COURT OF APPEALS
DECISION
DATED AND FILED

May 24, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1484-CR **Cir. Ct. No. 2014CF220**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM A. WISTH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: TODD K. MARTENS, Judge. *Affirmed*.

¶1 NEUBAUER, C.J.[1] William A. Wisth appeals from a judgment of conviction entered after a jury found him guilty of contempt of court and from an

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

order denying his motion for postconviction relief. Wisth complains that the criminal complaint and information were defective, the jury instructions erroneous, and the jury's verdict unsupported by legally sufficient evidence. We reject each of these contentions and affirm the judgment and order.

¶2 Wisth was charged with communicating with jurors during a trial in which he was the defendant and contempt of court for disobeying an order of the court, the latter contrary to WIS. STAT. § 785.01(1)(b).[2] The complaint alleged that on July 30, 2014, Wisth was sitting on a bench outside the main entrance to the Ozaukee County Justice Center with a cardboard sign and flyers, and he attempted to give one of the flyers to a juror but she refused. The cardboard sign said, "Don't trust Judge Malloy or Ozaukee County Sheriff's Department! They are dishonest!" The flyer said, in all capital letters, the following:

> BEWARE. BEWARE.
>
> DO NOT TRUST OZAUKEE COUNTY OR JUDGE MALLOY!
>
> IF YOU ARE A CRIMINAL DEFENDANT:
>
> YOUR RIGHTS WILL BE TAKEN AWAY FROM YOU
>
> 1. DO NOT REQUEST AN ATTORNEY
> 2. THE JUDGE WILL WORK IN THE DA'S FAVOR
> 3. THE JUDGE WILL WORK IN THE FAVOR OF THE POLICE
> 4. YOU CANNOT PLEAD NOT GUILTY AND GET A FAIR JURY TRIAL IN OZAUKEE COUNTY
>
> ***THE JUDGE SHOULD NOT BE A JUDGE***

[2] Wisth was acquitted of the former; thus, our discussion is limited to the latter.

DO NOT TRUST JUDGE MALLOY OR THE OZAUKEE COUNTY SHERIFF'S DEPARTMENT

¶3 At trial, the State presented testimony from juror Carol Mittag, deputy clerk for the Ozaukee County Clerk of Courts Marilyn Baunoch, and Deputy Sheriff Gary Keller.

¶4 Collectively, they testified that on July 29, 2014, Mittag was selected as a juror in a criminal case where Wisth was the named defendant and Judge Malloy presided. At the end of the day, Judge Malloy instructed the jurors "[n]ot to discuss the case with anyone."

¶5 The following day, Mittag arrived at the court early, about 8:00 a.m. As she walked towards the only public entrance to the building, she noticed that Wisth was sitting on a bench. Mittag put her head down and tried not to look at Wisth because she knew she was not supposed to talk with him. Wisth asked Mittag if he could give her something, but she refused. Mittag did not see the sign or the words on the flyer he tried to give her. Mittag acknowledged that she was wearing different clothes than the previous day and she was not wearing a name tag. After the encounter, Mittag went and told Baunoch. Baunoch looked outside and saw Wisth by the front entrance sitting on a bench. He was holding something, like a paper, and he had something next to him. Baunoch went and told a deputy.

¶6 Keller was working security that day, and another deputy directed him to see what Wisth was doing outside. Keller went outside and saw Wisth sitting on a bench on the walkway leading from the parking lot to the only public entrance. Wisth had a cardboard sign and flyers. The sign and a flyer were entered into evidence.

¶7 A video depicting, among other things, the encounter between Wisth and Mittag was played for the jury.

¶8 Wisth testified in his own defense. He testified that he was representing himself in a trial before a jury on July 29 and 30, 2014. He had never previously represented himself, and he had never previously sat on a jury. He did landscaping and tree work for a living. He was not familiar with where jurors entered the courthouse. The jurors were wearing tags around their necks while in court. During the trial, he glanced over at the jury a few times, but he was "constantly" reviewing documents, and when a witness testified he was either looking at the witness or his notes.

¶9 According to Wisth, on July 30, 2014, he arrived at the courthouse around 7:45 a.m. He first went over to the side of the building where the sheriff's department is located. He asked a deputy—Wisth did not recall the deputy's name—if he could hand out leaflets and display a sign, and he was told that he could do so as long as he did not obstruct traffic. Afterwards, Wisth went back to his car to retrieve the sign and flyers and then sat on a bench.

