RECEIVED
05-29-2020
CLERK OF COURT OF APPEA
OF WISCONSIN

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Appeal Case No. 2019AP002138

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JOSEPH K. EDWARDS,

Defendant-Appellant.

On Appeal of a Written Decision and Final Order Entered November 4, 2019 in Milwaukee County Circuit Court Case No. 16CM001596, Denying Motion for Post-Conviction Relief, Circuit Court Judge Jean M. Kies, Presiding

BRIEF OF PLAINTIFF-RESPONDENT

John Chisholm
District Attorney
Milwaukee County

Ryan Michaels
Assistant District Attorney
State Bar No. 1104947
Attorneys for Plaintiff-Respondent

District Attorney's Office
821 West State Street, Room 405
Milwaukee, WI 53233-1485
(414) 278-4646

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES CITED

Page

WISCONSIN STATUTES CITED

STATE OF WISCONSIN

C O U R T OF A P P E A L S

DISTRICT I

Appeal Case No. 2019AP002138

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JOSEPH K. EDWARDS,

Defendant-Appellant.

On Appeal of a Written Decision and Final Order Entered November 4, 2019 in Milwaukee County Circuit Court Case No. 16CF713, Denying Motion for Post-Conviction Relief, Circuit Court Judge Jean M. Kies, Presiding

BRIEF OF PLAINTIFF-RESPONDENT

John Chisholm
District Attorney
Milwaukee County

Ryan Michaels
Assistant District Attorney
State Bar No. 1104947
Attorneys for Plaintiff-Respondent

ISSUES PRESENTED

I. By failing to object to the jury instructions, did Edwards forfeit his right to challenge the instructions on review?

Trial court answered: Any error regarding the inclusion of the "true threat" instruction was waived.

II. Did the circuit court err by not including the "true threat" language of Wisconsin Criminal Jury Instruction 1900 during closing instructions to the jury?

Trial court answered: If it was an error it was harmless because the State did not have to show that Edwards' conduct rose to the level of a "true threat" in order to obtain a conviction for disorderly conduct.

III. Did the circuit court err by holding that, assuming for the sake of argument that the "true threat" paragraph in WIS JI Criminal Instruction 1900 should have been included in the disorderly conduct jury instruction, the error was harmless?

Trial court answered: Edwards does not explain how, under the totality of the circumstances, his behavior could not reasonably be interpreted as "a serious expression of intent to do harm" (i.e. a true threat) or how the jury's decision would have been any different with the instruction. Therefore, the omission of the instruction was harmless.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat. (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat. (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

On May 7, 2016, Edwards was charged with Disorderly Conduct by Use of a Dangerous Weapon in case number 16CM1596. (R1:1-2) The case proceeded to jury trial on July 9, 2018. (R63)

In the Criminal Complaint for case 16CM1596, the state charged that Edwards engaged in otherwise disorderly conduct for an incident that occurred on May 6, 2016. (R1:1-2) During the preliminary jury instruction conference at trial, the State did not ask for the true threat paragraph of the disorderly conduct instruction and defense counsel did not make any argument or request as to the inclusion of the threat paragraph. (R65:3-5) In its opening statement, the State did not claim that Edwards threatened the victim, S.G. (R64:14-16) Edwards argued that no threats to S.G. were made. (R64:16)

During direct examination of S.G., the State did not ask if Edwards threatened S.G. (R64:19-26) S.G. testified that on May 6, 2016, at approximately 8:30 p.m., she arrived home from church and parked in her garage. (R64: 20) After letting her garage door down, she noticed someone was across the street. (R64:20) S.G. stated that the individual, later identified as Edwards, began talking with her in seconds. (R64: 20-21) Edwards stated that he knew S.G.'s son. (R64:21) S.G. clarified whether Edwards was referring to her son that went to Rufus King High School. (R64: 22) Edwards responded, "no, your foster son." (R64:22) S.G. then stated that she was not a foster parent and that Edwards' comments "scared her" so she ran into the house, locked the door, and turned the alarm on. (R64: 22)

S.G. testified that Edwards, dressed in all black, began knocking and then banging on the front door. (R64: 22, 50) S.G. further testified that she, "went to the back door and I said who is it, and then it's like what you doing? I said we're busy." (R64: 22) S.G. testified Edwards responded, "Who is we?" (R64:22) S.G. responded "my husband." (R64:22) Edwards said, "you don't have no husband because I have been watching you." (R64:22) S.G. testified that she called a neighbor and 911 because she was "frazzled". (R64:22) S.G. ran out the back door of her house with no shoes on, crying and frazzled.

