COURT OF APPEALS
DECISION
DATED AND FILED

June 28, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2720-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RONALD J. MYREN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Judgment affirmed in part; reversed in part; order reversed and cause remanded with directions.*

¶1 DYKMAN, P.J. This is an appeal from a judgment convicting Ronald Myren of one count of stalking, contrary to WIS. STAT. § 940.32(2) (1997-

98),[1] and two counts of disorderly conduct, contrary to WIS. STAT. § 947.01, and from and order denying sentence credit. Ronald Myren raises sufficiency of evidence, other acts evidence, and sentence credit issues. We conclude that the evidence was sufficient to convict Myren of two of the three offenses, the other acts evidence was properly admitted, and that he is entitled to 102 days of sentence credit. We therefore affirm in part, reverse in part, and remand with instructions.

FACTS

¶2 Shannon A. was walking to her friend's house in a light rain. A man drove past in his car. Then he turned around and came back. He asked Shannon where she was going. Shannon replied that she was going to her friend's house. The man asked why Shannon was walking in the rain. Shannon replied that she was just going around the corner. The man asked if Shannon wanted a ride. Shannon said "no" and ran to her friend's house because she did not want the man to get her in his car. The encounter made Shannon feel afraid, though she could not explain the reason for her fear.

¶3 The next day, Shannon saw the man again. She was coming back from a swimming pool, and the man was in the same automobile as the day before. Shannon said that she saw the car coming toward her, and that it almost stopped. The man kept looking at her, which made her feel scared. She was able to remember and write down the automobile's license number, and eventually identify Myren as the driver of the car on both days.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

EVIDENCE SUFFICIENCY

¶4 Myren asserts that the evidence we have described is insufficient to convict him of either stalking or disorderly conduct. The statutes involved in Myren's conviction are WIS. STAT. §§ 940.32(2) and 947.01. Section 940.32(2) states:

> Whoever meets all of the following criteria is guilty of a Class A misdemeanor:
>
> (a) The actor intentionally engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to himself or herself or a member of his or her immediate family or to fear the death of himself or herself or a member of his or her immediate family.
>
> (b) The actor has knowledge or should have knowledge that the specific person will be placed in reasonable fear of bodily injury to himself or herself or a member of his or her immediate family or will be placed in reasonable fear of the death of himself or herself or a member of his or her immediate family.
>
> (c) The actor's acts induce fear in the specific person of bodily injury to himself or herself or a member of his or her immediate family or induce fear in the specific person of the death of himself or herself or a member of his or her immediate family.

Section 947.01 states:

> 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.

Stalking

¶5 Myren contends that the evidence did not show that his course of conduct toward Shannon caused her to actually fear that she would suffer bodily

injury or death, or that his conduct was such that her fear was reasonable. The test for evidence sufficiency is whether, considering the evidence in a light most favorable to the verdict, a reasonable jury could be convinced beyond a reasonable doubt of the defendant's guilt. ***State v. Samuel***, 2001 WI App 25, ¶26, 240 Wis. 2d 756, 770, 623 N.W.2d 565.

¶6 Shannon did not testify that she feared bodily injury or death, and Myren views this as fatal to his conviction. He contends that a generalized fear is not enough. But a reasonable jury could conclude that Shannon's parents had instilled in her the "stranger-danger" fear, and that the reason Shannon did not want the man to "get her in the car" was a fear of bodily injury or death. Myren's offer was suspicious at best—a ride to save an unknown child a very short walk in what she described as a light rain or sprinkle. Even Myren concedes: "Our society instills in its children a fear of strangers, in some instances, not unreasonably." That common knowledge, plus Shannon's aversion to a stranger getting her in his car for no benefit to her was enough, viewing this most favorably to the verdict, to sustain Myren's conviction.

