COURT OF APPEALS
DECISION
DATED AND FILED

March 7, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1932-CR **Cir. Ct. No. 2014CM2085**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES C. FAUSTMANN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Affirmed.*

¶1 REILLY, P.J.[1] James C. Faustmann was charged with unlawful use of computerized communication systems under WIS. STAT.

[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.

§ 947.0125(2)(a) for sending threats and obscenities by email to a public figure and bail jumping. The jury found Faustmann guilty on both counts. Faustmann argues the circuit court erred by: (1) denying his request to include disorderly conduct as a lesser-included offense of unlawful use of computerized communication systems and (2) allowing acts that were charged in another jurisdiction, but not yet adjudicated, to be introduced as other-acts evidence. We affirm.

¶2 At the time this case was tried, Faustmann was facing similar charges in Milwaukee County. The State sought to introduce the evidence from the Milwaukee County case as other acts evidence in this case. Following a ***Sullivan***[2] hearing, the court granted the State's request. Faustmann requested that disorderly conduct be included on the verdict as a lesser-included offense of unlawful use of computerized communication systems. The court denied the request.

Lesser-included Offense

¶3 Whether a lesser-included offense should be presented to a jury is a question of law we review independently. ***State v. Kramar***, 149 Wis. 2d 767, 791, 440 N.W.2d 317 (1989). A circuit court may not instruct a jury on a lesser *not* included offense. ***Randolph v. State***, 83 Wis. 2d 630, 638-39, 266 N.W.2d 334 (1978). For a crime to be considered within another crime, "it must be 'utterly impossible' to commit the greater crime without committing the lesser." ***Id.*** at 645 (citation omitted). An offense is a lesser-included offense "only if all of its

[2] ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

statutory elements can be demonstrated without proof of any fact or element in addition to those which must be proved for the 'greater' offense." ***Hagenkord v. State***, 100 Wis. 2d 452, 481, 302 N.W.2d 421 (1981) (citation omitted); *see also* WIS. STAT. § 939.66(1). We analyze whether the lesser offense is statutorily within the greater based on an analysis of the elements, not on the peculiar factual nature of the specific defendant's criminal activity. ***Hagenkord***, 100 Wis. 2d at 481.

¶4 The elements of unlawful use of computerized communication systems under WIS. STAT. § 947.0125(2)(a) are: (1) the defendant sent a message to the victim on a computerized communication system or an electronic mail system, (2) the defendant sent the message with intent to frighten, intimidate, threaten, abuse, or harass the victim, and (3) the defendant threatened to inflict physical harm or damage the property of any person. WIS JI—CRIMINAL 1908. The elements of disorderly conduct are: (1) the defendant engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct and (2) the "conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance." WIS JI—CRIMINAL 1900.

¶5 Disorderly conduct is not a lesser-included crime of unlawful use of computerized communication systems as a person can commit that crime without committing the crime of disorderly conduct. Disorderly conduct requires behavior that unlawful use of computerized communication systems does not: conduct tending to cause or provoke a disturbance. WIS JI—CRIMINAL 1900, 1908. The crime of unlawful use of computerized communication systems does not require proof of its impact upon the intended recipient. As a matter of law, disorderly conduct is not a lesser-included offense of unlawful use of computerized communication systems.

Other-Acts Evidence

¶6 A circuit court's decision to admit other-acts evidence is reviewed under the erroneous exercise of discretion standard. ***State v. Sullivan***, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998). "When a circuit court fails to set forth its reasoning, appellate courts independently review the record to determine whether it provides a basis for the circuit court's exercise of discretion." ***Id.*** at 781. We utilize the three-prong test established in ***Sullivan***: (1) whether the evidence being offered is for a permissible purpose under WIS. STAT. § 904.04(2); (2) whether the evidence is relevant; and (3) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the jury, or needless delay. ***Sullivan***, 216 Wis. 2d at 772-73.

¶7 Faustmann makes two "other acts" arguments on appeal: (1) the circuit court erred in admitting evidence from the Milwaukee County case as he was not convicted of those charges at the time of this trial, and (2) the other-acts evidence was unfairly prejudicial as it painted Faustmann as a repeat offender despite the lack of a conviction for the crime.

¶8 Faustmann's argument that the circuit court erred in allowing evidence of the Milwaukee County charges on the grounds that he had not yet been convicted of any crime implicates the relevance prong of the ***Sullivan*** analysis. "[I]mplicit in a decision that evidence of the other act is relevant is a determination that a jury could reasonably find by a preponderance of the evidence that the defendant committed the other act." ***State v. Gribble***, 2001 WI App 227, ¶40, 248 Wis. 2d 409, 636 N.W.2d 488 (citing ***State v. Gray***, 225 Wis. 2d 39, 59, 590 N.W.2d 918 (1999)). Whether a jury could determine that the defendant committed the other acts is a question of law that we review independently. ***Gray***,

225 Wis. 2d at 59. The "conviction" status is not determinative as our supreme court has previously decreed that "[i]t is not necessary that prior-crime evidence be in the form of a conviction; evidence of the incident, crime or occurrence is sufficient." ***Whitty v. State***, 34 Wis. 2d 278, 293, 149 N.W.2d 557 (1967). Other-acts evidence may consist of uncharged offenses so long as the other-acts evidence is relevant and "if a reasonable jury could find by a preponderance of the evidence that the defendant committed the other act." ***Gray***, 225 Wis. 2d at 59 (quoting ***State v. Bustamante***, 201 Wis. 2d 562, 570, 549 N.W.2d 746 (Ct. App. 1996)).

