COURT OF APPEALS
DECISION
DATED AND FILED

March 9, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1767-CR **Cir. Ct. No. 02CF003280**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES F. BLASKY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. James F. Blasky appeals from a judgment entered after a jury found him guilty of one count of robbery, threat of force, of an elderly

victim, contrary to WIS. STAT. §§ 943.32(1)(b) and 939.647[1] (2001-02).[2] He claims the evidence is insufficient to sustain the conviction, and that the trial court erroneously exercised its discretion in admitting other acts evidence. Because the evidence is sufficient to uphold the jury's verdict, and because the trial court did not erroneously exercise its discretion in admitting the other acts evidence, we affirm.

I. BACKGROUND

¶2 In June 2002, fifty-three-year-old James Blasky was living with his eighty-five-year-old mother, Joyce Blasky. He had moved in with her approximately three years earlier after he lost his long-term job at IBM. Joyce testified that Blasky repeatedly asked her for money, small amounts at first—between $10-20 a day, but later he demanded money from her in greater amounts—between $100-200 a day. The money was used to support Blasky's crack cocaine addiction.

¶3 On June 10, 2002, Blasky asked Joyce for money. She refused. Blasky then became angry, pounded his fists on the dining room table, broke a crystal vase, and grabbed Joyce's arm very hard. As a result, Joyce gave him the money. Joyce stated that Blasky hurt her arm badly, leaving a bruise.

¶4 On June 15, 2002, Blasky woke Joyce up at 4:45 a.m. and demanded money. Joyce gave him the last $10 she had. Blasky threw the money on the bed

[1] Although not applicable in this case, WIS. STAT. § 939.647 has been repealed effective February 1, 2003. *See* 2001 Act 109, § 580.

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

and said, "Get your clothes on and go get some more, we are going to the TYME machine to get it." Joyce said she complied with Blasky's demands because she was afraid he would hurt her. The two then walked to the TYME machine, and Joyce withdrew $110. She put $60 in her purse and gave $50 to Blasky. They then walked back to Joyce's apartment. Blasky left and Joyce went back to sleep.

¶5 At about 8:30 a.m., Joyce got up and ate breakfast. Blasky told her he needed more money. Joyce replied that she was not giving him any more money. Blasky then threatened Joyce: "I won't even take off your glasses, I'll fix your face unless you get me more." Joyce was afraid that Blasky would punch or otherwise hurt her, so she gave him $40. She then left the apartment and reported the incident to police.

¶6 Blasky was arrested and charged with robbery, threat of force, of an elderly victim. A jury found him guilty. He was sentenced to ten years, with four years' initial confinement, followed by six years of extended supervision. He now appeals.

II. DISCUSSION

A. Sufficiency of the Evidence.

¶7 Blasky argues that the evidence was insufficient to support the fourth element of robbery—that Blasky had the intent to permanently deprive Joyce of the money. He claims the evidence shows only that he intended to repay the money to his mother once he got a job. The State responds that the evidence was sufficient for the jury to infer that Blasky had the requisite intent to steal Joyce's money. We agree.

¶8 In sufficiency-of-the-evidence claims, our standard of review is limited:

> [A]n appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citations omitted). Here, Blasky contends that there was no evidence of his subjective intent to steal the money; but rather, the only evidence was that he intended to repay his mother after he found a job. Although Blasky correctly states the law, his argument fails because of the facts.

¶9 It is true that intent to steal is an element of threat-of-force robbery. WIS. STAT. § 943.32(1); ***State v. Lasky***, 2002 WI App 126, ¶16, 254 Wis. 2d 789, 646 N.W.2d 53. It is also true that the State must prove that Blasky had the subjective intent to steal the money. ***State v. Evers***, 139 Wis. 2d 424, 428, 407 N.W.2d 256 (1987). However, the record contains evidence from which a jury could infer the requisite subjective intent.

¶10 First, although Blasky stated that he intended to repay his mother, his actions indicated otherwise. Joyce testified that Blasky had been taking increasing amounts of money from her for the past several years to support his crack cocaine habit. On the date of the incident, Blasky woke his eighty-five-year-old mother at 4:45 a.m. and forced her to walk to the TYME machine to get money. Several hours later, he threatened to physically hurt her if she did not give