¶10 Wisth had 500 flyers, and he wanted to distribute them to anybody except the jurors on his case. Wisth noted that when he first pulled into the parking lot that morning he noticed a large group of people going inside the courthouse, and he assumed that it was the jury because it was a large group and because the judge "really never gave us any guidelines to go by."

¶11 While sitting on the bench, Wisth saw a car pull into the parking lot, and he realized that this person would be passing him, so he wanted to give her a flyer. Wisth did not see a juror tag on the woman and she was walking quickly with her head kind of turned to the right. Wisth did not recognize the woman.

Wisth was having some difficulty removing a flyer from his bag because the flyers were tightly packed together. As the woman passed by, Wisth asked, "Can I give you a flier?" She just shook her head. Wisth did not pursue the woman.

¶12 Mittag was the only person who passed Wisth until, a few moments later, a deputy came outside to speak with him.

¶13 At the close of evidence, the court instructed the jury on the count charging contempt of court as follows:

> Contempt of court as defined in [WIS. STAT. §] 785.01(1)(b) of the Wisconsin Statutes is committed by one who intentionally acts in disobedience, resistance, or obstruction of the authority, process, or order of a circuit court. Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present: 1, William A. Wisth was the defendant in an action pending before the circuit court; 2, William A. Wisth did an act in disobedience, resistance, or obstruction of the authority, process, or order of that court; 3, the defendant did this act intentionally.

¶14 The jury returned a verdict finding Wisth guilty of contempt of court.

¶15 The court sentenced Wisth to sixty days in jail with Huber privileges.

¶16 Wisth moved for postconviction relief, but his motion was denied. Wisth appeals from the judgment of conviction and the order denying his postconviction motion.

¶17 Contempt of court, as charged in this case, means "intentional … [d]isobedience, resistance or obstruction of the authority, process or order of a court." WIS. STAT. § 785.01(1)(b). "The power to punish for contempt … exists

for the purpose of enabling a court to enforce the fair and orderly administration of justice, and to maintain such dignity and discipline as is essential to that end." ***Feuerstein v. Kalb***, 227 Wis. 62, 68, 278 N.W. 1 (1938). Stated differently, contempt of court is designed to protect "the authority and dignity of the court." ***In re Kading***, 74 Wis. 2d 405, 411, 246 N.W.2d 903 (1976).

¶18 Wisth first complains that the State failed to state a contempt offense because the complaint and information charged each permutation of contempt, instead of charging only one type of contempt, such as disobeying a court order or resisting the authority of the court, and without supporting allegations. In other words, the charge was duplicitous, lacking in certainty and specificity, and stated no offense at all. Thus, the court's jurisdiction was lacking.

¶19 Considering the claim Wisth raises, his argument is not well developed. Nevertheless, we briefly address Wisth's claim. To the extent Wisth is arguing that that the circuit court lacked subject matter jurisdiction because of duplicity in the complaint, there is a difference between a complaint that charges two offenses and is duplicitous and a complaint that charges a nonoffense. *See* ***United States v. Adesida***, 129 F.3d 846, 850 (6th Cir. 1997). The latter goes to the circuit court's jurisdiction over the subject matter, the former does not. *See* ***State v. Bloecher***, No. 2009AP999-CR, unpublished slip op. ¶17 n.7 (WI App Oct. 21, 2009). It is for this reason that Wisth's citation to ***Champlain v. State***, 53 Wis. 2d 751, 193 N.W.2d 868 (1972), is misplaced, for there the defendant was not charged with an offense known at law—the State failed to charge the element of taking property through the use or threat of force for the crime of armed robbery. ***Id.*** at 753-54. But, here, Wisth was charged with all the elements of contempt of court. Indeed, Wisth's argument is that he was charged with every permutation of contempt.

¶20 To the extent Wisth challenges the complaint as duplicitous, his failure to raise that challenge prior to trial resulted in a waiver of it. WIS. STAT. § 971.31(2); ***State v. Lomagro***, 113 Wis. 2d 582, 589-90 & n.3, 335 N.W.2d 583 (1983).

¶21 Wisth also challenges the court's instructions to the jury as duplicitous, arguing that, as a result of those instructions, he was deprived of his right to be convicted beyond a reasonable doubt by a unanimous jury. But, like his challenge to the complaint and information, Wisth never raised this challenge at trial. Consequently, Wisth's challenge to the court's instruction to the jury is waived. WIS. STAT. § 805.13(3); ***State v. Schumacher***, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988).[3]

¶22 Wisth complains that the evidence convicting him of contempt of court was legally insufficient to support the conviction because he was charged with disobeying an order but no evidence was presented of a court order, and, indeed, the prosecutor argued in closing that he did not need to prove a court order. Additionally, Wisth argues, his conduct was constitutionally protected free speech.

