COURT OF APPEALS
DECISION
DATED AND FILED

February 16, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP27-CR **Cir. Ct. No. 2012CF1592**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VICKIE M. GROVER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: NICHOLAS J. McNAMARA, Judge. *Judgment affirmed; order reversed and cause remanded with directions.*

Before Kloppenburg, P.J., Sherman, and Blanchard, JJ.

¶1 PER CURIAM. Vickie M. Grover was convicted of stalking S.W., a Wisconsin State Patrol trooper. On appeal, Grover challenges the sufficiency of the evidence and the effectiveness of trial counsel. She also asks this court to

order a new trial in the interest of justice. We conclude that sufficient evidence supports the jury's verdict and we decline to order a new trial in the interest of justice. As to Grover's claim that her trial counsel was ineffective, we conclude that the circuit court erred in denying the postconviction motion without a hearing. Accordingly, we reverse the postconviction order and remand for an evidentiary hearing under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).[1]

FACTS

¶2 S.W. first met Grover when she approached him at a gas station and asked him a question about her damaged windshield. S.W. worked the overnight shift, and he generally began his shift by getting gasoline for his squad car at a Sun Prairie gas station. Grover drove a white Nissan Cube, a "distinct" vehicle. S.W. testified that after that initial encounter, he started noticing Grover's car frequently, with Grover following him to whatever gas station he happened to visit. Grover would engage him in "one-sided" conversation "[a]lmost every night."

¶3 S.W. testified that he became "concerned" about seeing Grover so often and he "started changing [his] patterns" regarding where he got gas and the route he would take to the interstate. S.W. began noticing Grover's car driving past the DeForest State Patrol headquarters. Grover would pass him on the interstate and wave. These encounters took place between the start of S.W.'s shift

[1] We affirm the judgment of conviction at this time because Grover has not established that it should be reversed. If the circuit court determines after the hearing that Grover did receive ineffective assistance of counsel, the judgment would, of course, be reversed at that time.

until 3:00 to 4:00 a.m. S.W. testified that, on several occasions, Grover followed his squad into Columbia County. At some point, S.W. ran Grover's license plate and learned her name.

¶4 S.W. often parked his squad in front of his Sun Prairie house when not working. He testified that one night, in January 2011, he went out to the squad at the start of his shift when Grover drove up and stopped in front of his driveway. S.W. described the incident as follows:

> After a second or two I was kind of like sitting there in shock a little bit, like this can't be happening. She exited the vehicle. I still was in my vehicle. I opened the driver's side door and she walked to the driver's side door of my vehicle.

¶5 When asked how he felt, S.W. testified:

> I felt violated. I had a rush of emotions going through me. I had my wife inside who was pregnant, about to have a baby. I'd never had this happen before so I was—I was a little concerned to say the least.
>
> ….
>
> … I guess I felt threatened. I had no idea what her intentions were.

¶6 S.W. testified that he was "pretty sure" he spoke first, asking Grover, "what the hell she was doing" at his house. S.W. was "upset" and "probably more authoritative" than in prior encounters. Grover told S.W. that she wanted to give him some gifts—a University of Wisconsin Rose Bowl hat and some pens and paper from her employer. Grover was dressed in Wisconsin clothes and colors, looking like she had just come from a football game. S.W. told Grover he could not accept the items, that he was married, and that this was "inappropriate."

¶7 S.W. testified that he thought that Grover learned where he lived by following him when he returned to his house. S.W. testified that at the end of the incident, he was "emotionally drained" and "couldn't believe it had happened." S.W. "felt threatened, … an unwanted person [was] coming to my house." S.W. testified he was "mentally and physically and emotionally drained" after the incident and his "anxiety was through the roof."

