COURT OF APPEALS
DECISION
DATED AND FILED

September 26, 2007

David R. Schanker
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. 2006AP2486-CR

Cir. Ct. No. 2004CF1169

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEONARD F. GRASSO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed*.

Before Brown, C.J., Anderson P.J., and Nettesheim, J.

¶1 NETTESHEIM, J. This case began with an episode of road rage. A jury convicted Leonard Grasso of disorderly conduct and two counts of aggravated battery to an elderly person. On appeal, Grasso contends that: (1) his on-the-scene statement to the police should have been suppressed because he was not

advised of his ***Miranda***[1] rights, (2) the trial court erroneously excluded habit evidence about one of the victims who Grasso claims was the prime aggressor, and (3) the evidence was insufficient to support the verdict because it is not clear whether the jury found him guilty of aggravated battery due to his conduct or due to the victims' ages.

¶2 We conclude that, gauging the totality of the circumstances, Grasso was not in custody and ***Miranda*** advisories thus were not required. We also conclude that evidence of a 1999 domestic abuse allegations against one of the victims was properly excluded as too remote in time and similarity to this chance encounter with a stranger to show a habit for violence. Finally, we conclude that from start to finish this case was prosecuted and tried as a case of aggravated battery to an elderly person and the evidence was sufficient to support the conviction on that ground. We affirm the judgment.

¶3 The State charged Grasso with two counts of aggravated battery to an elderly person under WIS. STAT. § 940.19(6)(a), criminal damage to property under WIS. STAT. § 943.01(1), and disorderly conduct under WIS. STAT. § 947.01 (2005-06).[2] According to the criminal complaint, on July 17, 2004, four Kenosha county sheriff's deputies responded to a Town of Salem gas station to investigate a fight between the occupants of two vehicles. The deputies took statements from Grasso, sixty-three-year-old Glenn Franz and his sixty-three-year-old wife, Ruth Franz, and two witnesses. The gist was that the occupants of the

---

[1] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

two vehicles became upset with each other while driving and Grasso ultimately struck both Franzes. Grasso acted either aggressively or while trying to defend himself; he and the Franzes each claimed the other was the aggressor. Tammy Behringer and Robert Mickelsen, the two witnesses, told the deputies that Grasso approached the Franz vehicle and began hitting Glenn. Behringer also reported that she saw Grasso strike Ruth in the head five or six times. The complaint stated that Glenn's forehead was bleeding, Ruth's head was bruised, and there were dents in two doors of the Franzes' van. Grasso pled not guilty to all four counts.

¶4 Grasso filed a pretrial motion seeking to introduce at trial police reports from a 1999 domestic disturbance at the Franz home as evidence of Glenn's "violent nature or disposition" to show his habit for violence, pursuant to WIS. STAT. § 904.06. According to the motion, the police reports' allusions to "numerous violent episodes" between Glenn and his family would support Grasso's defense that Glenn was the primary aggressor in the road rage incident. The State objected, indicating that, according to Ruth, Glenn had since addressed his drinking problem and there had been no reoccurrences of violence. The trial court denied Grasso's motion on grounds that the domestic disturbance was too dissimilar from a road rage incident and therefore was not probative.

¶5 Grasso filed a motion for reconsideration, arguing that he was not "simply asking the Court to admit the '99 incident. What we're talking about is [a] lifelong habit for violence." He also argued that Glenn's violence was linked to alcohol consumption, and Grasso would testify that he smelled the odor of intoxicants on Glenn's breath during the confrontation. The court denied the motion for reconsideration on the same grounds as it had the first.

¶6 At trial, the court held a ***Miranda/Goodchild***[3] hearing to determine whether to admit a statement Grasso made to Deputy Jon Hasselbrink, who was among the officers summoned to investigate the incident. Hasselbrink testified that he did not give a ***Miranda*** advisory before taking the written statement because Grasso was not in custody. The court agreed and admitted the statement.

¶7 After a four-day trial, the jury returned a verdict of guilty on two counts of aggravated battery to an elderly person and one count of disorderly conduct, and not guilty of criminal damage to property. Grasso appeals the resulting judgment of conviction. More facts will be supplied as needed.