him more money. Joyce also testified that although Blasky frequently stated that he would repay her when she gave him money, she knew that he never would, because he was using the money for drugs and did not have a job. Thus, the jury could infer from Blasky's conduct and the other circumstances that he never had the intent to pay the money back. ***State v. Webster***, 196 Wis. 2d 308, 321, 538 N.W.2d 810 (Ct. App. 1995). Moreover, the jury was free to assess the credibility of Blasky's testimony that he intended to repay his mother. ***State v. Sharp***, 180 Wis. 2d 640, 659, 511 N.W.2d 316 (Ct. App. 1993). Having heard that Blasky was demanding more and more money from his mother to support a drug addiction, particularly given the threatening circumstances which formed the basis for the charge in this case, the jury could reasonably infer that Blasky's words of promised repayment were without substance. When the record supports more than one reasonable inference, we are bound to accept the inference drawn by the trier of fact. ***State v. Jensen***, 2000 WI 84, ¶23, 236 Wis. 2d 521, 613 N.W.2d 170.

¶11 Likewise, we reject Blasky's contention that there could not have been intent to steal because Joyce voluntarily gave him the money. Joyce testified that the only reason she gave Blasky the money was because she was afraid of him and because he threatened her. Her testimony is sufficient to support the jury's inference that Blasky had the requisite intent to steal on the date in question. ***State v. Dix***, 86 Wis. 2d 474, 484-85, 273 N.W.2d 250 (1979) (intent to steal may be inferred by defendant's actions following threat of use of force); ***State v. Johnson***, 231 Wis. 2d 58, 69, 604 N.W.2d 902 (Ct. App. 1999) (words and gestures intending to create the impression that the defendant would use force, if necessary, to take the property, support the conclusion that a robbery occurred).

¶12 We conclude that a reasonable jury could infer the requisite element of intent to steal based on the facts and circumstances in this record. Accordingly,

there is sufficient evidence to uphold the judgment and we reject Blasky's argument to the contrary.

B. Other Acts Evidence.

¶13 Blasky next contends that the trial court erroneously exercised its discretion in admitting other acts evidence. Specifically, he claims the trial court should have excluded evidence of the June 10, 2002 incident in which he grabbed his mother's arm so hard that he bruised her. The State responds that the evidence was properly admitted. We agree.

¶14 In evidentiary matters, our review is deferential. We will not reverse the trial court's determination if the trial court considered the proper facts, applied the correct law, and reached a reasonable determination. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). In determining whether "other acts" should be admitted, we employ a three-step test: first, the evidence must be offered for an admissible purpose under WIS. STAT. § 904.04(2); second, the evidence must be relevant; and third, the probative value of the evidence must not be substantially outweighed by WIS. STAT. § 904.03 factors. ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

¶15 Admittedly, the trial court's ***Sullivan*** analysis was not as comprehensive as it could have been. Therefore, we will review the record independently to determine whether there is a reasonable basis for the trial court's evidentiary decision. ***State v. Davidson***, 2000 WI 91, ¶53, 236 Wis. 2d 537, 613 N.W.2d 606. Here, we conclude that all three ***Sullivan*** steps are satisfied and, therefore, the trial court did not erroneously exercise its discretion in admitting the other acts evidence.

¶16 First, the June 10, 2002 incident was admitted for the acceptable purpose of *intent*, one of the purposes listed in WIS. STAT. § 904.04(2). Blasky, in fact, concedes that the first ***Sullivan*** step was satisfied—that this evidence could be admitted to demonstrate his intent or motive to steal from his mother.

¶17 The second step requires a determination of whether the June 10 evidence was relevant to the intent-to-steal element of robbery. We conclude that the evidence was relevant. It tended to show Joyce's belief that Blasky's threat was real, and that Blasky intended to use force to get Joyce's money. In assessing the probative value of the other acts evidence, the court may consider whether the proffered evidence has nearness in time, place, and circumstances to the charged crime. ***Sullivan***, 216 Wis. 2d at 786. Here, the other acts were close in time, place, and circumstances, occurring just five days before the charged incident, at the same place and under very similar circumstances—Blasky demanding money by using force or threatening to use force. Accordingly, we conclude that the second ***Sullivan*** factor was satisfied.

¶18 The third and last ***Sullivan*** factor involves a balancing test of whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Blasky contends that admitting the June 10 incident unfairly prejudiced the jury against him. We disagree. The trial court gave the jury a cautionary instruction advising that the June 10 evidence should be used solely for the acceptable purpose and not to assess Blasky's character. Such instruction minimized any potential prejudice. ***State v. Hammer***, 2000 WI 92, ¶36, 236 Wis. 2d 686, 613 N.W.2d 629. Accordingly, because the other acts evidence satisfied the

Sullivan test, the trial court did not erroneously exercise its discretion in admitting the evidence.

By the Court.—Judgment affirmed.

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