COURT OF APPEALS
DECISION
DATED AND FILED

January 30, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1757-CR **Cir. Ct. No. 2011CM104**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM G. BENNETT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed*.

¶1 REILLY, J.[1] William G. Bennett, a registered sex offender, appeals his conviction for disorderly conduct following a court trial and the circuit court's

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

denial of his postconviction motion seeking the vacation of his conviction, a new trial, and resentencing. Bennett argues that the evidence was not sufficient to prove disorderly conduct and that the use of a presentence report from an earlier conviction was improper. We disagree as to both arguments and affirm Bennett's conviction and sentence.

Facts

¶2 Bennett, while in prison, mailed a "private" letter on February 7, 2011, to the wife of a couple who had befriended him. The four-page letter in graphic detail invited the victim to perform, photograph, and send to him a narrative of sexual acts. Bennett described what he would do physically when he received her response. Bennett asked the victim to give his "info" to a friend such that she could likewise correspond with him. Bennett also asked the victim whether she would give a "dirty" letter from Bennett to the victim's underage granddaughter and permit the granddaughter to write back as she was at the age "where she <u>needs</u> to learn, and who better to teach her right?" Bennett explicitly and extensively described the sexual acts that he wanted to engage in with the victim when he returned to the "street." Bennett has not denied that he sent the letter nor disputed its contents. Bennett was charged with one count of disorderly conduct in relation to the letter.

¶3 At Bennett's court trial, the victim testified that she was sixty years old and married to her husband for forty-one years. She testified that she became physically ill and vomited upon reading the letter; that she cried; that she was embarrassed, angry, and hurt by the letter; and that she was still frightened and sick to her stomach over the letter. The victim also testified that she was afraid both for her seventy-year-old friend referenced in the letter and for her underage

granddaughter. After receiving the letter, she contacted the police and obtained a restraining order against Bennett.

¶4 The victim's husband also testified at the court trial. He testified that he and his wife were aware that Bennett had gone to prison for a sex offense; that he was present when his wife received and read the letter; that the letter greatly upset his wife, making her cry and shake; and that the letter made him feel humiliated, degraded, angry, and upset. He also testified that he and his wife do not feel comfortable with Bennett out on the street and that he was afraid Bennett will carry out the sexual acts described in the letter against his wife.

¶5 At the time of this incident, Bennett's criminal history was extensive. His more recent offenses included exposing a sixteen-year-old girl in 2002 to sexual activity, for which he was convicted and placed on probation. Bennett's probation for this offense was revoked and he was sent to prison for two years in 2003. A short time after his release, Bennett was convicted of attempted false imprisonment with threatened use of a dangerous weapon, as a repeat offender, for an incident in which he followed a woman into a parking lot, told her he had a large knife, and made a threatening move toward her. ***State v. Bennett***, No. 2006AP2802-CR, unpublished slip op. at ¶¶2, 4 (WI App Apr. 30, 2008). When police later stopped Bennett, they found a number of suspicious items in his vehicle, including surgical lubricant, gloves, a ski mask, a nude-colored women's "body wrap," a black body dress, and two women's blouses. ***Id.*** Bennett's conviction for this incident resulted in a sentence of six years of initial incarceration and registration as a sex offender. ***Id.***

¶6 Following his court trial on the disorderly conduct charge, the circuit court found Bennett's letter to be "indecent" and "obscene." The circuit court also

found, under the circumstances, "there is no way in the world that [the letter] would not provoke a disturbance." Accordingly, the court determined the elements of disorderly conduct had been met and found Bennett guilty. The court also found that the State had established that Bennett was a repeat offender, subject to possible prison time. Prior to sentencing, the court accepted the State's offer to introduce the presentence investigation report (PSI) from Bennett's 2005 case for sentencing purposes, to which Bennett objected. Bennett offered an extensive rebuttal of the PSI's contents at the sentencing hearing. The court ultimately sentenced Bennett to one and one-half years of initial confinement and six months of extended supervision.

¶7 Postconviction, Bennett moved for the court to vacate its verdict or grant him a new trial on the basis that there was insufficient evidence to support his conviction and that the court erred in its interpretation and application of the disorderly conduct statute. Bennett also moved for a new sentencing hearing on the grounds that the court relied on inaccurate, outdated, and improperly obtained information when it used the 2005 PSI in sentencing. The court denied Bennett's motion. Bennett appeals.

Bennett's Conduct Supports a Conviction for Disorderly Conduct

¶8 Disorderly conduct, as defined by WIS. STAT. § 947.01, is committed by a person who, "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." Sec. 947.01(1).

