

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 7, 2016

Diane M. Fremgen
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. 2015AP2350-CR

Cir. Ct. No. 2015CM71

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KERRY A. SIEKIERZYNSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: VINCENT R. BISKUPIC, Judge. *Affirmed.*

¶1 STARK, P.J.¹ Kerry Siekierzynski appeals a judgment of conviction for disorderly conduct as an act of domestic abuse. He argues the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

evidence presented at his trial was insufficient for the jury to find him guilty of disorderly conduct. We disagree and affirm.

BACKGROUND

¶2 Siekierzynski was charged with disorderly conduct as an act of domestic abuse, in violation of WIS. STAT. §§ 947.01(1) and 968.075(1)(a). The charges arose out of an incident on October 11, 2014, involving Siekierzynski and A.B., his ex-wife. A.B. and Siekierzynski were divorced in August 2014 and had a child who was fourteen months old at the time of the incident. A.B. had primary placement of the child, and she supervised the child's visits with Siekierzynski pursuant to court order.

¶3 At trial, A.B. testified that she and Siekierzynski began to argue regarding the care of their child during a visit she supervised at Siekierzynski's residence. While neither adult shouted at each other, A.B. testified at one point Siekierzynski grabbed her arm "very hard" and "pushed her to the right." A.B. told Siekierzynski to stop and not to touch her again, that she did not "feel very safe," that she was "scared" and she did not like his "behavior." She described Siekierzynski as being "really upset" and sobbing about the unfairness of the visitation, stating:

I do remember after he talked about things being unfair he kept sobbing. Then he would get angry again, and he said who are you? And at some point in that part of the conversation he called me a creature, and that's when I started the flight-or-fight response.

¶4 A.B. testified that Siekierzynski "was getting very into her personal space" so she began to collect the child's things and told Siekierzynski she would leave if he did not calm down. As A.B. took the child from Siekierzynski's arms,

Siekierzynski began to videotape A.B. with his phone, which caused A.B. to be frightened. A.B. tried to leave through the front and back doors, but Siekierzynski stopped her by placing his body between her and the doors. Siekierzynski told A.B. that she could leave, but their child would remain at his residence with him. After A.B.'s further attempts to leave through the front and back doors with the child were blocked, Siekierzynski said he was calling "[Child Protective Services]" to tell them that A.B. was interfering with his court-ordered visitation time. A.B. took that opportunity to exit Siekierzynski's residence with the child and drove away. Siekierzynski did not pursue A.B. outside his residence.

¶5 After driving for about a mile and a half, A.B. stopped her vehicle on the side of the road and called the police. Officer James Gray testified that he made initial contact with A.B. where she had parked. After speaking with A.B., Gray proceeded to Siekierzynski's residence where he found Siekierzynski sitting and crying outside near the front door. Siekierzynski told Gray he and his ex-wife had an argument and admitted that he had stood in front of the door when A.B. wanted to leave. He was later arrested. A jury ultimately found Siekierzynski guilty of disorderly conduct.²

DISCUSSION

¶6 Upon a challenge to the sufficiency of the evidence, this court will not substitute its judgment for that of the trier of fact unless "the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a

² Siekierzynski did not testify at trial.

reasonable doubt.” *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). A jury, however, cannot base its findings on conjecture and speculation, and the facts in the record must support the inferences of the jury. *Id.*

¶7 WISCONSIN STAT. § 947.01(1) provides: “Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.” Disorderly conduct cases are often fact-specific. “An objective analysis of the conduct and circumstances of each particular case must be undertaken because what may constitute disorderly conduct under some circumstances may not under others.” *State v. Schwebke*, 2002 WI 55, ¶24, 253 Wis. 2d 1, 644 N.W.2d 666. “An examination of the circumstances in which the conduct occurred must take place, considering such factors as the location of the conduct, the parties involved, and the manner of the conduct.” *Id.*, ¶30; *see also City of Oak Creek v. King*, 148 Wis. 2d 532, 540, 436 N.W.2d 285 (1989) (conduct must generally have “a tendency to disrupt good order”).

¶8 The State limited the disorderly conduct charge to alleging that Siekierzynski’s conduct was abusive or otherwise disorderly. As a result, in order to convict Siekierzynski, the State was required to prove his conduct was abusive or otherwise disorderly and that such conduct occurred under circumstances that tended to cause or provoke a disturbance. *See State v. Douglas D.*, 2001 WI 47, ¶15, 243 Wis. 2d 204, 626 N.W.2d 725.