¶8 After that incident, S.W. spoke with a sergeant, his wife, and ultimately, the Sun Prairie police department. The discussion with a police officer led to the issuance of a "no stalking" letter from the police to Grover. Officer Raymond Thompson testified that he served Grover with the letter on March 29, 2011, and read and explained the letter to her. The letter advised Grover that her behavior towards S.W. could be interpreted as stalking, as defined by WIS. STAT. § 940.32 (2015-16).[2] The letter further advised Grover that "future stalking behavior" towards S.W. "could result in [her] arrest." Thompson testified that Grover agreed to not have any further contact with S.W.

¶9 S.W. testified that after the letter was served, he continued to see Grover in the Sun Prairie area, including in his neighborhood. In April, while S.W. was on duty, he was buying lunch at a grocery store. Grover approached him and started talking to him. Grover told S.W. she was sorry, that she "wasn't trying to pick [him] up," and that she followed him because she felt safe around him. S.W. told Grover that her conduct was inappropriate and she should not be talking to him.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶10 After that incident, S.W. continued to see Grover but did not have any direct contact with her until August 2012. S.W. testified that on August 9, 2012, a package was found in his home mailbox. The package had no return address, several stamps, but no postmark. S.W. and his wife discussed whether to open the package. S.W.'s wife was "very concerned and upset with [S.W.]," questioning him about whether he had a girlfriend. Eventually, they surmised that the package might have been sent by Grover. S.W.'s wife opened the package. Inside the package were several wax candles in the shape of Roman numerals and a birthday card, signed, "me." S.W. testified that he felt "[t]hreatened" by the incident. S.W. explained that he "was very concerned" and "afraid for [his] family" because he still did not know anything about Grover beyond her name.

¶11 Officer Timothy Lingle testified that he spoke with Grover after the package incident. Grover admitted mailing the package to S.W. Lingle testified that Grover told him that S.W's "body language" indicated that he "liked her but [he] was too shy to let her know." Grover admitted receiving the "no-stalking" letter but said she was unsure whether she was supposed to still have contact with S.W. after the letter.

¶12 Grover did not testify at trial and the defense did not present any witnesses.

SUFFICIENCY OF THE EVIDENCE

¶13 We first set out the familiar standard of review. When reviewing a challenge to the sufficiency of the evidence, we employ a highly deferential standard of review. *See* ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659. We will not overturn a verdict if there is any credible evidence, under any reasonable view, that leads to an inference

supporting the verdict, and we consider the evidence in the light most favorable to the verdict. ***Id.***, ¶¶38-39. We may not substitute our judgment for that of the jury "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force" that no reasonable jury "could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). We will uphold the verdict if any possibility exists that the jury could have drawn the inference of guilt from the evidence. *See* ***id.*** at 507. It is the jury's province to fairly resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts. *See* ***id.*** at 506. If more than one inference can be drawn from the evidence, the inference which supports the jury's finding must be accepted unless the testimony was incredible as a matter of law. *See* ***State v. Witkowski***, 143 Wis. 2d 216, 223, 420 N.W.2d 420 (Ct. App. 1988).

¶14 The elements of stalking are set forth in WIS. STAT. § 940.32(2)(a)-(c):[3]

> (a) The actor intentionally engages in a course of conduct directed at a specific person that would cause a reasonable person under the same circumstances to suffer serious emotional distress or to fear bodily injury to or the death of himself or herself or a member of his or her family or household.
>
> (b) The actor knows or should know that at least one of the acts that constitute the course of conduct will cause the specific person to suffer serious emotional distress or place the specific person in reasonable fear of bodily injury to or the death of himself or herself or a member of his or her family or household.

[3] The pertinent statutory language is unchanged from the statutes in effect at the time of the crime and trial.

> (c) The actor's acts cause the specific person to suffer serious emotional distress or induce fear in the specific person of bodily injury to or the death of himself or herself or a member of his or her family or household.

