COURT OF APPEALS
DECISION
DATED AND FILED

December 9, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1561-CR **Cir. Ct. No. 02CF000151**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON R. GLASCOCK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: JOHN ULLSVIK, Judge. *Affirmed in part and reversed in part*.

Before Deininger, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Jason Glascock appeals a judgment of conviction and an order denying his postconviction motion. The issues are sufficiency of the evidence and ineffective assistance of counsel for failing to preserve the

defendant's right to a unanimous and specific verdict. We reverse on two counts, and otherwise affirm.

¶2 Glascock was found guilty by a jury and convicted of four counts of sexual assault of a child and two counts of intimidating a victim. The crimes were all alleged to have occurred in 1997, and all were against the same victim, a female we will refer to as "L."

¶3 Glascock first argues that the evidence was insufficient on one of the intimidation counts, count two of the information. We will affirm the verdict unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that no reasonable trier of fact could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶4 The State relied on L.'s testimony to support the charge. She testified that while Glascock was sexually assaulting her in her own bed at home, her hands were tied above her head to the bed "railing," and she was unable to scream because there was something in her mouth. She tried to shake the bed and make as much noise as she could, but when she did that Glascock put his hands on her and told her to stop, or he would kill her. She stopped, and the assault continued. He later told her to "shut up," and to stay there until she heard the car drive away.

¶5 The charge in count two was under WIS. STAT. § 940.45(3) (1995-96).[1] In accordance with that statute, the jury was instructed that the elements

[1] All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise noted.

were, first, that L. was a victim of crime; second, that Glascock attempted to dissuade L. from reporting the crime to a law enforcement agency; and third, that Glascock acted knowingly and maliciously in such dissuasion. The jury was told that, in the third element, "knowingness or maliciousness means that Mr. Glascock knew [L.] was a victim of crime, and that Jason Glascock acted with an intent to interfere with orderly administration of justice." Finally, if the jury found those three elements, it was also instructed to decide whether his act of intimidation was accompanied by any express or implied threat of physical harm or death, which would make the crime a felony. The jury found against Glascock on all elements.

¶6 Glascock argues that the evidence was insufficient to show that, at the time of the act in question, he had a present mental purpose of dissuading L. from subsequently contacting law enforcement. We agree. We focus, initially, on the second element, whether Glascock attempted to dissuade L. from reporting the crime to a law enforcement agency. There was no evidence that if L. had been more successful in making noise by shaking the bed, the noise could have been perceived directly by law enforcement. Nor did L.'s testimony support an inference that the threat was an attempt to dissuade her from reporting the assault to law enforcement at some *later* time. The only reasonable inference is that Glascock's act was an attempt to dissuade her from making noise at the time of the assault, that is, from summoning help or otherwise attracting attention within the residence that might have stopped the assault. Thus, if the conviction is to be sustained, it must be on the basis that L.'s actions could have led, eventually and indirectly, to the crime being reported to law enforcement.

¶7 The State argues that if L. were successful in summoning help, Glascock's crime might have been reported to police. In essence, the State is arguing that any effort by a victim to call for help during a crime is an attempt to

report the crime to law enforcement. We believe that such a broad reading exceeds the intended reach of the instruction and statute. The act of summoning help from companions or bystanders during an assault is not an act that can sensibly be described as "reporting the crime to a law enforcement agency," to use the term required by the instruction. We acknowledge that it would be a different question if a victim was specifically attempting to ask other people to report the crime, or if a defendant instructed a victim not to talk about the assault. But in this case no such request can be found in either L.'s non-verbal attempts to make noise or Glascock's threat.

¶8 Furthermore, if the statute was intended to criminalize the dissuasion of victims from seeking *any* form of assistance, it certainly could have been written to say as much. However, the statute's language is plainly directed at protecting victims' efforts to report to law enforcement authorities or otherwise use legal process, such as commencing a criminal action or causing the arrest of a person. *See* WIS. STAT. § 940.44. This limited focus is recognized in the jury instruction on the third element, in the requirement that the defendant "acted with an intent to interfere with orderly administration of justice." For this reason, our conclusion also carries over to the third element in this case. There is no evidence that, at the time Glascock made the threat, part of his intent was to interfere with the orderly administration of justice. Accordingly, we reverse as to count two.

¶9 The second issue relates to sufficiency of the evidence on the last of the sexual assault counts. Count six alleged that Glascock committed second-degree sexual assault of a child under WIS. STAT. § 948.02(2). One of the elements of that offense is that L. was under the age of sixteen at the time. The crime was alleged to have occurred in summer 1997, when L. would have been thirteen. She was born in May 1984, and was therefore eighteen at the time of trial

in August 2002. When L. testified at trial, she was not asked, and did not testify, when this assault occurred. The prosecutor asked simply: "Was there a next time?" She said there was, and described the incident. Glascock argues that without evidence of when the assault occurred, the evidence was insufficient to prove the element of her age beyond a reasonable doubt.