I. Abusive Conduct

¶9 Siekierzynski acknowledges that speech can be abusive when it carries with it the “non-speech element of an express or implied threat or

challenge to fight.” *Id.*, ¶24. Siekierzynski asserts, however, that the State presented no evidence his speech was abusive. Siekierzynski notes he and A.B. argued without raising their voices and that calling A.B. a “creature” and asking her “who are you” was far less damaging than language found to be abusive elsewhere. *See, e.g., Lane v. Collins*, 29 Wis. 2d 66, 72, 138 N.W.2d 264 (1965) (insulting a person under charged circumstances likely to result in retaliation may be construed as abusive conduct).

¶10 Siekierzynski also acknowledges that abuse may generally include both violent and non-violent conduct. *See Evans v. DOJ*, 2014 WI App 31, ¶15 n.4, 353 Wis. 2d 289, 844 N.W.2d 403. However, he argues that his physical conduct could not be reasonably viewed as abusive. He asserts abuse should be defined as in WIS. STAT. § 813.12(1)(am)³ and blocking A.B.’s exit and grabbing her forearm does not constitute abuse under that definition. Although he concedes grabbing A.B.’s forearm could be construed as an intentional infliction of physical pain, which is one of the bases to find abuse under § 813.12(1)(am), he argues the

³ WISCONSIN STAT. § 813.12(1), which defines “domestic abuse” for the purposes of issuing domestic abuse restraining orders and injunctions, states in relevant part:

(am) “Domestic abuse” means any of the following engaged in by ... an adult against his or her adult former spouse ... or by an adult against an adult with whom the person has a child in common:

1. Intentional infliction of physical pain, physical injury or illness.
2. Intentional impairment of physical condition.
3. A violation of s. 940.225 (1), (2) or (3) [sexual assault].
4. A violation of s. 940.32 [stalking].
5. A violation of s. 943.01, [damage to property] involving property that belongs to the individual.
6. A threat to engage in the conduct under subd. 1., 2., 3., 4., or 5.

State presented no evidence that Siekierzynski grabbed A.B.'s arm with the subjective intent to cause her pain.

¶11 We first note that Siekierzynski's attempt to define "abusive" by referencing "domestic abuse" under WIS. STAT. § 813.12(1)(am) is made without reference to any binding or persuasive legal authority. Siekierzynski fails to indicate why the term "abusive" as found in WIS. STAT. § 947.01(1) should be defined under § 813.12(1)(am), as there is no cross-reference in ch. 813 to the disorderly conduct statute. Siekierzynski also does not address why § 813.12(1)(am) would apply here, but WIS. STAT. § 968.075(1), also defining "domestic abuse" in the context of mandatory arrest, would not. While the differences in the definitions are minor, § 968.075(1)(a)4. defines domestic abuse as "[a] physical act that may cause the other person *reasonably to fear imminent engagement* in the conduct described under subd. 1., 2. or 3. [equivalent to 1., 2., or 3. of § 813.12(1)(am)]." (Emphasis added.) Siekierzynski does not account for this difference.

¶12 Moreover, Siekierzynski's claims of non-abusive behavior appear to be based upon the characteristics of each comment and act in isolation. The jury was not required to evaluate the evidence that way and was permitted to take into account the circumstances and "the manner of the conduct" in question. *See Schwabke*, 253 Wis. 2d 1, ¶24. Siekierzynski's speech—calling A.B. a "creature," saying "who are you," and telling A.B. that she could leave but the child would remain—occurred in the context of a dispute between two parents over the care for their child. Siekierzynski and A.B. had been divorced only two months at the time, their divorce had been contentious, and the circumstances of this visitation were, according to A.B., "tense" from the start. The language, accompanied by Siekierzynski's physical acts of grabbing or pushing A.B.'s arm, and then

blocking her exit from the residence, all in the immediate presence of their child, could reasonably be viewed by the jury as an implied threat that Siekierzynski objected to A.B.'s control of the situation beyond mere argument, and that he would not permit her to remove their child from his home.

