

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 1, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2014AP932-CR

Cir. Ct. No. 2012CF1483

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY P. ZOELICK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
KATHRYN W. FOSTER, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly, and Gundrum, JJ.

¶1 PER CURIAM. Timothy Zoelick appeals from a judgment of conviction for stalking with a previous stalking conviction involving the same

victim within seven years, contrary to WIS. STAT. § 940.32(3)(b) (2013-14),¹ and three counts of violating a harassment restraining order as a habitual offender. He argues that the State's use of evidence of stalking conduct in another county violated his due process right to notice of the nature of the charge, rendered the complaint duplicitous, and violated his right to be free from double jeopardy because he had already been convicted for that stalking conduct. We reject his claims and affirm the judgment.

¶2 While a resident of Jefferson County, R.E. obtained a harassment restraining order against Zoellick which required Zoellick to avoid R.E.'s "residence or any premise temporarily occupied" by her until February 29, 2016. Zoellick was convicted on May 11, 2012, in Jefferson County of stalking R.E. by conduct occurring between October 29, 2011, and February 2, 2012.

¶3 In November 2012, R.E., now living and working in Waukesha County, reported seeing Zoellick driving by her place of work and home. The criminal complaint charged Zoellick with aggravated stalking and violations of the restraining order for conduct between November 10, 2012, and November 27, 2012. The complaint also alleged Zoellick's prior stalking conviction in Jefferson

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

County and purported to attach and incorporate by reference a copy of the criminal complaint from the Jefferson County case.²

¶4 Before the jury trial, the prosecution filed a motion to admit other acts evidence consisting of Zoellick's behavior toward R.E. in Jefferson County in 2011 and 2012. The motion stated that the conduct was relevant for motive and context but also "necessary to prove the course of conduct element of the crime."³ At the hearing on the motion, the trial court explicitly stated that the other acts analysis under WIS. STAT. § 904.04 did not apply but indicated that the evidence was relevant to show a course of conduct. Zoellick questioned whether the evidence could be used as course of conduct evidence because it was not set forth in the criminal complaint. The discussion evolved to whether the prosecution would be required to accept Zoellick's stipulation that he had previously been convicted of stalking R.E. The prosecutor indicated that he would not stipulate to the prior crime because the circumstances of the conviction "is part of what makes what happens here stalking [by] the fact that he has done it in the past." The trial court ruled that it would admit the evidence as continuing course of conduct

² The Jefferson County complaint was not attached to the criminal complaint. At an April 18, 2013 status hearing, the circuit court observed that the complaint was not attached. The prosecutor provided the court with the Jefferson County charging documents by a letter dated April 19, 2013.

³ Under WIS. STAT. § 940.32(1)(a), (2), the offense of stalking requires proof that the defendant intentionally engaged in a "course of conduct directed at a specific person," and "'course of conduct' means a series of 2 or more acts carried out over time, however short or long, that show a continuity of purpose."

evidence. At trial R.E., a Watertown (Jefferson County) police officer, and R.E.'s mother testified about all of Zoellick's acts toward R.E. in Jefferson County in 2011 and 2012.

¶5 Zoellick first argues that the criminal complaint failed to give him notice that he would have to defend against acts committed in Jefferson County in 2011 and 2012. He claims that the admission of that evidence expanded the time frame in which the crime occurred to a time frame not set forth in the criminal complaint. See *State v. Conner*, 2011 WI 8, ¶22, 331 Wis. 2d 352, 795 N.W.2d 750 (illustrating the same argument as a due process challenge to the complaint). His claim rests on the admission of the Jefferson County acts as evidence of the continuing course of conduct element of the stalking crime. However, just because the pretrial ruling characterized the evidence as continuing course of conduct evidence does not mean that case was actually tried to the jury using the evidence for that purpose.