¶7 Myren next argues that the State did not provide sufficient evidence to convince a jury that even if Shannon had a fear of bodily injury, her fear was reasonable. "Reasonableness" is a question of law, though we are to give weight to the fact-finder's decision. *See* ***Wassenaar v. Panos***, 111 Wis. 2d 518, 525, 331 N.W.2d 357 (1983).

¶8 We do not agree with Myren that it was unreasonable for Shannon to fear death or bodily injury from accepting a ride with him. The media today focuses heavily on stories of child abduction, sexual assault, and murder. "If it bleeds, it leads" is a phrase commonly attributed to the media. Shannon was ten

years old at the time she had contact with Myren. This is more than old enough to have been media educated to the violence perpetrated on children by those who begin their plans by getting children into their cars. Insofar as the reasonableness of Shannon's fear is a question of law, we conclude that this fear, brought on by a suspicious offer, parental warnings, and media reporting is reasonable. Insofar as the question is one of fact, a reasonable jury could hold our view as to the reasonableness of Shannon's fear. The evidence was sufficient to sustain Myren's conviction for stalking.

Disorderly Conduct

First Encounter

¶9 In ***State v. A.S.***, 2001 WI 48, ¶¶5-8, 243 Wis. 2d 173, 626 N.W.2d 712, the supreme court explained WIS. STAT. § 947.01 in the context of an attack on the sufficiency of a delinquency petition. In ***A.S.***, a juvenile made statements at school that he was going to kill everyone at the middle school, make people suffer, hang a police officer, rape a fellow student, and shoot a school principal. ***A.S.***, 2001 WI 48 at ¶3. The supreme court reversed the trial court's dismissal of the petition, concluding that the juvenile's statements were "otherwise disorderly." ***Id.*** at ¶30-31. The court noted that A.S. made the threats ascribed to him during a discussion of the murders at Columbine High School in Colorado. ***Id.*** at ¶34.

¶10 The ***A.S.*** court then noted:

> We conclude that under these circumstances such conduct supports a finding of probable cause of "otherwise disorderly" conduct. Such violent threats are of the type that tend to disrupt good order under the circumstances because they could cause the listeners to be seriously concerned about the safety of those threatened.

A.S., 2001 WI 48 at ¶34.

¶11 Myren asserts that the only possible way he could have violated WIS. STAT. § 947.01 would be if his conduct was "otherwise disorderly." The State does not challenge this assertion, and we therefore take it as admitted. *See* ***Mackenzie v. Miller Brewing Co.***, 2000 WI App 48, ¶61, 234 Wis. 2d 1, 608 N.W.2d 331, *aff'd*, 2001 WI 23, 241 Wis. 2d 700, 623 N.W.2d 739. In ***City of Oak Creek v. King***, 148 Wis. 2d 532, 542, 436 N.W.2d 285 (1989), the supreme court noted the importance of a coalescing of conduct and circumstances when conduct is alleged to be "otherwise disorderly." The conduct must be of a type having a tendency to disrupt good order, and must be engaged in under circumstances which tend to cause or provoke a disturbance. ***Id.*** at 540.

¶12 ***A.S.*** applied this definition to the threats we have noted in that case. Significantly, the court noted that the threats could disrupt good order under the circumstances because of their effect on a listener. ***A.S.***, 2001 WI 48 at ¶34. The listener could become seriously concerned about the safety of those threatened. ***Id.*** We see no difference between a person listening to threats and becoming concerned about others' safety and a person hearing threats and becoming concerned about his or her own safety. It is enough under ***A.S.*** that the action of the defendant cause a listener to become concerned for her safety. If that is fulfilled, the action is of a sort that tends to disrupt good order, and is "otherwise disorderly." The question becomes whether that conduct tends to cause or provoke a disturbance.

