COURT OF APPEALS
DECISION
DATED AND RELEASED

October 15, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3077-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RAYMOND F. SCHORDIE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Raymond F. Schordie has appealed from a judgment convicting him of the following offenses: one count of second-degree recklessly endangering safety while using a dangerous weapon in violation of §§ 939.63(1)(a)3 and 941.30(2), STATS.; one count of harassment in violation of § 947.013(1m)(a), (1r) and (1t), STATS.; one count of violating a domestic abuse

injunction as a repeat offender in violation of §§ 939.62, STATS., 1995, and 813.12(8)(a), STATS.; one count of violating a domestic abuse injunction as a repeat offender while using a dangerous weapon; and one count of unlawful use of a telephone as a repeat offender in violation of §§ 939.62 and 947.012(2)(d), STATS. The convictions stem from Schordie's relationship with his former girlfriend, Rhonda Olson, and from a domestic abuse injunction which Olson previously obtained against Schordie.

On appeal, Schordie contends that the evidence was insufficient to support his conviction for recklessly endangering safety, for harassment, and for one of the counts of violating a domestic abuse injunction. He also contends that he was entitled to an instruction on a lesser included offense. We reject these arguments and affirm the judgment.

The test on appeal for the sufficiency of the evidence is not whether this court is convinced of the defendant's guilt beyond a reasonable doubt, but whether the trier of fact, acting reasonably, could be so convinced by evidence that it had a right to believe and accept as true. *See* ***State v. Poellinger,*** 153 Wis.2d 493, 503-04, 451 N.W.2d 752, 756 (1990). The credibility of the witnesses and the weight of the evidence are for the trier of fact. *See* ***id.*** at 504, 451 N.W.2d at 756. We must view the evidence in the light most favorable to the verdict, and if more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the trier of fact. *See* ***id.*** A jury verdict will be overturned only if, viewing the evidence most favorably to the state and 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. *See* ***State v. Alles***, 106 Wis.2d 368, 376-77, 316 N.W.2d 378, 382 (1982). The function of weighing the

credibility of witnesses is exclusively for the jury. *See* ***id.*** at 376, 316 N.W.2d at 382.

To convict Schordie of second-degree recklessly endangering safety, the jurors were required to find that he endangered the safety of another by criminally reckless conduct. *See* WIS J I—CRIMINAL 1347 (1993). They were required to find that his conduct created an unreasonable and substantial risk of death or great bodily harm to another person and that he was aware that his conduct created such a risk. *See* ***id.*** Schordie contends that the evidence was insufficient to support a finding that he was aware of the unreasonable and substantial risk of death or great bodily harm created by his conduct. We disagree.

Testimony at trial indicated that both Olson and a witness named Robert Dunivan were leaving the Kenosha Public Safety Building at about 3:00 a.m. on July 31, 1995. Olson testified that as she started to step into the street from the curb, she heard squealing tires and saw Schordie's car accelerating directly at her. She testified that she jumped back and the car passed directly over where she had been, that the car accelerated "heavily" and that it continued to accelerate until it passed her. She further testified that if she had not jumped back, the car would have struck her. Dunivan similarly testified that the car almost hit Olson and that she would have been hit if she had not jumped out of the way.

Evidence at trial also established that Schordie and Olson had lived together before the incident but that Olson had broken off the relationship and obtained a restraining order against Schordie. At trial, Olson testified that Schordie continued to harass her after the restraining order was issued, including knocking her down the steps of the courthouse when they left the hearing at which the restraining order was issued. Evidence further indicated that in 1994 Schordie

was convicted of five crimes directed at Olson or arising from his conduct toward her. Evidence of these crimes was admitted to establish his motive and intent in the July 31, 1995 incident. Testimony at trial also indicated that while in jail, Schordie told another inmate that he was in custody because he tried to run over Olson.

Based on the totality of this evidence, the jury was clearly entitled to find that Schordie intentionally accelerated his car at Olson, that he would have struck her if she had not jumped back, and that he was aware that his conduct created an unreasonable and substantial risk of death or great bodily harm. The evidence therefore was sufficient to support the conviction for second-degree recklessly endangering safety.