¶13 Viewing the evidence in the light most favorable to the State and the conviction, a jury could reasonably find, in this emotionally charged situation, Siekierzynski's comments and behavior exhibited "an express or implied threat or challenge to fight" with A.B. and, as a result, that Siekierzynski's conduct was abusive. *Douglas D.*, 243 Wis. 2d 204, ¶24. The State provided sufficient evidence of one factor to convict for disorderly conduct. Therefore, we need not address Siekierzynski's claim that his conduct was not otherwise disorderly.

II. Conduct Tending to Cause or Provoke a Disturbance

¶14 Siekierzynski next argues that even if the jury could reasonably conclude his conduct was abusive or otherwise disorderly, the State failed to present sufficient evidence to prove that his conduct under WIS. STAT. § 947.01(1) "tend[ed] to cause or provoke a disturbance." Conduct that tends to cause or provoke a disturbance can be private in nature, but only to the extent that it entails a "real possibility that this disturbance will spill over and cause a threat to the surrounding community as well." *Schwebke*, 253 Wis. 2d 1, ¶31. When a private disturbance may affect the "overall safety and order in the community," the State has an interest in regulating that conduct underlying the disturbance. *Id.*

¶15 Siekierzynski recognizes that domestic incidents are of concern to the State and that purely private conduct may disrupt the community at large, but argues there is "a line between argument and domestic abuse." Relying on *State v. Zwicker*, 41 Wis. 2d 497, 515, 164 N.W.2d 512 (1969), Siekierzynski notes the

“design of the disorderly conduct statute is to proscribe 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.* at 508. In the present case, Siekierzynski claims his argument with A.B. was private and not loud, profane or disruptive to others. A.B. testified that Siekierzynski did not threaten to hurt their child, and that she realized Siekierzynski was crying and upset because A.B. was going to take their child away from him. Siekierzynski contends his argument with A.B., while perhaps uncomfortable, did not present a “real possibility that this disturbance [would] spill over and cause a threat to the surrounding community.” *See Schwabke*, 253 Wis. 2d 1, ¶31. He asserts while A.B. may have been unnerved by the argument, the disorderly conduct statute does not punish conduct “which might offend some hypercritical individual.” *Zwicker*, 41 Wis. 2d at 508.

¶16 These arguments, however, fail to reflect the totality of the evidence at trial. The jury heard evidence that the argument between Siekierzynski and A.B. involved physical action by Siekierzynski against A.B. and repeated physical restriction of her movement. Siekierzynski intended that A.B. leave his residence, but do so without their child, contrary to their divorce decree. A.B. did manage to leave the residence with the child, but only after Siekierzynski had repeatedly attempted to prevent her from doing so. A reasonable jury could well conclude such conduct affected the overall safety of A.B., the child, and order in the community represented by the existing court order regarding visitation and custody rights.

¶17 The jury could further determine this private incident had public characteristics. While A.B. acknowledged she was unhurt and Siekierzynski never verbally threatened to harm her or their child, A.B. nonetheless felt frightened,

threatened, and the need to leave Siekierzynski's residence. After doing so, A.B. also felt it important to report the incident to the police. In addition, Siekierzynski stated that he was contacting Child Protective Services due to A.B.'s claimed interference with his placement rights. While no severe violence occurred in this scenario, the community has an interest in seeing that incidents such as this do not devolve into shows of force.⁴ As the State also notes, where both parties to a dispute call on outside intervention for assistance regarding a pre-determined custody arrangement, it can hardly be said that there is no risk of the dispute spilling over into the surrounding community. In light of this evidence, the jury could reasonably infer that Siekierzynski's comments and actions created a disturbance that required public intervention.

¶18 The evidence was sufficient for a reasonable jury to determine this was not a typical private argument about custody and placement between two divorced individuals in which A.B. was an easily offended or hypersensitive individual. The evidence, when viewed in the light most favorable to the State and a conviction, supports the jury's determination that Siekierzynski engaged in abusive conduct that tended to cause or provoke a disturbance.

By the Court.—Judgment affirmed.

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

⁴ Domestic incidents often carry the potential to cause collateral damage to the community and threaten law enforcement. See *Koll v. DOJ*, 2009 WI App 74, ¶20, 317 Wis. 2d 753, 769 N.W.2d 69 (Anderson, P.J., concurring) (citing statistics noting “thirty percent of officers assaulted or injured when responding to a call for help were responding to a domestic violence call”).

