COURT OF APPEALS
DECISION
DATED AND FILED

June 28, 2018

Sheila T. Reiff
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 Nos. 2017AP971-CR
2017AP972-CR

Cir. Ct. Nos. 2011CF4672
2012CF669

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVONTE LOVE,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI and M. JOSEPH DONALD, Judges. *Affirmed*.

Before Sherman, Blanchard, and Kloppenburg, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Davonte Love appeals judgments of conviction and an order denying his motion for postconviction relief. We affirm.

¶2 After a jury trial, Love was convicted of second-degree sexual assault and felony intimidation of a witness. Love filed a postconviction motion, which the circuit court denied.

¶3 We first address Love's argument that the evidence was insufficient on the witness intimidation count. We affirm the verdict unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that no reasonable trier of fact could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶4 Boiled down, the evidence supporting this charge consisted of statements that Love made during a telephone call from jail to a friend. In those statements, Love encouraged the friend to pay money to the sexual assault victim to discourage her from testifying.

¶5 The witness intimidation statute is unusual in that it contains an "attempt" provision within the substantive statute. It provides, in relevant part: "[W]hoever knowingly and maliciously prevents or dissuades, or who attempts to so prevent or dissuade any witness from … giving testimony" is guilty of an offense. WIS. STAT. § 940.42 (2015-16).[1] However, this statute does not expressly define the concept of attempt.

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

¶6 Most criminal statutes do not contain a separate attempt provision, but instead any charge of attempt is made using WIS. STAT. § 939.32, which is a provision for inchoate crimes that applies generally to criminal statutes. That attempt statute includes language setting forth the conceptual requirements to prove attempt. *See* § 939.32(3).

¶7 The pattern jury instruction for witness intimidation tracks the language of the witness intimidation statute, in the sense that it simply uses the word "attempt" without any language defining that concept. As given to the jury in this case, the pattern instruction states that the second element is that: "The defendant attempted to prevent [the witness] from attending or giving testimony at a proceeding authorized by law." WIS JI—CRIMINAL 1292.

¶8 In a comment, the instructions committee states that "it may be advisable to define 'attempt' for the jury." The comment then provides possible language for that purpose that is less detailed than the instruction for the general attempt statute, WIS JI—CRIMINAL 580. The committee states that it believes this briefer version is "sufficient for most cases."

¶9 Both the additional suggested attempt language for witness intimidation and the jury instruction for the general attempt statute include a passage to the effect that the defendant must have committed "acts which indicated unequivocally" that the defendant intended to commit the crime. On appeal, Love relies on that provision to argue that the evidence in his case was insufficient because "words are not acts," meaning that the mere speaking of words asking another person to commit a crime is not sufficient to qualify as "acts" for purposes of an attempt. Love admits that his words may have been a crime under the solicitation statute, WIS. STAT. § 939.30, but not as an attempt.

¶10 The problem with Love's sufficiency argument is that in his case the jury was not given either of the additional instructions on attempt. The jury was simply instructed as we quoted above, that one element was whether Love "attempted to prevent" the witness from testifying. In the absence of any specific legal definition of "attempted," we must assume the jury would apply an ordinary, common-sense meaning of that word. In ordinary use, to attempt to do something is to try to do it, that is, to make some effort to achieve an intended result. With this instruction, the jury would have had no reason to consider a legalistic distinction between words and acts, because the concept of acts does not appear in the instruction.

¶11 In the context of sufficiency of the evidence, it is not appropriate for us to consider instructions that were not given. We should review sufficiency of the evidence based on the instructions that were actually given. If we were to review sufficiency of the evidence based on instructions not given we would, in practical effect, be altering unobjected-to instructions in a way that favors one party, and then speculating about what a jury *might* have decided, if it had been given those instructions. We would no longer be reviewing the verdict that was actually reached by the jury in Love's case.

¶12 Here, Love's words during the phone call clearly show that he tried to have his friend pay the witness. Love made an effort to achieve that result. Based on the instruction given, a reasonable jury could find guilt beyond a reasonable doubt. Accordingly, there is sufficient evidence to support the verdict.

¶13 Love also argues that his trial counsel was ineffective by not requesting an additional instruction to provide a definition of the attempt concept. To establish ineffective assistance of counsel a defendant must show that counsel's

performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if the defendant makes an inadequate showing on one. ***Id.*** at 697.

¶14 To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.*** We affirm the circuit court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the circuit court. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985).

¶15 Love argues that his trial counsel should have asked for the general attempt instruction. If the jury had been given that instruction, he contends, the jury would not have found him guilty, because that instruction requires the State to show that Love performed acts toward the commission of the crime that demonstrated his unequivocal intent to commit it. And, Love argues, the jury would not have found that his words alone were acts for that purpose.

¶16 We conclude that Love has not shown prejudice. Even if the jury had been given the attempt instruction, that instruction does not define what an "act" is. In ordinary usage, speech can be considered an act. Without a specific definition of "act," it would be up to the jury to decide whether Love's speech was an act for purposes of applying the instruction.

¶17 We conclude that it is highly likely that the jury would have found that Love's speech was an act toward the commission of the crime. His speech went beyond idle musing. It was strong encouragement to a friend to proceed with

a crime, accompanied by a proposed plan of action. Accordingly, our confidence in the outcome is not undermined.

¶18 Love also argues that he was denied his constitutional right to a speedy trial. The parties agree that we should apply a four-part balancing test in which we consider: "(1) the length of delay, (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant." *See* ***State v. Urdahl***, 2005 WI App 191, ¶11, 286 Wis. 2d 476, 704 N.W.2d 324. This is a question of law, although we accept findings of fact unless they are clearly erroneous. ***Id.***, ¶10.

¶19 In this appeal our focus is on the reasons for the delays. In Love's opening brief he briefly explains why he believes most of the delays in the first case charged against him, which was eventually dismissed without prejudice, should be attributed to the State. In response, the State provides a more detailed discussion of those delays and argues that most of them are either neutral or attributable to Love.

¶20 In reply, Love does not dispute the State's attribution of those delays, either specifically or generally. We take that as a concession that the State's attribution is largely correct. *See* ***State v. Chu***, 2002 WI App 98, ¶41, 253 Wis. 2d 666, 643 N.W.2d 878 (propositions not refuted may be taken as conceded). With the attribution apportioned in that manner, the application of the balancing test readily leads to a conclusion that Love's right to a speedy trial was not violated.

By the Court.—Judgments and order affirmed.

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