(R64:22). Later in her testimony, S.G. reiterated that during their brief conversation at her door, she was "frightened…to know that somebody was watching me, to know what I'm doing day by day" when Edwards stated "you don't have a husband, I have been watching you." (R64: 24)

Frightened, S.G. called 911 and a neighbor. (R64:24) S.G. exited the back door of her house and ran to her neighbor's home. (R64:24) While waiting for police to arrive on her neighbor's porch, S.G. testified that Edwards "walked around the corner with a bag in his hand…and he pulled out this machete." (R64:25).

On cross examination, defense counsel asked S.G. "He [Edwards] wasn't threatening you to try and get you to come outside?" (R64:28). S.G. responded, "That's not his words. His words were what are you doing. And I don't know him." (R64:28). Defense counsel asked two more times if Edwards made threats for S.G. to come outside. (R64: 28). Both times S.G. answered that Edwards did not threaten her to come outside. (R64:28) S.G. testified that she did not tell Edwards that he was scaring her. (R64:33) Defense counsel, referring to a pre-trial interview S.G. had with a defense investigator, Connie Culpepper, asked if Edwards made any threats towards S.G. (R64:48). S.G. responded, "I didn't say threats. I told her he asked me who I was and what I told you, hello, and then he said I know your son and that conversation, that's what I told her." (R64:48-49) When pressed on whether S.G. told the defense investigator that Edwards "never made any threats towards you throughout any sort of speaking that you may have had", S.G. responded, "I told him he said he was watching me, so that is kind of threatening." (R64:49) At no time during cross examination did S.G. testify that Edwards explicitly threatened her.

At the close of the State's case, Edwards moved to dismiss. (R65:56) The State responded that witnesses testified to the disturbance that was created by the defendant's actions that ultimately caused or provoked a disturbance. (R65:56). The court ruled that:

> "clearly he [Edwards] came to the door of S.G.'s home, knocking on the door and having these

> kinds of creepy conversations with her, saying I know your son, I know your foster son, I know you have no husband because I have been watching you, almost engaging in stalker-like behavior. I think those statements alone show that Mr. Edwards, if I view the evidence in a light most favorable to the State, there was otherwise disorderly conduct engaged in by Mr. Edwards." (R65:57-58)

After finding that there was sufficient evidence to enable the trier of fact to find Edwards guilty beyond a reasonable doubt of disorderly conduct, use of a dangerous weapon, the court denied the defense motion to dismiss. (R65:58-60)

After Mr. Edwards did not testify, defense counsel called investigator Connie Culpepper to testify. (R65:66-71) The investigator testified that she spoke to S.G. in a phone call prior to trial. (R65:67) The investigator testified that during the call, she asked S.G. if Edwards had threatened her. (R65:68). S.G. answered that Edwards did not threaten her. (R65:68) After the defense investigator's testimony, the defense rested. (R65:71)

The court then proceeded with a jury instruction conference. (R65:74-89) The court contemplated Wisconsin Jury Instruction 1900, the substantive instruction for disorderly conduct. The court considered whether Edwards engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct. (R65:75) The court determined that "[o]therwise disorderly conduct clearly is actually the best choice." (R65:75) The state and defense counsel did not have any objections. (R65:75) The court explicitly discussed whether the State was relying on threats. (R65:77). The court stated:

> Then the next provision under 1900 for the jury instruction is about whether – whether the State is relying on these threat, through threats, and disorderly applies under the circumstances. So I would take that portion of the jury instruction out, if that is okay with the parties. (sic)

Neither the State nor defense counsel objected. (R65:77)

The court suggested giving WIS-JI Criminal 180, Statements of Defendant. (R65:83-84) The court stated:

> I had on my list No. 180 for statements of the defendant, but, actually, the defendant did not testify in this case, and the only statements that was given by him were potentially talking to the victim in this case about whether or not she has a son at Rufus King or a foster son, etc.
>
> If you think that that's appropriate, I think we could read that as the State has introduced evidence and statements by the defendant. It is for you to determine how much weight to give each statement and the go further on that.
> Thoughts? Do you want me to give that jury instruction or not?

