COURT OF APPEALS
DECISION
DATED AND FILED

September 28, 2004

Cornelia G. Clark
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. 04-1419-CR **Cir. Ct. No. 02-CF-80**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERRY REED,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: HAROLD V. FROEHLICH, Judge. *Affirmed.*

¶1 CANE, C. J.[1] Jerry Reed appeals a judgment of conviction, entered upon a jury's verdict, for misdemeanor disorderly conduct. Reed contends the court erred by allowing one of the State's witnesses to testify about the victim's statements in the case because the State failed to prove the victim was unavailable

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

to testify. Assuming without deciding there was error, this court concludes it was harmless and affirms the judgment accordingly.

Background

¶2 On February 9, 2002, city of Appleton police officer John Schira and sergeant Donald Kramer responded to a 911 hang-up in an apartment complex. Arriving at the scene, they discovered the call had originated in the management office, but the disturbance had moved. The officers tried to find where the problem was.

¶3 Outside one apartment, Schira heard a woman sobbing within, saying "Please don't hit me again, please don't hit me with the hammer." He heard a male voice yell back "I want my fucking money, bitch," and "You're fucking dead, bitch." Kramer described the sounds as banging, yelling, and crying.

¶4 The officers knocked and announced themselves. Reed answered the door. The officers observed Janene Mielke huddled against a wall, crying, with a hammer at her feet. Schira ordered Reed out of the apartment and told him he was under arrest. Reed became argumentative and combative, struggling while the officers tried to handcuff him. Later, at the police station, Reed said without prompting that "Sometimes you need to use a hammer to keep your woman down."

¶5 Kramer assisted Mielke at the scene. He observed that her hands were scratched, her leg was bruised and beginning to swell, and her face was red and swollen. Kramer also interviewed Mielke at the scene and later at the hospital. She told him she and Reed had been arguing about money. The fight

started in the manager's office but migrated to their apartment after she tried to call for help. In the apartment, the fight escalated. Mielke told Kramer in both interviews that she felt Reed would have killed her if they had not intervened. Reed was charged with aggravated battery, obstructing an officer, and disorderly conduct.

¶6 At trial, Mielke did not testify, so Kramer testified about what she had told him during the interviews. Reed objected, but the court allowed the hearsay testimony under the excited utterance exception. A jury acquitted Reed of battery and obstructing but convicted him of disorderly conduct. Reed appeals.

Discussion

¶7 Reed claims that the State failed to prove Mielke's unavailability as a witness so Kramer should not have been allowed to testify about her statements. Reed argues the court's error in this respect is a violation of his right to confrontation.

¶8 This court will assume, but not decide, that there was confrontation clause violation.[2] "The determination of a violation of the confrontation clause 'does not result in automatic reversal, but rather is subject to harmless error analysis.'" ***State v. Weed***, 2003 WI 85, ¶28, 263 Wis. 2d 434, 666 N.W.2d 485 (citations omitted).

[2] Reed argues that the State failed to prove Mielke's unavailability under ***Crawford v. Washington***, 124 S.Ct. 1354 (2004). We note that, at the time the circuit court here issued its decision, ***Crawford*** had not been decided.

¶9 To determine "whether an error is harmless, we focus on the effect of the error on the jury's verdict." ***Id.***, ¶29. This test is whether it appears beyond a reasonable doubt the error did not contribute to the verdict rendered. ***Id.*** That is, it must be clear beyond a reasonable doubt that a rational jury would have convicted absent the error. *See* ***Neder v. United States***, 527 U.S. 1, 18 (1999).

¶10 Reed complains "it is impossible to say with any degree of confidence that the jury ignored Mielke's statements …." That, however, is not our test. The test is whether a rational jury would have convicted Reed without those statements.

¶11 Evidence that did not come from the interviews is as follows. Schira heard a woman crying and begging not to be hit *again* with a hammer. Kramer observed scratches, bruising, and swelling on Mielke. Later, Reed stated "Sometimes you need to use a hammer to keep your woman down." The officers heard a man, later identified as Reed, yelling profanities at someone. Kramer heard banging, yelling, and crying from Reed's apartment. This was all loud enough to be heard by officers *outside* the apartment. Indeed, Reed does not protest the admissibility of any of this evidence and concedes "If this evidence were sufficient to establish criminal conduct and if it were the only evidence relied upon for the conviction, this court could uphold the conviction."

¶12 WISCONSIN STAT. § 947.01 is the disorderly conduct statute. It states:

> Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.

¶13 The undisputed evidence of record demonstrates violent and abusive conduct based on evidence that the hammer was involved and Mielke's injuries. The evidence demonstrates indecent and profane conduct based on the statements Schira overheard and Reed's statement at the police station. Finally, the evidence demonstrates boisterous and unreasonably loud conduct because the 911 call establishes the argument was mobile, starting somewhere other than the apartment, and the argument was loud enough for the officers to hear from outside the apartment. This evidence is more than sufficient to allow a rational jury to convict Reed of disorderly conduct, whether there was a confrontation clause violation or not.[3]

By the Court.—Judgment affirmed.

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

[3] Mielke evidently told Kramer that Reed had come home intoxicated, that he had slapped and punched her, that he was threatening to kill her, that he was swinging it at her, and that she was afraid he would kill her. It is this court's perception that this evidence is more probative of the battery charge, not the disorderly conduct charge. Reed, however, was acquitted of the battery charge.