¶15 WISCONSIN STAT. § 940.32(1) defines "course of conduct" in pertinent part as:

> (a) "Course of conduct" means a series of 2 or more acts carried out over time, however short or long, that show a continuity of purpose, including any of the following:
>
> 1. Maintaining a visual or physical proximity to the victim.
>
> 2. Approaching or confronting the victim.
>
> 3. Appearing at the victim's workplace or contacting the victim's employer or coworkers.
>
> 4. Appearing at the victim's home or contacting the victim's neighbors.
>
> ….
>
> 7. Sending material by any means to the victim ….
>
> 8. Placing an object on or delivering an object to property owned, leased, or occupied by the victim.

"Serious emotional distress" is defined as "to feel terrified, intimidated, threatened, harassed, or tormented." Section 940.32(1)(d).

¶16 The State established the requisite "course of conduct." Grover saw S.W. nearly every night, often following him into whatever gas station he entered. *See* WIS. STAT. § 940.32(1)(a)1. She followed his squad car into another county and waved at him when passing on the interstate. *See* § 940.32(1)(a)1. and 3. Grover went to S.W.'s house, uninvited, to give him gifts. *See* § 940.32(1)(a)4. After receiving a formal letter telling her that S.W. considered her contact to be stalking and advising her not to have further contact with him, she approached him

and talked with him at the grocery store. *See* § 940.32(1)(a)2. Also after receiving the letter, Grover sent a package to S.W.'s house. *See* § 940.32(1)(a)7. and 8.

¶17 Grover argues that the State failed to prove that S.W. suffered serious emotional distress. She emphasizes that she never threatened S.W. and her conduct was not illegal. Grover characterizes her conduct as merely "annoying or frustrating."

¶18 S.W. testified repeatedly that he felt threatened by Grover's conduct. S.W. had no way of knowing Grover's true motivations. From S.W.'s perspective, a person he did not know was purposely seeing him nearly every day and obviously following him as he worked his shift for unknown reasons. Grover then amplified S.W.'s fear and apprehension when she came to his house. When Grover sent S.W. the package in August 2012, S.W. again felt threatened, concerned, and scared for his safety and the safety of his family. Grover sent the package despite the "no-stalking" letter's express direction to stop contacting S.W. The State presented sufficient evidence that S.W. suffered serious emotional distress. *See* WIS. STAT. § 940.32(1)(d) (victim feeling "threatened" defined as serious emotional distress).

¶19 Grover contends that the State did not prove that she knew or should have known that her conduct was causing S.W. serious emotional distress. Grover contends that there was no "overt act" showing her awareness "that she could create such a serious level of emotional distress." That argument fails largely on the strength of the "no-stalking" letter. Even if Grover was wholly ignorant that S.W. felt threatened by her conduct before the letter, such ignorance was conclusively refuted by the letter formally advising Grover that her conduct had

caused S.W. serious emotional distress. After receiving the letter, Grover continued to see S.W. in the Sun Prairie area, approached him in the grocery store, and sent the anonymous package to his home.

¶20 Lastly, Grover contends that the State failed to show that a reasonable person would have suffered serious emotional distress. *See* WIS. STAT. § 940.32(2)(a). Grover emphasizes that she never directly contacted S.W.'s family and that the number of contacts with S.W. had decreased over time. Grover characterizes S.W.'s fears as "unreasonable" fears of "some unknown risk" in his "imagined vision of the world."

¶21 We disagree. Although Grover's dismissive description of her conduct and criticism of S.W.'s reactions are possible inferences that the jury could have drawn from the evidence, the alternative inference—that S.W.'s fear was reasonable under the circumstances—was also available to the jury. We must accept the inference chosen by the jury. *See* ***Witkowski***, 143 Wis. 2d at 223.

INEFFECTIVE ASSISTANCE OF COUNSEL

¶22 In a postconviction motion, Grover argued that her trial attorney was ineffective in several respects: (1) improper advice on the question of whether she should testify; (2) inadequate investigation; and (3) inadequate presentation of exculpatory evidence. The trial court denied the motion without a hearing, stating only that there was "no basis given" for a hearing.

