COURT OF APPEALS
DECISION
DATED AND FILED

August 20, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0493-CR **Cir. Ct. No. 01 CM 2491**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHANING B. GRABNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed*.

¶1 WEDEMEYER, P.J.[1] Chaning B. Grabner appeals from a judgment entered after a jury found him guilty of disorderly conduct and obstructing a police officer, contrary to WIS. STAT. §§ 947.01 and 946.41(1) (1999-2000).[2] Grabner

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (1999-2000).

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

claims: (1) the trial court's and the district attorney's use of the term "domestic violence" violated his right to due process and a fair trial; (2) the trial court erred when it permitted the district attorney's comment on "other bad acts," which were not part of the charges lodged against him; and (3) the trial court improperly instructed the jury during defense counsel's closing argument.

¶2 Because no objection was made to the use of the term "domestic violence," because the district attorney's comments relating to Grabner's state of sobriety were not "other acts" evidence, and because the trial court's curative instruction to the jury during defense counsel's final argument did not unfairly prejudice the defense, this court affirms.

BACKGROUND

¶3 This appeal has its genesis in a complaint received by the West Allis Police Department on March 19, 2001, that a husband/wife argument and physical altercation had occurred. Grabner is the husband and Debra is his wife. Two police officers investigated the report. As a result of the investigation, the State charged Grabner with battery, disorderly conduct, and obstructing an officer. Grabner pleaded not guilty. The battery count was dismissed. The disorderly conduct and obstruction of a police officer counts were tried to a jury. The jury found Grabner guilty on both counts. He now appeals.

ANALYSIS

¶4 Grabner first claims that the trial court erred during jury selection, when it used the term "domestic violence." He argues that the error was repeated when the district attorney used the same term during opening statement. These

utterances, argues Grabner, deprived him of his constitutional right to a fair trial by an impartial jury. This court is not convinced.

¶5 Grabner's counsel acknowledged that the reason police officers were summoned to the Grabner residence was relevant, but disagreed with the State as to how to describe to the jury the reason for the visit. He wanted the reason to be labeled a "domestic complaint" or a "domestic dispute." The district attorney, on the other hand, wanted to describe the reason as responding to a "domestic abuse" call. The trial court never ruled on the disputed description. The instances that form the basis for this claim of error occurred in the following sequence.

¶6 Prior to conducting the voir dire of the jury panel, the trial court initially instructed the jury that in evaluating the two charges against Grabner, it should weigh only the evidence presented by the testimony of witnesses and exhibits. During these instructions, the trial court advised the jury that there could be a reference to a "domestic violence case or charge."

¶7 Next, during the voir dire of the jurors, Grabner's counsel asked the jury panel whether anyone had been a victim of a crime that was assaultive in nature. Juror Stikl responded that she had been the victim of domestic violence at the hands of her ex-husband. Counsel further asked who had ever called the police because of an argument with a spouse. Again, Stikl responded she had. As a follow-up, the trial court remarked:

> Ms. Stikl, to follow up with one or two things that you said in response to the questions of the lawyers. And you had indicated that you had been-- I'm not sure if you said that you were a victim of domestic violence. Although you did have familiarity with it, and I believe it was with respect to your ex-husband[,] is that correct? I did hear that correctly? Did you ever call the police or get the police involved with respect to any domestic situation?

Juror Stikl answered that she had called the police one time. The trial court then stated:

> Given that marital history, the fact that there may be reference during the course of this domestic violence case or charge I should say, although the charge of disorderly conduct and obstructing officers are not the typical traditional type of domestic violence case, you are nonetheless going to hear some allegation or some information concerning where [sic] the police were there at that residence to begin with and it will involve a domestic dispute.[3]

¶8 Lastly, at the beginning of his opening statement, the district attorney remarked: "On March 19, this officer, Officer Chad Piontek was called to the residence of Mr. Chaning Grabner on a domestic violence call." For the reasons that follow, this court is not persuaded that these utterances eliminated fairness from this trial.

¶9 First, from a procedural standpoint, no objection was lodged to the remarks, nor was a motion for a mistrial made. Thus, the alleged error is deemed waived. *See* ***Holmes v. State***, 76 Wis. 2d 259, 272, 251 N.W.2d 56 (1977).

¶10 Second, any challenge to the demands for a fair trial is not to be analyzed in isolation. The whole record must be examined for such an evaluation. This examination reveals that prior to conducting the voir dire of the jury panel, the trial court gave some introductory instructions. It charged the jury that in evaluating the two allegations against Grabner, it should weigh only the evidence

[3] This court notes that in his brief, Grabner does not include the last sentence of the quotation.

presented to it by either the testimony of witnesses or the exhibits admitted into the record. Then, in the final instructions given prior to closing arguments, the trial court admonished the jury to ignore any impression it might have received from the bench as to the guilt or innocence of the accused. It again explained the nature of evidence and what it could consider and additionally emphasized that the remarks of counsel are not evidence. "If the remarks impl[y] the existence of certain facts and those facts [are] not [] in evidence, disregard any such implication and draw no inference from the remarks." In the absence of additional proof, it is presumed that the jury followed those instructions and fairly reached its verdict. ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989)

¶11 Third, from this court's review of the entire trial record, no instance of any alleged domestic abuse appears. For these reasons, this claim of error fails.

¶12 Grabner next claims the trial court erred in allowing into evidence testimony about his state of observed sobriety which he denominates as "unwarranted Whitty evidence." In his brief, Grabner cites four instances in which mention is made of what he claims is improperly admitted "other acts evidence."