¶6 The criminal complaint and information alleged that between November 10, 2012, and November 27, 2012, in Waukesha County, Zoellick intentionally engaged in a course of conduct directed at R.E. by repeatedly driving past her residence and either past or through the parking lot of her place of work. That allegation was read to the jury voir dire panel on the first day of the trial. The four counts of violating a harassment restraining order were also read and each identified a specific date in November 2012 and a location within Waukesha

County that Zoellick committed an act directed at R.E. in violation of the harassment restraining order. During closing argument the prosecutor told the jury that the things that happened in Jefferson County were background. The prosecutor argued that the background of what happened in Jefferson County “explains why there is more meaning than otherwise might be to the things that are going on in November of 2012, but you are not being asked to find him guilty based on those facts.” The prosecutor emphasized that Zoellick was on trial only for what happened in November of 2012. The prosecutor also argued that because the Jefferson County acts resulted in a stalking conviction, Zoellick knew the same kind of acts in Waukesha County in November of 2012 were also stalking and causing R.E. severe emotional distress. The verdicts for the stalking crime were fashioned to limit the jury’s consideration to guilty or not guilty “of stalking during the month of November 2012, as set forth in Count 1 of the information.”⁴ At the start of jury instructions, the information with the time and place limitations was again read to the jury. The jury was also informed that the parties had stipulated that Zoellick had been convicted of stalking R.E. in Jefferson County on May 11, 2012.

⁴ The date limitation was placed in the verdict forms in response to Zoellick’s concern that the jury could not rely on what happened in Jefferson County to find that a new event causing serious emotional distress occurred in Waukesha County.

¶7 Despite the pretrial characterization that the Jefferson County acts would be admitted as course of conduct evidence, it was not utilized for that purpose. Rather, as the State advances in its respondent's brief, the evidence was used to establish context for the acts committed in Waukesha County. As the State explains:

Standing alone, Zoellick's November 2012 behavior may seem innocuous to an ordinary person. But when placed against the backdrop of his prior stalking of R.E. and R.E.'s decision to seek a harassment injunction, it supports R.E.'s claim that, under the circumstance, Zoellick caused her to suffer severe emotional distress in November 2012.

¶8 Evidence of the Jefferson County acts was used for a proper purpose;⁵ a purpose that did not convert it into evidence of the continuing course element of the crime. It was not necessary that the Jefferson County acts be charged in the criminal complaint. Moreover, the record demonstrates that Zoellick was convicted only of the conduct set forth in the complaint. The jury found Zoellick guilty of three counts of violating the harassment restraining order by the three acts that occurred in November 2012. The three acts were a sufficient number of acts to constitute a course of conduct for stalking. The verdict form also served to establish the time period in which the offense was committed. *State*

⁵ That an other acts analysis was not performed is of no consequence. "Evidence is not 'other acts' evidence if it is part of the panorama of evidence needed to completely describe the crime that occurred...." *State v. Dukes*, 2007 WI App 175, ¶28, 303 Wis. 2d 208, 736 N.W.2d 515.

v. Miller, 2002 WI App 197, ¶17, 257 Wis. 2d 124, 137, 650 N.W.2d 850. Zoellick’s claim that the complaint failed to provide him adequate notice fails.

¶9 We need not address Zoellick’s claim that if the Jefferson County allegations were properly incorporated into the criminal complaint to satisfy the notice requirement, the complaint is then duplicitous because the Jefferson County course of conduct comprises a complete, separate, and stand alone offense. It is not necessary to incorporate the Jefferson County allegations into the criminal complaint.

¶10 Zoellick’s remaining claim is that admission of the Jefferson County acts, without any limiting instruction, violates his right to be free from double jeopardy because of the possibility that the jury relied wholly or in part upon the Jefferson County stalking offense of which he had already been convicted. Stalking is a continuous crime. *Conner*, 331 Wis. 2d 352, ¶30. ““Only one prosecution may be had for a continuing crime. When an offense charged consists of a series of acts extending over a period of time, a conviction or acquittal for a crime based on a portion of that period will bar a prosecution covering the whole period”” *State v. George*, 69 Wis. 2d 92, 98, 230 N.W.2d 253 (1975) (quoted source omitted).

¶11 We have determined that the Jefferson County acts were not evidence of the continuing course of conduct element of the crime. Additionally,

the jury was instructed on the time and location limitations of the information and verdict. Zoellick was charged only for acts occurring in November 2012, and there were a sufficient number of acts to constitute a course of conduct. Zoellick was not charged for an expansive period of time that included the acts in Jefferson County for which he had already been convicted. Thus, this is not a case “where successive identical prosecutions for stalking are being undertaken using the same past acts to satisfy the elements of the charges.” *Conner*, 331 Wis. 2d 352, ¶43 (explaining why double jeopardy concerns are not implicated by evidence of conduct predating earlier convictions for crimes other than stalking as part of the continuum of conduct for stalking). Zoellick’s conviction does not violate his right to be free from double jeopardy.

By the Court.—Judgment affirmed.

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