¶13 It is not necessary that a disturbance actually occur. ***Oak Creek***, 148 Wis. 2d at 545. ***A.S.*** discusses the element of "tends to cause or provoke a disturbance." ***A.S.***, 2001 WI 48 at ¶36. The court noted that in the context of a

discussion at school, A.S.'s statements "could only serve to frighten and cause serious concern to the listeners." ***Id.*** at ¶37. The court also noted that the actual effects of A.S.'s conduct were probative. ***Id.*** at ¶39. The student hearing A.S.'s threats was frightened and concerned enough to report A.S.'s conduct to the police. ***Id.***

¶14 We apply ***A.S.*** to Myren's actions. A male automobile driver who, upon seeing a ten-year-old girl, turns around and asks questions of the girl is likely to cause that girl concern. Adding a suspicious offer to give her a ride for a very short distance is likely to frighten and cause serious concern to the girl. Shannon testified that Myren's actions caused her to be afraid, and her mother testified that after the incident, Shannon's voice was shaky. And, her mother reported the incident to the police.

¶15 No actual disturbance occurred in ***A.S.*** No actual disturbance occurred here. While the threats in ***A.S.*** were violent and detailed, the ***A.S.*** court looked to the effect the threats had and might have had on others. Here, we look at the statements of Myren which, though they were not direct threats, conveyed a message threatening enough to frighten Shannon, concern her mother, and lead to a call to police. While we might have concluded otherwise prior to ***A.S.***, we conclude that in light of that case, a reasonable jury could have found that Myren's conduct tended to cause or provoke a disturbance in his first encounter with Shannon.

<u>Second Encounter</u>

¶16 This is a different situation. Shannon testified:

> Well, the parking lot is right here, and I was standing by this house and I was talking to my friend, Monique, and my

> other friends from school, and this car came like towards from Shopko way and he was coming and he almost stopped, but he just kept going. He kept looking at me. Then we just went to Monique's house and played.

Shannon also testified that this scared her.

¶17 Myren argues that conduct could not reasonably be interpreted as "otherwise disorderly." He contends:

> An adult who does nothing more than look for a few seconds at a ten-year-old girl standing on a public street corner does not disrupt good order or provoke a disturbance….
>
> …. Certainly we have not reached the point in our society where one cannot look at a girl without committing a crime.

¶18 We would have liked to consider the State's response to Myren's argument. But the State does not respond to Myren's arguments concerning his second disorderly conduct conviction, other than to write: "[T]he act of a strange adult male … slowing down, smiling and staring at [a young girl] is disorderly conduct …."[2] As we previously noted, we deem unrefuted arguments admitted. *See* ***Mackenzie***, 2000 WI App 48 at ¶61. We see no reason to depart from ***Mackenzie*** now. We therefore reverse the judgment insofar as it convicts Myren of a second count of disorderly conduct committed on July 18, 1999.

[2] This sentence, in reality the State's opinion, is asserted without authority or explanation. In ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980), we explained that argument not supported by authority is inadequate, and that in the future we would refuse to consider such an argument. We see no reason to depart from ***Shaffer*** here. Nor do we find in the record evidence that Myren smiled.

OTHER ACTS EVIDENCE

¶19 Prior to trial, the State moved *in limine* to be permitted to introduce evidence that on two occasions in 1996, Myren had followed, questioned, and stared at Jennifer S., then twelve years old. The trial court, though by a judge other than the judge who tried the cases against Myren, granted the motion, ruling that the 1996 incident could be considered in connection with the stalking and disorderly conduct charges, and only on the issues of intent and knowledge. At trial, the court instructed the jury accordingly. During the deliberations, the jury sent out a note, asking "Can we use the 1996 case for purpose of intent in this case?" The trial court held a conference with counsel, and determined that it would ask the jury to re-read WIS JI—CRIMINAL 275. Myren's attorney replied: "I think that's fine."

¶20 We review admission of other acts evidence for erroneous exercise of discretion. ***State v. Sullivan***, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). We will sustain an evidentiary ruling if we conclude that the trial court examined the relevant facts, applied a proper standard of law, and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach. ***Id.*** at 780-81.