Both the State and defense counsel agreed that the instruction was appropriate. (R65:84)

The case was submitted to the jury on July 11, 2018, and the jury returned a verdict of guilty on Count 1 disorderly conduct, use of a dangerous weapon. (R66:44-45)

On October 18, 2019, Edwards filed a motion for post-conviction relief. Edwards' motion raised two points. First, Edwards alleged that the absence of a defense request or a *Perkins*-based "true threat" instruction, and despite defense counsel's agreement that such language in the WIS JI Criminal 1900 should note be included, the court erred by not giving the "true threat" instruction. (R50:6) *State v. Perkins*, 2001 WI 46, 243 Wis. 2d 141, 626 N.W.2d 762. Second, Edwards argued that Defense counsel's position that a "true threat" jury instruction was not warranted because the State had not introduced any evidence of threats constituted ineffective assistance of counsel. (R50:9).

Judge Kies denied the motion by written order dated November 4, 2019. She ruled:

> In this instance, it was sufficient for the State to show that the defendant engaged in creepy, stalker-like behavior and that the victim was fearful for her safety and ran to a neighbor's house because she was in fear of the defendant. The State did not have to show that the defendant's conduct rose to the level of a "true threat" in order to obtain a conviction for disorderly conduct. Consequently,

> it was not error to omit the true threat portion form the disorderly conduct instruction.

(R51:4-5)

As to Edwards' second point, Judge Kies ruled:

> The defendant does not explain how, under the totality of the circumstances, his behavior could not reasonably be interpreted as "a serious expression of intent to do harm" (i.e. a true threat) or how the jury's decision would have been any different with the instruction. Consequently, the court must find that the omission of the instruction was harmless and that trial counsel was not ineffective for failing to request that the instruction be given.

(R51:6)

This appeal follows.

STANDARD OF REVIEW

A circuit court has broad discretion in deciding whether to give a particular jury instruction, and the court properly exercises its discretion when it fully and fairly informs the jury of the law that applies to the charges. *State v. Ferguson*, 2009 WI 50, 317 Wis. 2d 586, 767 N.W.2d 187, citing *State v. Fonte*, 2005 WI 77, ¶9, 281 Wis. 2d 654, 698 N.W.2d 594. The appellate court reviews whether it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the [instructional] error as a question of law." *State v. Harvey*, 2002 WI 93, 254 Wis. 2d 442, 647 N.W.2d 189. See also *State v. Gonzalez*, 2011 WI 63, ¶20-21, 335 Wis. 2d 270, 802 N.W.2d 454.

ARGUMENT

I. Defense counsel failed to object during the jury instructions conferences and failed to request that the true threat paragraph be added, therefore the objection is waived.

Instruction and verdict conferences are governed by Wis. Stat. §805.13(3)(2017-2018). The statute instructs that the court shall hold a conference with the attorneys outside the

presence of the jury. *Id.* The court shall then inform the attorneys of the instructions it will read the jury. "Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict." *Id*. "[U]nobjected-to-errors are generally considered waived; and the rule applies to both the evidentiary and constitutional errors." *State v. Davis*, 199 Wis. 2d 513, 545 N.W.2d 244 (Ct. App. 1996) (citation omitted).