¶9 Our review of the Milwaukee County evidence satisfies us that there is sufficient evidence for a reasonable jury to find by a preponderance of the evidence that Faustmann had committed the acts charged in the Milwaukee County case. The Milwaukee County other-acts evidence involved two emails sent to an attorney in the Milwaukee area, threatening physical harm to the attorney. Both emails were sent from the same yahoo.com email address,[3] both emails were sent using the "contact us" link on the law firm's website, and both emails originated from the same IP address.[4] Time Warner Cable indicated that Faustmann was the subscriber associated with the IP address. When police interviewed Faustmann for the purposes of this case, Faustmann admitted contacting the attorney in the Milwaukee County case. The evidence of the Milwaukee County case was sufficient for a reasonable jury to find by a

[3] This was the same email address used in the current case. Yahoo.com's records indicated that a "Flip Phillips" registered that email address, but yahoo.com does not independently verify that information.

[4] IP address is defined as "a code that identifies a computer network or a particular computer or other device on a network, consisting of four numbers separated by periods." *IP address*, www.dictionary.com, Random House Dictionary (2017), http://www.dictionary.com/browse/ip-address?s=t (last visited Feb. 19, 2018).

preponderance of the evidence that Faustmann engaged in acts of unlawful use of computerized communication systems.

¶10 The Milwaukee County evidence was also relevant under the ***Sullivan*** analysis as the other acts related to facts consequential to the determination of the action and had some tendency to make the consequential facts more or less probable. ***Sullivan***, 216 Wis. 2d at 772. "The measure of probative value in assessing relevance is the similarity between the charged offense and the other act." ***Gray***, 225 Wis. 2d at 58. "The stronger the similarity between the other acts and the charged offense, the greater will be the probability that the like result was not repeated by mere chance or coincidence." ***Id.*** (citation omitted).

¶11 Here, there were several similarities between the Milwaukee County case and the crimes charged in this case. In both cases, the perpetrator used the "contact us" link on an internet website to send the emails, and the emails were sent from the same email address at yahoo.com. The emails both contained similar threats of death to the intended recipient. The IP address associated with the emails were either registered directly to Faustmann or to his apartment complex. Based on the high degree of similarity between both cases, we conclude that the evidence met the relevancy test of ***Sullivan***.

¶12 Under the third prong of the ***Sullivan*** test, we consider the danger of unfair prejudice. ***Sullivan***, 217 Wis. 2d at 772-73; *see also* WIS. STAT. § 904.03. "The inquiry is not whether the other acts evidence is prejudicial but whether it is *unfairly* prejudicial." ***Gray***, 225 Wis. 2d at 64. The probative value of the other-acts evidence in this case results from the inference that it is likely that Faustmann committed the crime of unlawful use of computerized communication systems because he likely committed very similar acts elsewhere. The danger of unfair

prejudice comes from the risk that the jury will conclude that Faustmann committed the crime simply because he committed similar acts and is a "bad guy."

¶13 Due to the similarities between the crimes, we conclude that there is significant probative value here and that the danger of unfair prejudice does not substantially outweigh the probative value in this case. Faustmann's argument that the evidence is unfairly prejudicial because his Milwaukee County case was not yet concluded is simply conclusory, and he overlooks case law allowing such evidence and the fact that the burden of proof for other-acts evidence is not beyond a reasonable doubt. *See* ***id.*** at 59. Faustmann fails to overcome his burden of proving that the probative value of the evidence is substantially outweighed by the risk of unfair prejudice.[5]

¶14 Faustmann also claims that the court "failed to take any steps, such as a cautionary jury instruction, to attempt to limit the unfair prejudice resulting from the admission of this evidence." Although a cautionary jury instruction is preferred, it is not required unless the instruction is requested. ***State v. Payano***, 2009 WI 86, ¶100 & n.21, 320 Wis. 2d 348, 768 N.W.2d 832. Faustmann failed to request a cautionary jury instruction,[6] and did not object to the jury instructions at trial. Failure to object to the jury instructions at trial waives the issue. WIS. STAT. § 805.13(3); ***State v. Perkins***, 2001 WI 46, ¶¶11-12, 243 Wis. 2d 141, 626 N.W.2d

[5] Our supreme court has explained that the party who seeks to admit the other-acts evidence bears the burden of establishing the first two prongs of the ***Sullivan*** test by a preponderance of the evidence, but once the first two prongs have been established, "the burden shifts to the party opposing the admission of the other-acts evidence to show that the probative value of the evidence is substantially outweighed by the risk or danger of unfair prejudice." ***State v. Marinez***, 2011 WI 12, ¶19, 331 Wis. 2d 568, 797 N.W.2d 399.

[6] The State requested a curative instruction in its motion to admit other-acts evidence, but neither party mentioned the instruction during the jury instruction conference.

762 (holding that failure to object at conference about jury instructions constitutes a waiver of any error in the proposed instructions or verdict).

¶15 Accordingly, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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