¶21 The subject of the 1996 other acts evidence came up on four occasions. The first was a motion hearing on February 4, 2000. Judge Mulroy concluded that the State could introduce the evidence, but that its relevance was limited to the stalking and disorderly conduct charges against Myren. At a February 10 motion hearing, Judge Montabon, who was assigned to try the case, concluded that Judge Mulroy's ruling was incorrect, and that the State could use the evidence "vis-a-vis any charge." That included a charge of child enticement,

contrary to WIS. STAT. § 948.07, for which the jury eventually found Myren not guilty. At the instruction and verdict conference on February 15, 2000, Judge Montabon concluded that the evidence could be used only in the disorderly conduct and stalking counts. And in answer to the jury's question, Judge Montabon told the jury to re-read the instructions he had given them, which limited the use of the evidence to the disorderly conduct and stalking counts.

¶22 Myren asserts that the trial court erred by allowing the State to use "other acts" evidence to prove that he was guilty of disorderly conduct because intent is not an element of that crime. But Myren does not argue that the other acts evidence was improperly admitted to prove him guilty of stalking. Indeed, he concedes that intent is an element of stalking. Thus, the evidence could properly have been admitted to help prove Myren guilty of stalking. Under Myren's theory, had the trial court limited the use of the other acts evidence to the stalking charge, there would have been no error, or at least no error of which Myren now complains. It was the following jury instruction that caused the error, under Myren's theory:

> Consider this instruction only when considering the allegations of stalking *and disorderly conduct.*
>
> ….
>
> Specifically, evidence has been received that the defendant previously committed the crimes of disorderly conduct. If you find that this conduct did occur, you should consider it only on the issues of intent and knowledge.

(Emphasis added.)

¶23 The error of the trial court, if error at all, was therefore not an evidentiary error—the other acts evidence could have properly been presented to the jury. The error occurred when the trial court instructed the jury that the

evidence could be used only to show intent or knowledge and to prove Myren guilty of disorderly conduct.

¶24 The error of which Myren complains is therefore an instructional error if it was error at all. And this court is without jurisdiction to address instructional errors unless an objection is made to the instruction at the instruction conference. WIS. STAT. § 805.13(3); ***P.C. v. C.C.***, 161 Wis. 2d 277, 297, 468 N.W.2d 190 (1991); ***State v. Schumacher***, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988).

¶25 At the instruction conference, the court commented on WIS JI—CRIMINAL 275, the cautionary instruction if other acts evidence has been received:

> THE COURT: The only thing I really did anything different from any standard one, as per the ruling, as to 275, the other crimes, I—consider this instruction only with considering—when considering the allegations of stalking and—stalking and disorderly conduct.
>
> [STATE'S ATTORNEY]: Judge, I thought—did you want that to be in there or are you—
>
> THE COURT: I thought it was agreed that that be in there.
>
> [DEFENDANT'S ATTORNEY]: That's the way I think it should be.
>
> ....
>
> THE COURT: [Mr. Myren's attorney]?
>
> [DEFENDANT'S ATTORNEY]: Judge, that was Judge Mulroy's ruling. Judge Mulroy's ruling actually is consistent with the way the instructions are, that it's only relevant to stalking and disorderly conduct. It's true that at the motion hearing that you appeared to change your mind. If you listened to the evidence here today and decided that it wasn't relevant to that or upon reflection have decided that it wasn't relevant to that, I believe that that's what the law is. I don't think the law is that if it's relevant to one thing, it's relevant to—that the State can argue that it's relevant to everything. I think it has to be limited a little bit more, and I do think it's appropriate in this case to limit its relevance to the disorderly conduct and the stalking,

> because I honestly don't think it shows anything about Mr. Myren's intent in the child-enticement case.