¶10 We are satisfied that the evidence was sufficient to prove this element beyond a reasonable doubt. There was other evidence from which the jury could infer an approximate time period, before her sixteenth birthday. For example, L. testified that Glascock no longer lived with her family after the summer of 1997. It would be reasonable to infer that no assaults occurred after that time. In addition, L. testified that she revealed these assaults during a summer camp in 2000. Because L. would have just turned sixteen in May 2000, it would be reasonable to infer that the fourth assault occurred during the long period from 1997 to May 2000, rather than in the short time between her sixteenth birthday and the summer camp.

¶11 The third issue is whether Glascock's attorney was ineffective by failing to object to jury instructions or verdict forms to preserve Glascock's right to jury unanimity and verdict specificity on one of the intimidation charges. The State has made several concessions that narrow the analysis necessary to resolve this issue. The State concedes that counsel was ineffective if there is a unanimity problem.

¶12 The basic difficulty is that there are two charges of intimidation, but three acts described in the testimony that could fit the elements of that offense. The jury convicted on one count and acquitted on the other. Glascock argues that the instructions and verdict forms fail to tie specific counts to specific acts, thereby

causing a unanimity and specificity problem as to the one conviction. The State concedes that the instructions and verdict are far from ideal, but argues that a careful review of the evidence and the jury's conclusions shows that only one of the acts could have been the basis for the jury's finding of guilt. While we agree that the State's explanation is plausible, our confidence in the verdict is undermined because we are not sufficiently convinced that it is the *only* plausible explanation.

¶13 Both parties agree that the intimidation charge we reversed above (count two) is not involved in this problem. That is because the time period alleged in the information made it clear that count two was the statement Glascock was alleged to have made during the first sexual assault, in "February or March 1997."

¶14 The intimidation counts at issue are five and nine, both of which alleged "summer of 1997" as the time period. The testimony of L. described three acts that potentially fit the elements of the crime. The first was a statement by Glascock during the second sexual assault (count three) in which he told L. he would kill her if she told anyone. The second act was during the fourth sexual assault (count six), which is the assault we discussed above that lacked specific evidence as to when it occurred. L. testified that her assailants, before leaving, "told me that they could take me away and put me in a place where nobody would be able to find me." She further testified to a third act, also at an unspecified time, in which she received a letter in her locker in high school that "was a reminder saying that they were still watching me, they can still get – they can still kill me, if I tell anybody."

¶15 The State argues that the jury's finding of guilt on count five could have been based only on the second of the acts we just described. The State relies on a process of eliminating the first and third acts as possible bases for the conviction. While the State's analysis of those acts is plausible, Glascock's reply points out several sound reasons why that analysis is not free from doubt.

¶16 Furthermore, we note that under any analysis of the verdicts, jurors were forced to conclude that the State did not charge intimidation for one of the acts that might fit the elements. The State's version requires that the jury concluded the uncharged act was during the fourth assault, where L. was told they could take her away; and also that the jury concluded count nine was a charge for the locker incident, but misstated the time period. However, a different interpretation of all the counts also appears reasonable. A juror could conclude count nine was *not* the locker incident because the time allegation did not match the evidence; that count nine was therefore based on the "take me away" statement during the fourth assault, but the evidence was insufficient to convict because there was no express direction that she keep silent; and that, contrary to the State's analysis, count five was thus for the *first* act of intimidation, during the second assault.

¶17 Both parties rely on questions sent out by the jury during deliberation. The jury's question about count nine is particularly significant. The jury asked: "What part of the testimony is Count 9 referring to (i.e., the letter in the high school locker?)" The parties proposed a joint response that did not attempt to answer the question. The court noted that the proposed response "is not very helpful to the Jury," but agreed to give that response anyway. The court wrote: "You must find or not find that Count 9 was proved by the State." The jury deliberated approximately another hour before returning with verdicts. The

significance of this note is that it shows the jury was struggling to match the charged counts with the acts described in testimony. How the jurors responded to the court's failure to answer their question is a matter that we can only speculate about, causing even less confidence in the eventual verdict.

¶18 We turn to the question of remedy. Both parties rely heavily on ***State v. Marcum***, 166 Wis. 2d 908, 480 N.W.2d 545 (Ct. App. 1992), in their analysis of the unanimity issue. Like Glascock's, ***Marcum*** was an ineffective assistance case. We concluded in ***Marcum*** that counsel was ineffective, but rather than reverse and remand for a new trial, we reversed because we could not be certain that we would not be remanding for retrial for acts on which the defendant had already been acquitted. ***Id***. at 925. Similarly, in Glascock's case we do not know what acts the conviction and acquittal were for, nor which act was the one for which no charge was tried at all. Accordingly, we reverse on count five without remanding for a new trial.

¶19 In summary, we reverse the conviction on count two for insufficient evidence, and on count five due to ineffective assistance of counsel. We otherwise affirm.

By the Court.—Judgment and order affirmed in part and reversed in part.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.