests, for example, that dismissal of the disorderly conduct charge, and the filing of the felony charges after dismissal of the commitment proceedings, shows that, in filing the felony charges, the prosecutor was retaliating against Farr for prevailing in the commitment proceedings. The State points out, however, that there is no evidence that the assistant district attorney who made the final charging decision was aware of any prior civil commitment proceedings. Indeed, commitment proceedings are commenced by the county corporation counsel, not the district attorney's office. And, as we have noted above, successive civil and criminal proceedings arising from related incidents do not, by themselves, raise any presumption of vindictiveness. As for the State's re-filing the charges after the hung-jury mistrial, this is a common practice which is permitted by law. *See* ***State v. Kendall*****,** 94 Wis.2d 63, 71-72, 287 N.W.2d 758, 763 (1980); ***Wheeler v. State***, 87 Wis.2d 626, 631-33, 275 N.W.2d 651, 654 (1979). Lacking the benefit of any presumption of vindictiveness—which can arise in cases where the evidence shows a "reasonable likelihood of vindictiveness," *see* ***United States v. Goodwin***, 457 U.S. 368, 373, 376 n.8 (1982)—Farr retains the burden to establish actual vindictiveness; and he has made no effort to show that the assistant district attorney who charged him with extortion was motivated by any desire to punish or retaliate against him.

> reasonable doubt. If any possibility exists that the [jury] 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 [jury] should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990).

Farr begins his argument by pointing to language in ***State v. Dauer***, 174 Wis.2d 418, 431, 497 N.W.2d 766, 771 (Ct. App. 1993), where, in concluding that extortion was not a lesser-included offense of robbery, we made the following comment: "[W]e cannot agree that extortion includes nonverbal threats." And he says that because the actual words he spoke to the MG&E workers—"If I were you, I would hook that back up"—were not themselves threatening, his conviction cannot stand.

We disagree. We think our statement in ***Dauer*** must necessarily be confined to the facts of that case, and the context in which it was made. Dauer was convicted of armed robbery and extortion arising out of the same facts: after accusing the victim of taking cocaine from him a few days earlier without paying for it, Dauer told the victim that the man who supposedly supplied the drug to Dauer wanted his money, and if the victim did not come up with it, the supplier, who Dauer said was waiting in a car outside the house, would "shoot his ass." ***Id***. at 424, 497 N.W.2d at 768. Dauer argued on appeal that the convictions were multiplicitous and thus violated the double-jeopardy clause of the constitution. Considering the "elements-only" portion of the two-part double-jeopardy test, we concluded that, because extortion requires proof of a fact robbery does not—a verbal, written or printed threat—the former was not a lesser-included offense of the latter. In so holding, we made the statement upon which Farr relies in this case.

We disagree that ***Dauer*** compels reversal of Farr's conviction. We are not here, as we were in ***Dauer***, undertaking a pure statutory comparison, based solely on the wording of the laws under consideration. The "elements-only" analysis we were undertaking in that case operates in a factual vacuum. All we do is parse the language of the statutes; "the … facts of a given defendant's crime are irrelevant." ***Id***. at 428, 497 N.W.2d at 769. In this case, we are doing just the opposite: we are considering all of the relevant facts surrounding the particular incident, as proved at trial, to determine whether they are sufficient to support the jury's verdict that Farr "verbally … threaten[ed] … injury" to the MG&E workers. And we think that, to consider that question solely on the basis of Farr's words, sealed off from the context in which they were spoken, and interpreted in artificial isolation, would do violence to the law.

In ***State v. Murphy***, 545 N.W.2d 909 (Minn. 1996), the Minnesota Supreme Court rejected an argument that a statute penalizing one who "threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another…" applied only to verbal threats, and not to his acts, which included slashing automobile tires, breaking windows, cutting telephone wires, and placing dead animals, animal parts and blood at his victims' houses.

> Many physical acts considered in context communicate a terroristic threat. We may find our examples … in the movies, such as boiling a rabbit on the stove in the tranquil setting of [a] former paramour's new family home, or placing a severed horse's head in a bed…. Life is replete with such examples, and whatever the source, the principle is the same: physical acts communicate a threat that its originator will act according to its tenor….
>
> … [L]imiting the reach of the statute to oral or written threats would lead to an absurd result. It would allow one to terrorize another if the terrorist were clever enough to make threats without recourse to the spoken or

> written word. It is well settled that courts may presume that the legislature does not intend an absurd result.

Id., 545 N.W.2d at 915-16.

We agree with the State that there is nothing in the language of § 943.30(1), STATS., suggesting that the required verbal representation or statement must be considered in total isolation from the facts and circumstances under which it was made. And we note that, in other states, and in other contexts, whether a "threat" has been made is not only dependent upon "the entire factual context" of the case—"including the surrounding events and [the] reaction of the listeners"—but is tested by an objective standard: whether a reasonable person would foresee that the statement would be interpreted by the person or persons to whom made as a "serious expression of an intent to harm or assault." *See* ***United States v. Orozco-Santillan***, 903 F.2d 1262, 1265-66 (9th Cir. 1990), and cases therein discussed.

