

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 29, 2012

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2011AP1970-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2009CM616

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY JON ELOE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County
County: DAVID M. REDDY, Judge. *Affirmed.*

¶1 GUNDRUM, J.¹ Timothy J. Eloë appeals from a judgment of conviction for violating a foreign protection order, contrary to WIS. STAT.

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.

§ 813.128(2), and disorderly conduct, contrary to WIS. STAT. § 947.01. Eloë asks this court to vacate his conviction for violating a foreign protection order, arguing that the amended complaint failed to establish probable cause on that count and, thus, the count should have been dismissed prior to trial. Eloë also asks us to vacate his disorderly conduct conviction. He contends that, had the violating a foreign protection order count been dismissed prior to trial, evidence related to that count would not have been introduced to the jury. He believes evidence related to that count tainted the disorderly conduct verdict so as to undermine confidence in its reliability.

¶2 We conclude that the complaint sufficiently established probable cause to believe Eloë violated a foreign protection order and thus the circuit court properly denied Eloë's motion to dismiss that count. We affirm this conviction. Because the violating a foreign protection order count was therefore properly before the jury, evidence related to that count was properly introduced at trial and did not improperly taint the disorderly conduct verdict. We affirm the disorderly conduct conviction as well.

¶3 On November 18, 2009, Eloë was charged with criminal trespass. An amended criminal complaint (hereinafter "the complaint") charged Eloë with three additional counts: violation of a foreign protection order, disorderly conduct, and entry into a locked room. Related to violation of a foreign protection order, the complaint states in relevant part:

[O]n October 25, 2009, at approximately 12:30 a.m., Officer Ludlum spoke to Rebecca Ann Karls Eloë. Eloë reported that she was staying at the Baymont Hotel in the City of Whitewater, which complainant knows is located in Walworth County, Wisconsin. Eloë reported that she had an order of protection against her estranged husband, Timothy J. Eloë. Eloë reported that she had left her room to attend an event. Upon returning to her hotel room, she

noted that her room key would not work. Eloë reported that she spoke to the clerk at the hotel who stated that Eloë's husband had arrived and obtained an access card to her room and went into her room. Eloë reported that the defendant did not have permission to be in her room. Eloë reported that she believed there was a current order of protection against the defendant. Eloë further reported that she fears for her safety because of the defendant's behavior directed at her in the past.

Officer Ludlum reports that she spoke to Theron Ramirez. Ramirez reported that she was working as a clerk at the hotel. She stated that a man came to the counter and produced an Illinois photo driver's license identifying himself as Timothy Jon Eloë. Ramirez reported that she noted that the address on the defendant's license matched the address Eloë provided when she checked into the hotel. The defendant, according to Ramirez, identified himself as Eloë's husband and that she was expecting him in the room. Ramirez reported that she observed the defendant go in and out of the room a couple of times.

....

Officer Ludlum reports that Eloë decided not to stay in that hotel room for fear the defendant would come back and cause harm to her. Officer Ludlum reports that it was the middle of the night and the hotel was fully booked. Officer Ludlum reports that Eloë then decided to pack up her belongings and leave the hotel and return home

.....

[A]n order of protection was granted in the Circuit Court of Illinois 18th Judicial Circuit in DuPage County, case number 2009OP001296 filed September 17, 2009. Such order reflects that Rebecca Ann Karls Eloë was the petitioner and that the defendant, Timothy Jon Eloë was the defendant, the same defendant in this case. Such order reflects that the defendant was ordered to "stay away from the petitioner." The term "stay away" is further defined by the order which includes that the defendant was to refrain from both being present and having nonphysical contact with Rebecca Eloë.

....

Complainant has reviewed emails provided to the Walworth County District Attorney's Office by Rebecca Eloë and also by police officers from the City of Naperville

Police Department. Such emails reflect that they were sent by the defendant either to Rebecca Eloë or Officer Jim Sakelakos of the Naperville Police Department. Within those emails, the defendant makes reference to and acknowledges the existence of the order of protection.