The statutorily required instruction conference occurred in the case at hand, both for the preliminary jury instructions as well as the closing instructions to the jury. (R65:3-5; R65:74-89 *cont.* R66:2-8). The court began discussions of final jury instructions orally in the afternoon on July 10, 2018. (R65:74-89) Following the discussion, the court provided a copy of the proposed jury instructions to the state and defense. (R65:86) Prior to the jury returning the following morning, July 11, 2018 both parties were asked if they wanted to be heard on the jury instructions. (R66:2) The State asked to add WIS JI-- Criminal 170, Circumstantial Evidence, and WIS JI-- Criminal 172, Circumstantial evidence: Flight, Escape, Concealment. (R66:3-4) These jury instructions were ultimately rejected and not given to the jury. (R66:8) Neither party mentioned any concern about the disorderly conduct jury instruction or made any request to have the true threat paragraph of the instruction included. (R65:74-89; R66:2-8) The court even suggested adding WIS JI – Criminal 180, Statements of the Defendant. (R65:83-84) Yet, neither the State nor the defense requested the "true threat" language in WIS JI – Criminal 1900, Disorderly Conduct. Based on the facts in the record as cited above, under Wis. Stat. 805.13(3), Edwards waived any error that may have resulted from not including the true threat instruction.

II. The State did not rely on a true threat as an alternative theory prosecution to the disorderly conduct count.

The chief case Edwards cites in his post-conviction brief is *State v. Perkins*, 2001 WI 46, 243 Wis. 2d 141, 626 N.W.2d 762, in which the Court held that,

> "[T]his court may reverse a conviction based on a jury instruction regardless of whether an objection was made

> when the instruction obfuscates the real issue or arguably cause the real controversy not to be fully tried."

State v. Perkins, 2001 WI 46, 243 Wis. 2d 141, 626 N.W.2d 762

In the *Perkins* case, the defendant was charged with one count of threatening a judge. The defendant did not object to the jury instruction as it was written and he was convicted of threat to a judge. The defendant then appealed. The Supreme Court discussed the elements of the jury instruction for the charge of threat to a judge and focused specifically on the element that required the jury to find the defendant threatened to cause bodily harm to the judge. The jury was not instructed as to what language would be sufficient to find the defendant did indeed threaten to cause bodily harm. *Id.* at 162. The Court found that because the jury was not provided with a definition of what constitutes a threat, they were not aware of what test needed to be applied in considering whether the defendant threatened bodily harm.

However, the *Perkins* case is factually distinguishable from the case at hand. Edwards argues that by not giving the true threat instruction the real controversy was not fully tried. Edwards then cites Justice Wilcox's concurring opinion in the *Perkins* case, arguing that where a jury instruction is missing an explanation regarding an element of an alleged offense, there can be no jury verdict on that element, therefore harmless error analysis is inapplicable. (Brief of Defendant-Appellant, p. 12-14.) That opinion does not apply to the case at hand because, unlike the *Perkins* case, the jury did not need to find that Edwards threatened S.G. That is not one of the elements of the disorderly conduct statute. The jury only need to find that Edwards engaged in, "otherwise disorderly conduct." (R23:2) Nothing in either element of the disorderly conduct instruction requires the jury to consider whether Edwards explicitly threatened S.G. and therefore the jury did not need to be instructed on how to define a threat.

The State did not rely on Edwards' statements as an alternative theory of prosecution. The State did not ask if Edwards threatened S.G. (R64:19-26) Rather, the State asked S.G. to describe the events of May 6, 2016 as she experienced

them. These events included S.G. arriving home from church, seeing a stranger dressed in all black approach her as she was closing her garage door and walking to her house, having an invasive conversation about a non-existent foster son, being trailed into her house, having her front door pounded on by Edwards, and finally learning that Edwards knew she did not have a husband because he had been watching her. (R64:19-24) It is impossible to separate Edwards words from his other actions. Any of Edwards actions constitute otherwise disorderly conduct, or "conduct having a tendency to disrupt good order and provoke a disturbance." WIS JI--Criminal 1900, Disorderly Conduct.

III. Even if the court finds the true threat paragraph should have been given, the omission of that paragraph was harmless error.

Wis. Stat. §901.03(4)(2017-2018) recognizes the plain error doctrine. The plain error doctrine allows appellate courts to review errors that were otherwise waived by a party's failure to object. *State v. Jorgenson*, 2008 WI 60, 310 Wis. 2d, 137, 754 N.W.2d 77, *citing State v. Mayo*, 2007 WI 78, 29, 301 Wis. 2d 642, 734 N.W.2d 115. The existence of plain error will turn on the facts of the particular case. *Id*. at ¶23. The Supreme Court in *Jorgenson* explained:

> The plain error doctrine allows appellate courts to review errors that were otherwise waived by a party's failure to object. Plain error is "so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time. The error, however, must be "obvious and substantial." Courts use the plain error doctrine sparingly.

