COURT OF APPEALS
DECISION
DATED AND FILED

December 11, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP933-CR **Cir. Ct. No. 2010CF509**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID J. GALAROWICZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County: MICHAEL MORAN, Judge. *Affirmed*.

¶1 MANGERSON, J.[1] David Galarowicz appeals a judgment of conviction, entered on a jury verdict, for disorderly conduct. Galarowicz argues the conviction violated his right to a unanimous verdict. We disagree and affirm.

BACKGROUND

¶2 A criminal complaint charged Galarowicz with physical abuse of a child, resisting an officer, and disorderly conduct. At trial, sixteen-year-old Elesha J. testified that Galarowicz was her mother's former fiancé and, on the date of the incident, the three were all residing together. Galarowicz was dropped off at the residence at approximately 9:30 p.m. He appeared upset and intoxicated, and began calling Elesha's mother, who was not present, derogatory names. When Elesha told Galarowicz to stop, he grabbed her arm and unplugged the computer she was using.

¶3 Elesha told Galarowicz he needed to sit down in the living room. He let her go and sat down in a recliner. Galarowicz told Elesha to go to her room, but Elesha turned on the computer and resumed using it. She tried to contact her mother, but was unable to reach her on her cellphone. Approximately twenty minutes later, Galarowicz told Elesha he needed a maul to smash the television. Elesha told him that, if he continued his behavior, he would go to jail. In response, Galarowicz threw his shoe at Elesha and missed her. Galarowicz then approached Elesha, pulled the keyboard out of the computer desk, and threw the computer monitor on the floor. Galarowicz began yelling at Elesha, saying, "let's go, let's go, like he wanted to fight." He grabbed her arm, and she pushed him,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

causing him to fall into a television speaker. He grabbed her again, and Elesha struck him with her cellphone and ran into the bathroom, locking the door. Elesha called a friend for help. Elesha then ran outside and her friend picked her up down the block.

¶4 At approximately 10:30 p.m., officers were dispatched to Galarowicz's home. By this time, Elesha's mother had arrived home. She met the officers in the driveway and advised them Elesha had left. Officer Luis Lopes-Serrao testified he told Elesha's mother that he wanted to talk to Galarowicz. Lopes-Serrao stood outside the residence, while Elesha's mother went inside and asked Galarowicz to come outside to talk to the officers. When Galarowicz learned officers were outside, he exited his residence with his dog on a leash, and began yelling, "I have an attack dog." Lopes-Serrao asked Galarowicz to calm down; however, Galarowicz continued to yell at the officers. As Galarowicz turned toward his residence and began to walk closer to another officer, Lopes-Serrao grabbed Galarowicz. Galarowicz began struggling with the officers, who eventually decentralized, restrained, and arrested him.

¶5 Lopes-Serrao testified he placed Galarowicz under arrest for disorderly conduct and resisting. Lopes-Serrao did not observe any disorderly conduct in the residence, but believed he could have arrested Galarowicz for disorderly conduct based on the information he received from witnesses or other officers about the disturbance.

¶6 At the close of the State's evidence, Galarowicz moved to dismiss the charges based on a lack of evidence. For the disorderly conduct charge, Galarowicz argued his conduct with the officers did not amount to disorderly conduct because the officers precipitated the incident by coming onto his property.

The State responded that its theory of prosecution was that Galarowicz's conduct inside the home constituted disorderly conduct and Elesha was the victim. It stated it was unsure why Galarowicz believed the disorderly conduct charge related to his conduct with the officers, but "certainly our theory of prosecution is that the disorderly conduct occurred in the house with the throwing of the shoe, the fan, the basically trashing of the apartment, coupled with the, you know, behavior toward Elesha."

¶7 Galarowicz argued that he believed Lopes-Serrao testified Galarowicz was arrested for his conduct in the presence of the officers. Galarowicz contended his conduct at that moment did not amount to disorderly conduct. The State asserted that, if there was a mistake about when the disorderly conduct occurred, the charges could conform to the evidence at trial, and it was the State's theory that the disorderly conduct occurred inside the home.

¶8 The court denied Galarowicz's motion to dismiss. As for the disorderly conduct charge, the court found "there has been testimony regarding items being thrown about; at least to the point where the police were called, or someone called to get picked up."