In this case, Farr, holding a rifle, confronted two utility workers, who had just carried out their assigned task of disconnecting his electric service, stating to them: "If I were you, I'd hook that back up." In those circumstances, we see little difference between Farr's conduct and the conduct of a man who walks into a bank with a gun in his hand and states to the teller: "If I were you, I'd put $10,000 in a sack and hand it to me." We have little doubt that a reasonable jury could consider such conduct as a threat, even though the words themselves—in a wholly different context—might conceivably carry an innocent connotation, just as Farr's "if-I-were-you" statement might. As the Ninth Circuit Court observed in ***Orozco-Santilla***, however: "The fact that a threat is subtle does not make it less of

a threat." ***Id***., 903 F.2d at 1265.[3] And the fact that the persons to whom Farr's comment was made promptly did as he instructed—they re-connected his electric service—bears out the threatening, coercive nature of his statement and his accompanying conduct.

We are satisfied that a reasonable person could foresee that Farr's statement would be interpreted by the MG&E workers—as it was in fact—as a "serious expression of intent to harm or assault" them if they did not heed his instructions. If Farr had remained silent, simply appearing at the rear of the house with a gun, saying nothing to the workers, the workers may have simply fled the scene, leaving the service disconnected. But Farr's words, coupled with his armed status, were plainly understood by the workers as a threat, for they did exactly as they were told—contrary to the directions of their employer. The jurors could conclude, as they obviously did, that Farr's verbal statement, considered in light of the surrounding circumstances, was an attempt to acquire something of value (re-connection of his electrical service) by a threat; and that is the essence of the extortion statute's prohibition. The evidence was sufficient to convict.

[3] In ***State v. O'Flynn***, 496 A.2d 348 (N.H. 1985), for example, the court found that statements made by an elected county sheriff to several of his deputies in a campaign year—such as "our overtime could be shut off by a faucet," and "those who support me will be with me in November [and] those who don't won't"—were threats within the meaning of the State's extortion statute which punishes a public official who "threatens to … [t]ake action" against another. ***Id***. at 351. "To be extortionate," said the court, "a threat need not be express; it may be implied in words or conduct." ***Id***.; s*ee also* ***United States v. Fulmer***, 108 F.3d 1486, 1491-92 (1st Cir. 1997) (ambiguous language may, when considered with all of the surrounding circumstances, constitute a "true threat" within the meaning of 18 U.S.C. § 115(a)(1)(B), dealing with threats made to federal agents).

Privilege

Farr next argues that if he made a threat, it was privileged, because the workers were committing a species of trespass. Specifically, he maintains that the workers were illegally on his property, and illegally disconnecting the electricity, because a prior stay entered by a bankruptcy court prohibited disconnection. Farr contends, without citing pertinent authority, that only a victim engaged in "lawful" activity is protected from extortion under § 943.30, STATS. We reject the argument as lacking legal foundation. Section 939.14, STATS., specifically provides that it "is no defense to a prosecution for a crime that the victim was also guilty of a crime or was contributorily negligent."

Jury Instructions: The Weapons Enhancer

Farr argues that the circuit court erroneously instructed the jury concerning the weapons enhancer provisions of § 939.63, STATS. However, by failing to object to the jury instructions either at trial or in postconviction motions, he has waived the argument. ***State v. Schumacher***, 144 Wis.2d 388, 402, 424 N.W.2d 672, 677 (1988). And while we retain our discretionary authority to reverse in the interests of justice in such a situation—where certain criteria are met, ***Vollmer v. Luety***, 156 Wis.2d 1, 16, 456 N.W.2d 797, 804 (1990)—Farr has not advanced any such argument in his briefs.

Farr's Reply Brief

In his *pro se* reply brief, filed more than a year after his counsel's initial brief, he reargues certain issues briefed earlier by his attorney and then attempts to set forth several arguments not raised in his opening brief; specifically: (1) that he is entitled to "correction of the defective record of this case" for purposes

of showing that, among other things, both the trial court and this court are biased against him, and that he is entitled to damages for the "unconstitutional taking" of his person by the assistant district attorney prosecuting his case; (2) that his conviction should be reversed because "the unfair biases of the assigned trial judge 'permeated and polluted' all proceedings …, and that the judge "suborned prosecutorial perjury at trial and at sentencing…"; (3) that his two successive trial attorneys, his two successive post-conviction attorneys and his appellate counsel were all ineffective; and (4) that we should strike the State's brief as "frivolous," "fraudulent," unconstitutional, and violative of "Wis Supreme Court Rules governing misconduct of attorneys and prosecutors in Wisconsin.…"

We have often said that we will not consider arguments raised for the first time in a reply brief. ***Northwest Wholesale Lumber v. Anderson***, 191 Wis.2d 278, 294 n.11, 528 N.W.2d 502, 508 (Ct. App. 1994). And while it is also recognized that, "in some circumstances," *pro se* prisoners "deserve some leniency" in complying with procedural requirements, the supreme court said in ***Waushara County v. Graf***, 166 Wis.2d 442, 451-52, 480 N.W.2d 16, 19-20 (1992), that such litigants are, nonetheless,

> bound by the same rules that apply to attorneys on appeal. The right to self-representation is not a license not to comply with relevant rules of procedural and substantive law. While some leniency may be allowed, neither a trial court nor a reviewing court has a duty to walk *pro se* litigants thorough the procedural requirements or point them to the proper substantive law

Farr's *pro se* arguments, to the extent they depart from the arguments made in his opening brief, are largely undeveloped and unsupported by citations to legal authority. Even considering them, as best we could, they provide no basis for reversing his conviction.

By the Court.—Judgment affirmed.

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