¶26 Thus, far from objecting that the other acts evidence should not be used to show intent in the disorderly conduct charge, Myren agreed that the instruction that is the basis for this section of his appeal should be submitted to the jury. Because Myren failed to object to the instruction at the instruction and verdict conference, we are without jurisdiction to consider his assertions of error. And we question whether, having requested the instruction, Myren can now argue that the trial court erred by giving it.

SENTENCE CREDIT

¶27 Though sentence credit issues can be difficult, Myren and the State have greatly narrowed the issue here. Myren, citing ***State v. Boettcher***, 144 Wis. 2d 86, 99-100 & n.4, 423 N.W.2d 533 (1988), asserts that WIS. STAT. § 973.155(1) entitles him to 102 days of sentence credit. The State contends that the footnote in question is inapplicable to Myren. Section 973.155(1) provides:

> (a) A convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed. As used in this subsection, "actual days spent in custody" includes, without limitation by enumeration, confinement related to an offense for which the offender is ultimately sentenced, or for any other sentence arising out of the same course of conduct, which occurs:
>
> 1. While the offender is awaiting trial;
>
> 2. While the offender is being tried; and
>
> 3. While the offender is awaiting imposition of sentence after trial.
>
> (b) The categories in par. (a) include custody of the convicted offender which is in whole or in part the result of a probation, extended supervision or parole hold under

> s. 304.06(3) or 973.10(2) placed upon the person for the same course of conduct as that resulting in the new conviction.

¶28 In ***Boettcher***, 144 Wis. 2d at 88, a probationer was arrested for a probation violation, possession of a firearm. His probation was revoked 100 days after arrest, and he was sent to prison to serve a previously imposed sentence. ***Id.*** at 88-89. While awaiting his revocation hearing, he was charged with the crime of felon in possession of a firearm. ***Id.*** at 88. After his probation was revoked, he pleaded no contest to that charge, and was sentenced to one year in prison, consecutive to the charge for which his probation was revoked. ***Id.*** at 89. The court noted: "While acknowledging that in cases where sentences are concurrent dual credit may be permissible, the state argues that no dual credit is allowable where consecutive sentences are imposed. We agree with the state's position …." ***Id.*** at 90. Myren's sentences were not consecutive to the sentence for which his parole was revoked. Were they, ***Boettcher*** would be directly applicable to his situation, and he would not be entitled to sentence credit. "[I]n the absence of a statute to the contrary, or judicial declaration in the sentence imposed, where there is a present sentence for another offense of one then actually or constructively serving a former sentence, the two sentences run concurrently." ***Application of McDonald***, 178 Wis. 167, 171, 189 N.W. 1029 (1922).

¶29 While the continued vitality of ***McDonald*** has been questioned, *see* ***State v. Morrick***, 147 Wis. 2d 185, 187, 432 N.W.2d 654 (Ct. App. 1988), the ***McDonald*** rule makes sense when the record does not indicate whether a sentence is concurrent or consecutive. Consecutive sentences are more onerous. Using a concept similar to the rule of lenity, *see* ***State v. Kittilstad***, 231 Wis. 2d 245, 267, 603 N.W.2d 732 (1999), together with ***McDonald***, we conclude that Myren's

sentence for stalking was imposed to run concurrently, at least in part, to the sentence for which his parole was revoked.[3]

¶30 We therefore move to the part of ***Boettcher*** that Myren asserts is dispositive and the State claims is inapplicable to Myren. We have quoted WIS. STAT. § 973.155(1)(b). Referring to that statute, the court in ***Boettcher*** said:

> Paragraph (b) … is a statement of what must be included as creditable time under the statute. Thus, a rational, straightforward reading that does no violence to the literal words of the statute is simply that par. (b) is a provision not for dual credit but is to assure that there is the power to give dual credit in appropriate cases.[4]
>
> ———————————
>
> [4] *E.g.*, when a new sentence is imposed to run concurrently with a revoked probation.

Boettcher, 144 Wis. 2d at 99-100.