¶13 As reflected in the record, the first instance occurred when the district attorney asked Officer Chad Piontek if he made any observations about Grabner as he was handcuffing him. Piontek responded: "He appeared to be intoxicated based on the strong odor of alcohol detected on his breath, the fact that his eyes[,] when we saw them[,] his eyes were wild and glassy, and his face was very flushed." No objection was made to the question or the response.

¶14 The second instance occurred when the district attorney asked Grabner if "the two of you were at the bar together that night …?" Grabner's trial

counsel then objected stating: "… I object to the line of questioning talking about the incidents." The trial court overruled the objecting ruling that: "There's been some evidence introduced … as to the defendant's intoxication. The State is allowed further inquiry."

¶15 In the third instance, Grabner was asked by the district attorney: "And how many drinks did you have during that time?" He answered: "Three or four glasses of beer." Shortly thereafter, Grabner denied having any symptoms of intoxication and denied being intoxicated.

¶16 For the fourth instance, in closing argument, the district attorney stated to the jury: "By his own admission, he was drinking that night."

¶17 This court rejects this claim of error for several reasons. First, when the subject of Grabner's signs of intoxication was first raised, no objection was made. Thus, waiver occurred. When the trial court overruled the objection in the second instance, it was in effect basing its ruling upon the earlier waiver; i.e., since the matter of Grabner's state of sobriety had been introduced, it could be explored.

¶18 Second, the objection raised by Grabner's counsel lacked the required specificity required to preserve the error. *See* WIS. STAT. § 805.11(2).

¶19 Third, due to the nature of the disorderly and obstruction charges, any information explaining the possible source of the conduct under examination was relevant to the determination of what transpired in Grabner's residence once the police officers entered the premises. Additionally, any description of Grabner's physical and mental well-being was relevant to his correct or incorrect recollection of what occurred between the officers and him.

¶20 Lastly, as correctly suggested by the State in its brief, citing ***State v. Bauer***, 2000 WI App 206, 238 Wis. 2d 687, 617 N.W.2d 902, the purpose of the State's intention to admit evidence of intoxication could not have been to show similarity between the other conduct and the alleged acts just by the very nature of the activities involved. Rather, as indicated above, Grabner's state of sobriety was relevant to those issues. Thus, this claim of error also fails.

¶21 As a final claim of trial court error, Grabner contends that a curative instruction given by the court in response to the district attorney's objection to a portion of his counsel's final argument so prejudiced him that he was unable to receive a fair trial. The nature of this claim of error is not exactly clear. This court deems that the thrust of the claim is the content of the curative instruction. For that reason we recite it in its entirety.

> THE COURT: Ladies and gentlemen, I have interrupted closing arguments of the defense counsel because of the objection of the State. And I have heard arguments by both parties in chambers as to what is and what is not proper closing arguments.
>
> The Court has concluded and I have instructed the lawyers in chambers that part of the defense counsel's closing arguments has been inappropriate and outside the scope of proper closings. And I'm going to give you curative instructions as to what it is you need to do under the law.
>
> Counsel argued and used the phrase resisting, but this isn't a resisting case. No physical fighting or acts by the defendant was used against the officers. I felt that was a misstatement of the law. This is not a resisting case; this is an obstructing-officers case. I have read you the jury instruction 1766 which you will have a copy of and defines obstructing does not include physical acts.
>
> Secondly, Counsel referred to the private or the personal residence of the defendant in his comments, referring to it as this happened in his own home, in his kitchen. Again, referring you back to the jury instruction on disorderly conduct, disorderly conduct can occur under the law in both a public or a private residence.

> Counsel made reference to the actions of the officers as it relates to the arrest of the defendant. Defense has not raised, nor is it properly before you any allegations of an improper entry into the residence under a Fourth Amendment argument or that this was an unlawful arrest. Neither of those issues is properly before this jury. The defense specifically stipulated ahead of time that there would be no issues as it relates to those areas of this case. And so, you are not to consider any of that or any portion of his argument that went to those issues.
>
> Finally, the duty of the jury as I have instructed from the beginning is to weigh the evidence and to listen to the law that I give you in the jury instructions. You are to be guided by that and that alone and render your verdict. You are not to be swayed by passion, by sympathy, by prejudice, by bias. You are to be guided by the law and the law only.
>
> So any attempts on the part of the defense counsel in his closing arguments to do what we call sort of flag-waving for getting an emotional response out of you as opposed to the law is again inappropriate and must not be considered by you in rendering your verdict.

¶22 The closing arguments then resumed and concluded without further objections. In addressing a challenge to the appropriateness of a particular jury instruction, a court must be mindful that the purpose of instructions is to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence. ***State v. Dix***, 86 Wis. 2d 474, 486, 273 N.W.2d 250 (1979). Specific evidentiary facts may be incorporated into an instruction provided they do not lead the jury to believe the court has prejudiced the evidence. Additionally, it may be appropriate to include the court's interpretation of the law in relation to the specific set of facts under examination. ***Id.*** at 487. Logically, the same rubrics apply to a curative instruction.

¶23 When the trial court ordered an in-chambers conference after the objection of the State, in its reported remarks to counsel, it determined that portions of defense counsel's argument were inappropriate to charges filed against

Grabner and the issues to be resolved by the jury. From this court's review of the record, it was not error for the trial court to clear up any confusion that might exist by defense counsel's use of the term "resisting," when the actual charge lodged against Grabner was "obstructing." Nor was it error to clarify that "disorderly conduct" could occur in a private residence. Furthermore, it was not unreasonable for the court to be concerned about possible jury nullification because of counsel's emotional appeal to the sanctity of his client's kitchen. When one considers the curative instruction in its entirety, coupled with the entire closing argument, this court concludes Grabner was not unfairly prejudiced.

By the Court.—Judgment affirmed.

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