¶23 In a challenge to the legal sufficiency of the verdict, an appellate court is tasked with deciding whether, after viewing the evidence in the light most

[3] Even if Wisth had raised an objection below, on appeal he does not develop the substantive analysis that would follow for this type of challenge. *See, e.g.*, ***State v. Dearborn***, 2008 WI App 131, ¶¶19-20, 42, 313 Wis. 2d 767, 758 N.W.2d 463 (holding that it was not error for the court to charge the jury that a defendant commits resisting a warden if he "assaulted, resisted, or obstructed" the warden because it was not multiple crimes but one crime with alternate modes of commission and it did not offend due process; therefore, jury unanimity was not required); *see also* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

favorable to the prosecution, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ***State v. LaCount***, 2008 WI 59, ¶25, 310 Wis. 2d 85, 750 N.W.2d 780 (citations omitted). The legal sufficiency of the jury's verdict is a question of law reviewed independently of the circuit court. ***State v. Booker***, 2006 WI 79, ¶12, 292 Wis. 2d 43, 717 N.W.2d 676.

¶24 Although the complaint and information had in their headings, "contempt of court—disobey order," the text charged all of WIS. STAT. § 785.01(1)(b), as even Wisth notes. Again, Wisth did not object to the complaint, the information, or the instruction to the jury charging all of § 785.01(1)(b).

¶25 Further, the evidence presented was legally sufficient to sustain a conviction for contempt of court under WIS. STAT. § 785.01(1)(b). Wisth's act of trying to give to a juror sitting on the case in which he was the named defendant a flyer that, among other things, accused the judge of bias, constituted contempt of court. A Judicial Council Committee Note to WIS. STAT. ch. 257, § 11, Laws of 1979, which repealed and recreated § 785.01(1), refers to misconduct:

> The definition of contempt of court is intended to be broad and general. Wisconsin statutes formerly included a lengthy list of acts which were included in the definition of criminal contempt ([WIS. STAT. §] 256.03 (1975)). This list was shortened by chapter 401, laws of 1975 ([WIS. STAT. §] 757.03 (1977)). The intention of this new section is not to exclude any acts which were previously defined as contempt of court, but to make it more inclusive by being less specific and less wordy.

¶26 If one examines WIS. STAT. § 256.03(4) (1975-76), it punished as criminal contempt "intentional … misconduct on the basis of which the court could make a finding of civil contempt under [WIS. STAT. §] 295.01, which challenges and impugns the authority of the court." Section 295.01 (1975-76) said that contempt is, among other things, "misconduct, by which act the rights … of a

party in an action or proceeding pending … may be impaired, defeated or prejudiced."

¶27 Here, certainly Wisth trying to hand a juror a communication that, among other things, accused the judge of being biased, had the potential to prejudice the State's right to a fair trial. Wisth's actions could have resulted in a mistrial and, consequently, upset the "fair and orderly administration of justice." ***Feuerstein***, 227 Wis. at 68; *see* ***In re Kading***, 74 Wis. at 411 (noting that contempt "is not limited to instances of noncompliance with specific orders but has been used in many other situations in which judicial authority has been attacked or ignored" such as in the intimidation of witnesses).

¶28 It matters not, as Wisth argues, that the flyer "did not affect the juror or the trial." The result is immaterial, what is criminalized is Wisth's intent. Nor does it matter that neither the sign nor the flyer referred to Wisth's "pending trial." The juror testified that she recognized Wisth, and the jury did not have to believe Wisth's testimony that he did not recognize her. Rather, the jury could have inferred that Wisth, who had been representing himself and would have been involved in the selection of the jurors, did recognize the juror, just like she recognized him.

¶29 Alternatively, the jury could have found that Wisth's actions obstructed the authority of the court because, as the juror testified, the court instructed her and Wisth "not … to talk."

¶30 Finally, Wisth's conduct was not protected under the First Amendment to the United States Constitution. *See* ***Remmer v. United States***, 347 U.S. 227, 229 (1954) ("In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter

pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties."); *see also* ***Turney v. Pugh***, 400 F.3d 1197, 1202-03 (9th Cir. 2005).

¶31 Accordingly, we affirm the judgment of conviction and the order denying Wisth's motion for postconviction relief.

By the Court.—Judgment and order affirmed.

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