State v. Jorgenson, 2008 WI 60, 310 Wis. 2d, 137, 754 N.W.2d 77.

An error is considered harmless unless the error affects the substantial rights of the adverse party. The harmless error principle is outlined in Wis. Stat. § 805.18 (2017-2018). Although this section is in the code of civil procedures, it is applicable in criminal cases. *State v. Dyess*, 124 Wis. 2d 525, 370 N.W.2d 222 (1985). The harmless error concept has a presumption against an error being prejudicial. *See City of*

LaCrosse v. Jiracek Cos., 108 Wis. 2d 684, 324 N.W.2d 440 (Ct. App. 1982).

The Wisconsin Supreme Court in *Dyess* discussed the harmless-error test. *State v. Dyess*, 124 Wis. 2d 525, 543-547. For an error to affect the substantial rights of a party, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue. "A reasonable possibility of a different outcome is a possibility sufficient to undermine confidence in the outcome." *Id.* at 544-545; See also *State v. Harvey*, 254 Wis. 2d 442 at 467. Error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. "If the error at issue is not sufficient to undermine the reviewing court's confidence in the outcome of the proceeding, the error is harmless." *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W. 2d 768.

In this case, Judge Kies was correct in her written decision that there is ample evidence for the jury to convict Edwards of disorderly conduct absent the true threat paragraph. Given the testimony at trial, there is no reasonable possibility of a different outcome, even if the true threat paragraph was given. Edwards has failed to show in his brief that the un-objected to error of the omission of the true threat instruction is plain error. Edwards argues in his brief, the trial courts reliance on a "totality of the circumstances" view of the evidence, including "true threat" evidence and lack of instruction went beyond the more limited, speech-based form of otherwise disorderly conduct. (Brief of the Defendant-Appellant, p. 15) Therefore, the trial court improperly upheld Edwards' conviction for otherwise disorderly conduct using an approach that was not presented to the jury. *Id.* Edwards makes this conclusory assertion without any analysis or support to establish how the omission of the true threat paragraph is fundamental, obvious, or substantial.

Assuming, *arguendo*, that Edwards met his burden of establishing plain error, the burden shifts to the State to prove the omission is harmless. S.G. testified on direct examination she arrived home from church and parked in her garage. (R64: 20) After letting her garage door down, she noticed someone was across the street. (R64:20) S.G. stated that the individual,

later identified as Edwards, began talking with her in seconds. S.G. testified that Edwards, dressed in all black, began knocking and then banging on the front door. (R64:22, 50) Edwards then followed S.G. to her neighbor's house and pulled a machete from a bag he was carrying. (R64:25) In this case, it is entirely reasonable for the jury to have found Edwards guilty of disorderly conduct because S.G. testified that Edwards engaged in behavior that falls within the first element of disorderly conduct, and his behavior, under the circumstances as they existed, would have tended to cause or provoke a disturbance.

CONCLUSION

For the reasons herein, the State asks that the court affirm the denial of Edwards' motion for post-conviction relief.

Dated this 27th day of May, 2020.

Respectfully submitted,

JOHN CHISHOLM
District Attorney
Milwaukee County

/s/*Ryan Michaels*
Ryan Michaels
Assistant District Attorney
State Bar No. 1104947
Ryan.Michaels@da.wi.gov
Attorneys for Plaintiff-Respondent

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 4209.

May 27, 2020
Date

/s/ Ryan Michaels
Ryan Michaels
Assistant District Attorney
State Bar No. 1104947

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

May 27, 2020
Date

/s/ Ryan Michaels
Ryan Michaels
Assistant District Attorney
State Bar No. 1104947

P.O. Address:
Milwaukee County District Attorney's Office
821 West State Street- Room 405
Milwaukee, Wisconsin 53233-1485
(414) 278-4646
Attorneys for Plaintiff-Respondent.