COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2465-CR **Cir. Ct. No. 02CF000616**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM J. WESTERMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed.*

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

¶1 PER CURIAM. William Westerman appeals a judgment of conviction. The issues relate to admission of other acts evidence and to jury instructions. We affirm.

¶2 Westerman was convicted of controlled substance and paraphernalia offenses, and one count of stalking. Only the stalking charge is at issue in this appeal. The allegations, in general, were that Westerman had stalked the victim by frequently driving his pickup truck into her driveway at night and pausing there.

¶3 Westerman first argues that the court erred by admitting evidence of four other acts. This evidence is analyzed under the test provided in ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998), which need not be repeated here. We review the circuit court's decision for erroneous exercise of discretion. ***Id***. at 780-81.

¶4 As provided in WIS. STAT. § 940.32(2) (2001-02),[1] the jury was instructed that the elements of stalking are, first, that the defendant intentionally engaged in a course of conduct directed at the victim. "Course of conduct" was defined as a series of two or more acts carried out over time, however short or long, that show a continuity of purpose. Acts that may constitute a course of conduct are limited to maintaining a visual or physical proximity to the victim, approaching the victim, or appearing at the victim's home. Second, that the course of conduct would have caused a reasonable person to fear bodily injury or death to herself or a member of her household. Third, that the defendant's acts induced fear in the victim of bodily injury or death to herself or a member of her household. And fourth, that the defendant intended that at least one of the acts in

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

the course of conduct would place the victim in reasonable fear of bodily injury or death to herself or a member of her household.

¶5 The court admitted evidence of four other acts by Westerman. He argues that all were admitted erroneously. The State asserts that all were properly admitted, but then makes a specific argument as to only one of the acts. As to the remaining three, it argues that if their admission was erroneous, it was harmless. We first address the act on which the State makes the specific argument.

¶6 The court admitted testimony by a woman who said Westerman was an acquaintance, and that for a time he frequently drove by her apartment complex and would stop there, and eventually he left her a note stating his desire "to be naked" with her. Applying the test under ***Sullivan***, the State argues that this testimony was properly admitted for several of the purposes provided in WIS. STAT. § 904.04(2). The State argues that this evidence was properly used to show Westerman's intent to engage in a course of conduct against the victim in the present case, and also the absence of mistake or accident, in his frequent appearances near the victim's residence. We agree. The State argues that the evidence was properly used to show Westerman's plan, namely, "an overall plan to satisfy his sexual fantasies," and that the similarity between the two incidents shows that his conduct was part of the same plan. We agree. Finally, the State argues that the evidence was properly admitted to show Westerman's motive, namely, sexual gratification. We agree. For these reasons, the evidence also meets the second part of the ***Sullivan*** test, relevancy.

¶7 As to the third part of the test, whether the probative value of the evidence is outweighed by unfair prejudice, Westerman argues that the danger of unfair prejudice was high due to the antisocial nature of his earlier act. However,

we agree with the State's argument that a court could reasonably conclude this danger is outweighed by the probative value of the evidence, because of its similarity to the charged crime.

¶8 For the remaining three other acts, the State makes no specific argument in support of their admission. It argues instead that any error was harmless. The three other acts were incidents in which: (1) police received complaints that Westerman was driving around a residential area and slowing down and staring at people; (2) a thirteen-year-old newspaper delivery girl felt Westerman was driving in his pickup truck and following and staring at her; and (3) Westerman was seen masturbating in his vehicle. The State argues that any error was harmless due to the strength of the evidence on the charge. We agree. An error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189.

¶9 Westerman's defense did not dispute that the factual events forming the basis for the charge occurred. Rather, the defense was that his conduct did not meet the elements of stalking because it was not done with a focus specifically on the victim, as required, and was not done with the required intents, but instead for other reasons that he explained. The question before the jury, then, was whether it believed these explanations. Without attempting to recite all the evidence here, we are satisfied that the jury would have rejected Westerman's explanations, even without the evidence of the three other acts. The explanations appear rather strained and improbable to fully account for the conduct that occurred.

¶10 Westerman also argues that the court erred by giving the jury instruction known as *falsus in uno*, which stated: "If you become satisfied from the

evidence that any witness has willfully testified falsely as to any material fact you may disregard all the testimony of the witness which is not supported by other credible evidence in the case." The court proposed this instruction, and defense counsel objected, but the court concluded there was sufficient evidence for the jury to conclude that there may have been untruthful evidence offered, although it did not say by which witness.

¶11 Although the instruction is disfavored, it may be given if the false testimony is on a material point and willful and intentional. ***State v. Williamson***, 84 Wis. 2d 370, 394-95, 267 N.W.2d 337 (1978). "Because the trial court has the benefit of observing the actual testimony of all of the witnesses, its determination ought to be given much weight." ***State v. Robinson***, 145 Wis. 2d 273, 282, 426 N.W.2d 606 (Ct. App. 1988). The State argues that the instruction was proper in Westerman's case because there was evidence that he lied to police during investigations. However, the State cites no authority that lying to police, or anywhere other than while testifying, is grounds to give this instruction. The State also relies on one instance in which it claims Westerman may have lied at trial. In testifying about the first of the other acts, the woman who was the subject of Westerman's attention stated that she had never called him on the telephone, yet Westerman testified that she had called him three or four times. We conclude that this testimony was sufficient to support the instruction.

By the Court.—Judgment affirmed.

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