¶9 During closing arguments, the State argued:

> Regarding the disorderly conduct charge, a lot of the same behaviors and words that the defendant used support this charge; that he threw a shoe at Elesha, a box fan was thrown, and Elesha clarified that she only heard the box fan be thrown at her when she was running into the bathroom. The words the defendant used that night, yelling, using derogatory terms to her mother, the actions and/or the words the defendant are used to support the charge of disorderly conduct.

During Galarowicz's closing, he argued, "the State is trying to turn this around today and say[] the disorderly conduct was what happened earlier in the evening." The State objected, and a sidebar was held in chambers.

¶10 During the sidebar, Galarowicz asserted his closing argument was proper because, "Officer Lopes-Serrao said he was arresting him for the conduct with the officers." The court advised Galarowicz that he could comment on the evidence but he could not comment on the State's election to argue Galarowicz committed disorderly conduct in the residence as opposed to committing disorderly conduct with the officers.

¶11 Before the jury, Galarowicz continued, "Officer Serrao, I asked him, and he testified the reason that he was arresting him for disorderly conduct was what [Galarowicz] did when he came out of the house when the officers were present." The State objected, and the court sustained the objection, reasoning Galarowicz's argument was consistent with the evidence at trial.

¶12 The jury acquitted Galarowicz of physical abuse of a child and resisting an officer. The jury found him guilty of disorderly conduct.

DISCUSSION

¶13 Galarowicz asserts his right to a unanimous verdict was violated. The Wisconsin Constitution's guarantee of the right to a jury trial includes the right to a unanimous verdict. WIS. CONST., art. I, §§ 5 and 7; ***State v. Derango***, 2000 WI 89, ¶13, 236 Wis. 2d 721, 613 N.W.2d 833. The "jury must agree unanimously that the prosecution has proved each essential element of the offense beyond a reasonable doubt before a valid verdict of guilty can be returned." ***Holland v. State***, 91 Wis. 2d 134, 138, 280 N.W.2d 288 (1979). However,

"unanimity is not required with respect to the alternative means or ways in which the crime can be committed." ***Id.*** at 143. When the charged behavior constitutes "one continuous course of conduct," the jury unanimity requirement is satisfied regardless of whether there is agreement among jurors as to "which act" constituted the crime charged. ***State v. Giwosky***, 109 Wis. 2d 446, 451, 326 N.W.2d 232 (1982).

¶14 On appeal, Galarowicz argues the jury's verdict was not unanimous because three separate acts were presented to the jury that could have constituted disorderly conduct. He defines these separate acts as: his conduct with Elesha in the residence before the twenty-minute pause; his conduct with Elesha in the residence after the twenty-minute pause; and his conduct with police officers outside. Galarowicz contends these acts do not comprise a continuing course of conduct and, as a result, the jurors needed to be unanimous about which act constituted disorderly conduct. He asserts that, because there is no way to determine which act the jurors relied on to find him guilty of disorderly conduct, we must conclude his right to a unanimous verdict was violated.

¶15 We disagree. First, Galarowicz's contention that his right to unanimity was violated because some jurors may have found him guilty of disorderly conduct based on his conduct with the officers is a nonstarter. The State's theory of prosecution was always that the disorderly conduct charge stemmed from his altercation with Elesha in the residence. We also observe that the police report, which was incorporated into the criminal complaint as the probable cause section, recommended Galarowicz be charged with disorderly conduct because "[t]he incident that occurred in the residence between [Galarowicz] and [Elesha] created a disturbance which caused [Elesha] to call for help from several persons." Despite the State's clarification of the basis for the

charge—both outside the presence of the jury and during its closing argument—Galarowicz nevertheless suggested to the jury that the disorderly conduct charge stemmed from his altercation with police. To the extent Galarowicz's closing argument caused any juror to find him guilty based, not on an acceptance of the State's theory but, instead, on a rejection of his theory, Galarowicz is precluded from raising this argument on appeal. *See* ***State v. Gary M.B.***, 2004 WI 33, ¶11, 270 Wis. 2d 62, 71, 676 N.W.2d 475 ("'A defendant cannot create his own error by deliberate choice of strategy and then ask to receive benefit from that error on appeal.'" (quoting ***Vanlue v. State***, 87 Wis. 2d 466, 460-61, 275 N.W.2d 115 (Ct. App. 1978), *rev'd on other grounds*, 96 Wis. 2d 81, 291 N.W.2d 467 (1980). We will not consider it.