¶4 Prior to his trial, Eloë moved the circuit court to dismiss the violation of a foreign protection order count, arguing, as he does on appeal, that the complaint does not allege sufficient facts to establish probable cause to believe he violated the foreign protection order. As Eloë points out, the complaint alleges that the foreign protection order directed him to “stay away” from Rebecca Eloë. The complaint also alleges that “stay away” is “further defined” in the order as including that Eloë was to “refrain from both being present and having nonphysical contact with Rebecca Eloë.” Eloë contends, however, that the complaint does not allege facts which, if proven, would establish that Eloë was either present with Rebecca or that he had nonphysical contact with her. In essence, Eloë argues that because the complaint makes clear Rebecca was not physically present in her hotel room when Eloë allegedly went into it and because the complaint does not allege he had any other direct interaction with Rebecca during the time in question, it does not allege he failed to “stay away” from her and thus does not establish probable cause that he violated the terms of the foreign protection order. The circuit court was not persuaded by Eloë’s arguments. The court implicitly found probable cause and denied the motion, believing the issue raised by Eloë was more appropriately a question for a jury. Eloë appeals. We discuss additional facts as necessary below.

¶5 To be sufficient, a criminal complaint need only be minimally adequate in setting forth essential facts establishing probable cause. *State v. Adams*, 152 Wis. 2d 68, 73, 447 N.W.2d 90 (Ct. App. 1989). Further, the adequacy of the complaint is to be evaluated “in a common sense rather than a

hypertechnical manner.” *Id.* There must be facts within the four corners of the complaint that are sufficient, by themselves or together with any reasonable inferences drawn from them, to allow a reasonable person to conclude the defendant probably committed a crime. *State v. Thiel*, 183 Wis. 2d 505, 541-42, 515 N.W.2d 847 (1994); *State v. Haugen*, 52 Wis. 2d 791, 793, 191 N.W.2d 121 (1971). Whether a criminal complaint alleges sufficient facts to establish probable cause is a question of law we review de novo. *State v. Grimm*, 2002 WI App, ¶15, 258 Wis. 2d 166, 653 N.W.2d 284.

¶6 In the present case, the complaint alleges that the foreign protection order “reflects that the defendant was ordered to ‘stay away from the petitioner.’” The complaint then states that “[t]he term ‘stay away’ is further defined by the [foreign protection] order which includes that the defendant was to refrain from both being present and having nonphysical contact with Rebecca Eloë.”

¶7 The issue boils down to whether the complaint sufficiently alleges facts, or reasonable inferences that can be drawn from those facts, that Eloë failed to “stay away” from Rebecca, as the complaint alleges the foreign protection order requires. As the allegations in the complaint are phrased, the term “stay away” appears to stand as a definition unto itself, while also alleging that the term is “further defined” by the foreign protection order as “includ[ing] that the defendant was to refrain from both being present and having nonphysical contact” with Rebecca. “Nonphysical contact” clearly means a form of contact different from “being present” with Rebecca.

¶8 If the complaint sufficiently alleges Eloë had some form of nonphysical contact with Rebecca, then it sufficiently alleges he violated the “stay away” requirement of the foreign protection order and thus the order itself.²

¶9 To help us determine whether the complaint sufficiently alleges Eloë had nonphysical contact with Rebecca at the time in question, Eloë directs us to RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY 288 (2000).³ That source defines “contact” as “1. the act or state of touching; a touching or meeting, as of two things or people. 2. immediate proximity or association. 3. the act or state of being in communication.” Because there is no allegation that Eloë made physical contact or “[was] present” with Rebecca, our analysis focuses on the third definition of “contact.” Eloë argues that “[t]he common thread among [all three] definitions and the commonly understood meaning of the word contact is some element of interaction, whether physical or verbal.” Contact which is nonphysical, however, is not just limited to “verbal” interaction. Nonphysical contact can also occur, and in this case is sufficiently alleged to have occurred, by means of nonverbal communication.

¶10 The complaint alleges Rebecca had been staying at a hotel in Walworth county, Wisconsin. It alleges she had an order of protection in place against her estranged husband, Eloë, and that Eloë knew Rebecca had an order of protection in place against him. The complaint further alleges or reasonably

² Neither of the parties contend that the complaint alleges Eloë violated the foreign protection order by actually “being present” with Rebecca.