¶23 A postconviction hearing is necessary to sustain a claim of ineffective assistance of counsel. *See* ***Machner***, 92 Wis. 2d at 804. However, a defendant's claim that counsel provided ineffective assistance does not automatically trigger a right to an evidentiary hearing. *See* ***State v. Curtis***, 218

Wis. 2d 550, 555 n.3, 582 N.W.2d 409 (Ct. App. 1998). A circuit court may deny a postconviction motion without a hearing "if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether a motion alleges sufficient material facts that, if true, would entitle a defendant to an evidentiary hearing presents a legal issue that we review de novo. *See* ***id.*** In determining whether Grover is entitled to an evidentiary hearing, we accept as true the facts alleged in the postconviction motion. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309, 548 N.W.2d 50 (1996).

¶24 In her postconviction brief, Grover asserts that she wanted to testify but she "felt compelled to follow her trial attorney's advice" not to testify. She contends that trial counsel's ineffectiveness rendered invalid her waiver of the right to testify. Grover claims that counsel decided she would not testify and told her that if she did testify, she would be found guilty and he would no longer represent her.

¶25 Grover filed several exhibits with her postconviction motion: a lengthy history of S.W.'s gasoline purchases for his squad car from June 2009 until August 2012; records from the Department of Motor Vehicles showing the number of white Nissan Cubes registered in Dane County during that time period; the bill of sale from Grover's September 2009 purchase of a Cube; Google maps showing travel routes from Grover's house to her job; and evidence that Grover had won a $1000 gift card to a Sun Prairie gas station in December 2010.

¶26 Grover argues that the evidence of S.W.'s gasoline purchases would have contradicted his testimony that he changed his habits in response to Grover's

conduct. She contends that evidence of the number of white Nissan Cubes registered in Dane County would have undercut S.W.'s claim that the car was distinctive and that any time he saw such a car Grover was the driver. Grover also faults trial counsel for not calling her father, Richard Grover, as a witness. Grover claims that her father would have testified that she "habitually" came home from work between 11:00 p.m. and midnight, contrary to S.W.'s testimony that he saw her frequently between 3:00 a.m. and 4:00 a.m. Lastly, Grover argues that her counsel should have presented testimony of the manager of a video store in Sun Prairie who would have testified that she was a regular customer dating back to 2004, giving credence to the argument that her presence in the same areas as S.W. was purely coincidental.

¶27 The question is whether Grover has alleged facts, which if true, would entitle her to relief. *See* ***Bentley***, 201 Wis. 2d at 310. We conclude that Grover's motion was sufficient to warrant an evidentiary hearing. Grover claims inadequate pretrial investigation and she has shown "'with specificity what the investigation would have revealed and how it would have altered the outcome of the trial.'" ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994) (quoted source omitted). Grover claims that her trial counsel threatened to not represent her if she chose to testify, thus calling into question the validity of her waiver of her right to testify. Given those assertions, a postconviction evidentiary hearing is an appropriate next step to ensure that a defendant acted knowingly, voluntarily, and intelligently. *See* ***State v. Denson***, 2011 WI 70, ¶68, 335 Wis. 2d 681, 799 N.W.2d 831 (discussing a defendant's claim of an invalid waiver to the right not to testify). We emphasize that we are not deciding that Grover has established that her waiver was invalid or that she received ineffective assistance

of counsel, only that her motion was sufficient to require an evidentiary hearing on those questions.

NEW TRIAL IN THE INTEREST OF JUSTICE

¶28 An appellate court will exercise its discretion to grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983). We decline to do so here. Grover's interest of justice argument is a reformulation of her ineffectiveness-of-counsel argument. As noted above, Grover's arguments regarding her trial attorney's representations must be addressed in an evidentiary hearing. Because the record is not fully developed on this issue, it would be premature for this court to conclude that the interest of justice demands a new trial.

By the Court.—Judgment affirmed; order reversed and cause remanded with directions.

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