¶9 We first address Bennett's argument that the disorderly conduct statute does not apply to his mailing of a single, unsolicited, sexually explicit

letter. Whether the disorderly conduct statute can be applied to criminalize purely written speech presents an issue of statutory interpretation, which this court reviews de novo. ***State v. Douglas D.***, 2001 WI 47, ¶14, 243 Wis. 2d 204, 626 N.W.2d 725.

¶10 Bennett asserts that, as a matter of law, his letter cannot constitute disorderly conduct as the letter posed no threat to "good order," "public order," or "the surrounding community" and did not tend to create a public disturbance. Bennett argues that all the letter can be interpreted as is a personal annoyance to the victim. Bennett is wrong.

¶11 Purely written speech can constitute disorderly conduct even if that written speech fails to cause an actual disturbance. *See* ***id.***, ¶3. Certain types of speech—lewd, obscene, profane, and insulting words—by their very nature tend to cause an immediate breach of peace permitting an application of the disorderly conduct statute. ***State v. A.S.***, 2001 WI 48, ¶15, 243 Wis. 2d 173, 626 N.W.2d 712. "The right of free speech is not absolute. When speech is not an essential part of any exposition of ideas, when it is utterly devoid of social value, and when it can cause or provoke a disturbance, the disorderly conduct statute can be applicable." ***Id.***, ¶17. The disorderly conduct statute unquestionably applies to Bennett's conduct here. Bennett's letter was lewd, obscene, threatening, and—when he mailed that letter to the victim—likely to provoke a disturbance.

¶12 Bennett next argues that, even if the disorderly conduct statute applies, the evidence before the circuit court was not sufficient to support his conviction as the State did not show that his "written speech or the act of mailing the letter under the circumstances tended to cause or provoke a disturbance." In reviewing a challenge to whether the evidence at trial is sufficient to support a

conviction, an appellate court may not overturn a conviction unless the evidence, viewed most favorably to the State, is so lacking "that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Hayes***, 2004 WI 80, ¶56, 273 Wis. 2d 1, 681 N.W.2d 203.

¶13 Our supreme court has found that conduct that tends to cause a personal or private disturbance may constitute disorderly conduct if there exists the real possibility that this disturbance will spill over and disrupt the peace, order, or safety of the surrounding community. ***State v. Schwebke***, 2002 WI 55, ¶30, 253 Wis. 2d 1, 644 N.W.2d 666. "An examination of the circumstances in which the conduct occurred must take place, considering such factors as the location of the conduct, the parties involved, and the manner of the conduct." ***Id.*** "[T]he reaction of the listeners and the other actual effects" of the conduct are probative of whether the conduct may be considered disorderly. ***A.S.***, 243 Wis. 2d 173, ¶39.

¶14 We find that the evidence in this case was sufficient to convict Bennett for disorderly conduct. The letter is—without limitation—obscene, disturbing, threatening, and frightening and has the real possibility of causing a disturbance in the community. The letter, which also sexually implicated both the victim's older friend and young granddaughter, was sent unsolicited to a sixty-year-old married woman. The sexually graphic letter was sent by a known sex offender, whose previous victims included an underage girl and who was serving a lengthy prison sentence for a violent, sexual type of crime. The letter caused a significant disturbance in the victim and her husband, leading them to successfully seek a restraining order against Bennett. A reasonable trier of fact could find beyond a reasonable double that, under the circumstances, Bennett's mailing of the letter tended to provoke a disturbance and constituted disorderly conduct.

The Trial Court Did Not Err in Sentencing Bennett

¶15 Bennett argues that he is entitled to a new sentencing hearing as his 2005 PSI was improperly obtained and given weight by the circuit court at sentencing. We review sentencing decisions for an erroneous exercise of discretion. ***State v. Spears***, 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999). "[A] sentencing court, when fashioning a sentence, should consider all relevant and available information." ***Id.*** at 507.

¶16 The circuit court did not obtain the PSI improperly. WISCONSIN STAT. § 972.15(4) provides that a PSI is confidential after a sentencing and shall not be made available to any person except upon specific authorization of the court. The circuit court in this case authorized its use in a postconviction proceeding to aid it in imposing an appropriate sentence. *See* ***State v. Crowell***, 149 Wis. 2d 859, 872, 440 N.W.2d 352 (1989). Bennett was allowed to review the PSI and make comments regarding its use and accuracy at the sentencing hearing. *See* ***Spears***, 227 Wis. 2d at 508. Furthermore, the PSI included information relevant to Bennett's past record of criminal offenses and history of undesirable behavior patterns, two factors appropriate for consideration in fashioning a sentence. *See* ***id.*** at 507. On appeal, although Bennett contends that the PSI contained inaccurate information, he does not point to any particular inaccuracies or how the circuit court improperly relied on them. The fact that Bennett did not want the sentencing court to consider his criminal history and other information included in an existing PSI is not grounds for error.

By the Court.—Judgment and order affirmed.

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