³ Eloë actually directs us to the 2010 version of this dictionary. The definition Eloë quotes, however, is the same in the 2000 version, the most recent version available to us. We may use recognized dictionary definitions “to ascertain the meaning of ordinary, nontechnical words.” *State v. Quartana*, 213 Wis. 2d 440, 446, 570 N.W.2d 618 (Ct. App. 1997).

implies Rebecca left her hotel room to attend an event and that, while she was away at the event, Eloë came to the hotel and convinced the hotel clerk to give him an access card to Rebecca's room by showing the clerk his driver's license, telling the clerk he was Rebecca's husband, and that Rebecca was expecting him in the room. It alleges or implies Eloë then used this access key to go in and out of Rebecca's room multiple times before Rebecca returned from her event. The complaint alleges that, upon returning to her hotel room, Rebecca noticed her room key would not work and that she spoke with the hotel clerk who informed Rebecca that Rebecca's husband had come to the hotel, obtained an access card to Rebecca's room, and went into her room.

¶11 The complaint goes on to state that Rebecca decided not to stay in that hotel room out of fear Eloë would come back and harm her. The complaint alleges Rebecca has an order for protection in place because she fears for her safety because of Eloë's behavior directed toward her in the past. It further alleges or implies Eloë was aware of this order and aware of Rebecca's fear of him⁴ at the time of the incident in question.

¶12 The question is whether these facts and the reasonable inferences to be drawn from them sufficiently establish probable cause to believe Eloë had nonphysical contact with Rebecca. They do.

¶13 As previously expressed, one need not verbally express words directly to another person in order to communicate with that person. Actions alone can send a message and constitute a form of communication. In this case,

⁴ It is reasonable to infer Eloë was aware of his own past behavior toward Rebecca and, especially due to her procurement of the foreign protection order against him, the fact that his past behavior toward Rebecca caused her to fear him.

the complaint alleges, or it is reasonable to infer, Eloë was aware Rebecca had a protective order against him ordering him to “stay away” from her because of his past behavior toward her, past behavior which caused her to fear for her safety so much so that she took the steps of getting a protective order against him. That order not only directed Eloë to refrain from being present with Rebecca, but to also refrain from having nonphysical contact with her.

¶14 Considering Eloë’s own choice of dictionary definitions, Eloë’s actions as alleged in the complaint suffice to allege “an act or state of being in communication” with Rebecca and thus a form of nonphysical contact with her. Though Rebecca was not physically present in the hotel room when Eloë was going in and out of her room with the access key he procured from the hotel clerk, he nonetheless succeeded in communicating a significant message to Rebecca. When Rebecca returned to her hotel room and discovered her room key did not work and was informed by the clerk that her husband had arrived and gained access to and went into her hotel room, she was filled with fear he would come back and harm her. She was so fearful that, when she tried to get a new hotel room to stay in at the same hotel but could not because it was the middle of the night and the hotel was fully booked, she then packed up her belongings and left the hotel.

¶15 The message Eloë communicated to Rebecca was that despite knowing there was a protective order in place directing him to “stay away” from her, he nonetheless still desired and was able to gain access to, and indeed go into, her hotel room without her consent. For a woman who went to the lengths of procuring a protective order against her estranged husband because she was afraid of what he might do to her based on his actions toward her in the past, that is a very disturbing communication. While this form of alleged nonphysical contact

may not have been direct or immediate, it could be considered a form of nonphysical contact nonetheless.

¶16 Because the complaint sufficiently established probable cause to believe Eloe violated a foreign protection order, the circuit court properly denied Eloe's motion to dismiss that count.

¶17 Eloe's second contention on appeal, that the disorderly conduct conviction should be vacated, rests on the assumption that we would conclude the violation of a foreign protection order count should have been dismissed prior to trial. Had we come to that conclusion, Eloe's argument would be that because the violation of a foreign protection order count was not dismissed prior to trial, that count and evidence related to it were improperly before the jury and tainted the disorderly conduct verdict.

¶18 Eloe himself acknowledges in his brief that "if this Court upholds the trial court's ruling regarding the sufficiency of the complaint [on the violation of a foreign protection order count], then indeed this secondary issue of admissibility of evidence is rendered moot." Because we conclude the violation of a foreign protection order count was properly before the jury, evidence related to that count was also properly before the jury. For this reason, Eloe's request that this court vacate his conviction on the disorderly conduct charge is denied.

By the Court.—Judgment affirmed.

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