¶31 Myren's parole was revoked, while footnote four on its face refers to probation, but Myren's position is that footnote four refers to his situation. The State counters, however, by asserting: "The note in ***Boettcher***, to which the defendant-appellant refers in his brief logically and contextually must refer to new sentences that run concurrently and begin at the same time as the parole/probation revocation."

¶32 We think Myren has the better of this argument. ***Boettcher*** addressed an assertion that WIS. STAT. 973.155(1)(b) applied to a sentence imposed consecutively to the sentence for which Boettcher's probation was

[3] The trial court was certainly aware of its sentencing powers. It sentenced Myren to three years for Myren's first disorderly conduct conviction, consecutive to its sentence for stalking. And it sentenced Myren to three years' probation for the second disorderly conduct conviction, consecutive to the six years it had previously sentenced him.

revoked. The supreme court said that it did not, but noted that in appropriate circumstances, e.g., when a new sentence is imposed to run concurrently with a revoked probation, dual credit was appropriate. ***Boettcher***, 144 Wis. 2d at 100 n.4. There is nothing unusual or questionable about the supreme court's comment in ***Boettcher***. It is a common way for appellate courts to explain a decision. The State's belief that this comment applies only when a defendant is sentenced on the exact day that his probation or parole is revoked is not realistic. It is coincidental that probation or parole would be revoked on the same day as sentencing for a new crime. The chances of this occurring are less than slim. It is not realistic to conclude that given the ***Boettcher*** court's reliance on ***Doyle v. Elsea***, 658 F.2d 512, 515 (7th Cir. 1981), the court was limiting dual sentence credit to a situation that would probably not ever occur.

¶33 If the State is correct, the result is that Myren gets no sentence credit for the time he spent in jail. The State asserts: "The 102 days credit that the defendant obtained against the parole revocation should not be credited to the sentence for the new conviction also." While it is correct that Myren received 102 days of sentence credit against the parole revocation sentence, in fact that credit is worthless. Myren will not spend 102 fewer days in prison as a result of crediting him with 102 days against his parole revocation sentence. While it is true that his sentence on that charge will end 102 days earlier, in the real world, that fact is irrelevant. Myren will not be out of prison for that 102 days. He will be incarcerated because of his conviction for stalking, or perhaps disorderly conduct. Giving him credit against his parole revocation sentence would be like giving a thirsty person a handkerchief. It might be a beautiful handkerchief, but it is irrelevant to the problem at hand.

¶34 We believe that the first paragraph of the quote from ***Doyle*** found in ***Boettcher*** bears repeating here:

> As a practical matter, Doyle spent four months in pretrial custody for two reasons: because he was accused of committing a crime, and because he was accused of violating his parole. It seems obvious—and not particularly unusual—that he was in pretrial custody "in connection with" both the violator term and the 1978 sentence. Therefore, under section 3568, he is entitled to receive credit for the pretrial custody. That is not to say that he is entitled to double credit. It simply means that he is entitled to have the total amount of time he must spend in prison under his two sentences reduced by the amount of time he spent in pretrial custody.

Boettcher, 144 Wis. 2d at 94 (quoting ***Doyle***, 658 F.2d at 515.)

¶35 Myren is entitled to have the total time he will spend in prison on his parole revocation conviction, his stalking conviction, and his disorderly conduct conviction reduced by 102 days. That will not happen if he is credited with the 102 days only against his parole revocation conviction. The only way to cause it to happen is to give him credit, or "dual credit" as the State defines it, against his stalking conviction. Though the State terms this a "windfall," and "illogical," it is neither. There is nothing illogical about the ***Doyle*** analysis, and getting 102 days less in prison in trade for 102 days spent in jail can hardly be described as a windfall. We therefore reverse the trial court's order denying Myren's motion for 102 days of sentence credit and remand with instructions to grant that motion.

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

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4 (1999-2000).