This same evidence also provides a sufficient basis for upholding the convictions for harassment and violating a domestic abuse injunction. To convict Schordie of violating a domestic abuse injunction, the jury was required to find that an injunction had been issued against him, that he committed an act that violated the terms of the injunction, and that he knew the injunction had been issued and that his acts violated its terms. *See* § 813.12(8)(a), STATS., 1995; WIS J I—CRIMINAL 2040 (1995).

The "no contact" provision in the restraining order issued against Schordie prohibited him from "contacting or causing any person other than a party's attorney" to contact Olson unless she consented in writing. Contact was defined to include contacts at public places.

The evidence that Schordie intentionally drove his car directly at Olson, narrowly missing her, was sufficient to support a finding that he violated the injunction by contacting her at a public place. The same evidence supported a

finding that with the intent to harass or intimidate Olson, he attempted to subject her to physical contact by conduct which was threatening and placed her in reasonable fear of death or great bodily harm. It was therefore sufficient to support his conviction for harassment in violation of § 947.013(1m)(a) and (1r), STATS.

Schordie's final argument is that he was entitled to an instruction on the misdemeanor offense of endangering safety by use of a dangerous weapon in violation of § 941.20(1)(a), STATS. He contends that it is a lesser included offense of second-degree recklessly endangering safety while using a dangerous weapon in violation of §§ 939.63(1)(a)3 and 941.30(2), STATS.

Schordie acknowledges that his argument is contrary to the holding in ***State v. Carrington,*** 134 Wis.2d 260, 397 N.W.2d 484 (1986). He contends, however, that a good faith argument for an extension of the law can be made based on ***State v. Peete,*** 185 Wis.2d 4, 517 N.W.2d 149 (1994).

In ***Carrington,*** the Wisconsin Supreme Court reviewed the predecessor statutes to those involved here and held that misdemeanor endangering safety by use of a dangerous weapon was not a lesser included offense of felony endangering safety while armed with a dangerous weapon.[1] *See* ***Carrington,*** 134 Wis.2d at 270, 397 N.W.2d at 488-89. It pointed out that to convict of the misdemeanor, the State had to prove that the defendant's conduct in the operation or handling of a dangerous weapon endangered the safety of another. *See* ***id.*** It further pointed out that the felony offense could be established without

[1] Although §§ 941.20 and 941.30, STATS., have been revised since the Wisconsin Supreme Court issued its decision in ***State v. Carrington,*** 134 Wis.2d 260, 397 N.W.2d 484 (1986), the revisions are not material to this appeal.

proof that the defendant endangered the safety of another *through* the possession, use or threat of use of a dangerous weapon, but instead with proof that the defendant endangered the safety of another *while* possessing, using or threatening to use a dangerous weapon. *See* ***id.*** at 269, 397 N.W.2d at 488 (emphasis added). Because the misdemeanor required proof of an additional element not required for the felony, the court held that it was not a lesser included offense. *See* ***id.*** at 270, 397 N.W.2d at 488-89.

Since ***Carrington*** has not been overruled or modified by our supreme court in any way, we are bound by it. *See* ***Livesey v. Copps Corp.,*** 90 Wis.2d 577, 581, 280 N.W.2d 339, 341 (Ct. App. 1979). In reaching this conclusion, we note that ***Peete*** did not raise or address the lesser included issue presented here and in ***Carrington***. Moreover, rather than raising any questions as to the continued validity of ***Carrington***, the court in ***Peete*** cited it favorably.[2] *See*

[2] While we need not address this issue further, we point out that nothing in ***State v. Peete,*** 185 Wis.2d 4, 517 N.W.2d 149 (1994), is inconsistent with ***Carrington***. In ***Peete***, the court held that a defendant can be convicted under § 939.63, STATS., and a predicate offense when the state proves that the defendant used, threatened to use or possessed a dangerous weapon to facilitate commission of the predicate offense. *See* ***Peete,*** 185 Wis.2d at 17-18, 517 N.W.2d at 154. Since pursuant to ***Carrington*** a misdemeanor conviction under § 941.20(1)(a), STATS., requires additional proof that the defendant's operation or handling of the dangerous weapon was the conduct which endangered the safety of another, it remains clear that the misdemeanor offense requires proof of an element that the felony does not.

Peete, 185 Wis.2d at 22 n.9, 517 N.W.2d at 156. Based on ***Carrington,*** Schordie was not entitled to an instruction on the misdemeanor offense.

By the Court.—Judgment affirmed.

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