¶16 We therefore focus our discussion on the conduct that occurred with Elesha in the residence. Galarowicz argues his actions inside the residence did not amount to a continuing course of conduct because there was a twenty-minute pause in the altercation. He asserts that the pause created two "separate and distinct acts" and the jury needed to unanimously choose which act constituted disorderly conduct.

¶17 Galarowicz, however, does not present any relevant legal authority in his brief-in-chief to support his assertion that the twenty-minute pause precludes his actions in the residence from being considered a continuing criminal episode. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). In his reply brief, Galarowicz analogizes this situation to ***Giwosky***. There, the defendant was charged with and convicted of a single count of battery, but the evidence at trial showed he threw a log and then moments later punched and kicked the victim. ***Giwosky***, 109 Wis. 2d at 448, 450-51. The court found the defendant's right to unanimity was not violated because the defendant's actions

occurred in immediate succession, and therefore constituted a continuing criminal episode. ***Id.*** at 456-58. Galarowicz argues his actions in the residence cannot be considered a continuing course of conduct because, unlike the actions in ***Giwosky*** that occurred in immediate succession, here, there was a twenty-minute pause.

¶18 However, in ***State v. Lomagro***, 113 Wis. 2d 582, 594, 335 N.W.2d 583 (1983), the court limited the significance of ***Giwosky***'s temporal relationship between actions. In ***Lomagro***, the defendant was charged and convicted of one count of first-degree sexual assault as party to a crime, but the evidence at trial showed he and the co-defendant drove the victim to multiple locations and sexually assaulted her six times during a two-hour period. ***Id.*** at 583-86. When determining whether the defendant's right to unanimity was violated, the ***Lomagro*** court reasoned "the fact that the encounter in this case lasted two hours and only a few minutes in ***Giwosky*** is not legally significant. Both encounters were one continuous, unlawful event and chargeable as one count." ***Id.*** at 594. It observed that, in ***Giwosky***, the jury was not required to unanimously determine which blow constituted battery because unanimity was achieved "as long as the jury agreed that the defendant intentionally committed an act which caused physical harm." ***Id.*** (quoting ***Giwosky***, 109 Wis. 2d at 458). The ***Lomagro*** court reasoned that because the six acts of nonconsensual sex constituted alternative means of committing first-degree sexual assault, the jury was not required to unanimously determine which act formed the basis of its guilty verdict. ***Id.*** at 595, 598. The court concluded unanimity was achieved because the jury unanimously agreed a sexual assault had been committed. ***Id.*** at 594-95, 598.

¶19 Here, similarly, Galarowicz's conduct toward Elesha in the residence constituted a continuous, unlawful event that was chargeable as one count.[2] His conduct was continuous because it involved the same type of behavior toward the same victim in the same location over the course of the evening. The twenty-minute pause in the altercation is not legally significant. *See* ***id.*** at 594. Galarowicz's yelling, swearing, and object throwing in the residence were alternative means of committing disorderly conduct. *See* WIS. STAT. § 947.01.[3] We conclude unanimity was achieved because the jury agreed Galarowicz engaged in conduct that, under the circumstances, tended to cause or provoke a disturbance. *See* ***id.***

By the Court.—Judgment affirmed.

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

[2] Even if the twenty-minute pause created two separate disorderly conduct offenses, it is well established that the State has discretion to couple separately chargeable offenses into one count as long as the offenses were committed "by the same person at substantially the same time and relating to one continued transaction." *See* ***State v. Lomagro***, 113 Wis. 2d 582, 587-89, 335 N.W.2d 583 (1983). This discretion is limited by the prohibition against duplicitous charges. *See* ***id.*** at 586 ("Duplicity is the joining of a single count of two or more separate offenses."). However, the issue of duplicity is waived if not raised in the circuit court. *See* ***id.*** at 590 n.3. Because Galarowicz has not asserted the charge was duplicitous, we assume that the disorderly conduct in the residence was properly charged as a single offense.

[3] WISCONSIN STAT. § 947.01(1) provides: "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."