DISCUSSION

Alleged ***Miranda*** *Violation*

¶8 Grasso contends he was in custody when he gave his statement to the police and that the statement therefore should have been suppressed because he was not advised of his ***Miranda*** rights. A person is entitled to have counsel present during custodial interrogation to safeguard his or her Fifth Amendment right against compulsory self-incrimination. ***Miranda v. Arizona***, 384 U.S. 436, 471 (1966); ***State v. Kramer***, 2006 WI App 133, ¶8, 294 Wis. 2d 780, 720 N.W.2d 459, *review denied,* 2007 WI 16, 298 Wis. 2d 95, 727 N.W.2d 34. Statements made in violation of a suspect's right to counsel are inadmissible but, unless a person is in custody, the right to counsel under ***Miranda*** does not apply. ***Kramer***, 294 Wis. 2d 780, ¶¶8, 9. "Custody" for purposes of ***Miranda*** occurs when a

---

[3] *See* ***Miranda***, 384 U.S. at 436, and ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

person is deprived of his or her freedom of action in any significant way. ***State v. Armstrong***, 223 Wis. 2d 331, 353, 588 N.W.2d 606 (1999).

¶9 Whether this evidence should have be suppressed is a question of constitutional fact. ***State v. Knapp***, 2005 WI 127, ¶19, 285 Wis. 2d 86, 700 N.W.2d 899. We uphold the trial court's factual findings unless they are clearly erroneous, but we independently determine whether those facts meet the constitutional standard. ***Id.*** Here the historical facts are not in dispute on this issue. "Custody" therefore is a question of law that we review de novo. *See* ***State v. Pallone***, 2000 WI 77, ¶44, 236 Wis. 2d 162, 613 N.W.2d 568.

¶10 To determine if a person is in custody for Fifth Amendment purposes, the test is whether a reasonable person in the defendant's position would have considered himself or herself to be in custody, given the degree of restraint under the circumstances. ***State v. Gruen***, 218 Wis. 2d 581, 593, 582 N.W.2d 728 (Ct. App. 1998) (citation omitted). We must examine the totality of the circumstances, including such factors as the defendant's freedom to leave the scene; the purpose, place and length of the interrogation; and the degree of restraint. ***Id.*** at 594. Relevant to assessing the degree of restraint is (1) the manner in which the defendant was restrained, if at all; (2) the number of police officers involved; and whether (3) the defendant was handcuffed; (4) a gun was drawn on the defendant; (5) a ***Terry***[4] frisk was performed; (6) the defendant was moved to another location; and (7) the questioning took place in a police vehicle. ***Id.*** at 594-95. The determination is an objective one and does not depend on the subjective view harbored by either the officers or the person being questioned.

[4] *See* ***Terry v. Ohio***, 392 U.S. 1 (1968).

State v. Mosher, 221 Wis. 2d 203, 211, 584 N.W.2d 553 (Ct. App. 1998). Therefore, even if an officer has a thought or plan to later make an arrest but does not communicate it to the suspect, the unarticulated plan has no bearing on whether the suspect was in custody at a particular time. ***Id.*** at 215-16 (citing ***Berkemer v. McCarty***, 468 U.S. 420, 442 (1984)).

¶11 The trial court held a ***Miranda/Goodchild*** hearing out of the presence of the jury to consider whether Grasso was in custody when he made his unwarned statements to the officers. Deputies Jon Hasselbrink, Rory Zuerlein and Tom Gilley testified that they responded to a call of a fight at an Amoco station. Dispatch informed Hasselbrink that one individual, later learned to be Grasso, had left the scene, but was stopped by another deputy. Grasso told that deputy that he was "involved in a road rage incident and I hit a guy." Driving his own vehicle, Grasso followed the deputy back to the gas station parking lot. There, in an effort to determine what happened, the deputies interviewed Grasso, the Franzes and the witnesses.

¶12 Hasselbrink took Grasso's account of the incident while sitting in Grasso's vehicle with him and Grasso's son. The officers considered Grasso a suspect in the investigation but not in custody and so did not give Grasso the ***Miranda*** warnings or take a waiver. Grasso later signed a written version of his statement without making any changes to it. Grasso was cooperative during the interview, did not appear impaired or intoxicated, and made no request to leave, to not make a statement, or for a break, refreshments or an attorney. Grasso never was handcuffed, put in a squad car, restrained or told he was under arrest. Gilley said he considered Grasso "detained" for questioning, but "[b]oth parties were detained. Everybody was detained there." Zuerlein agreed he would have arrested

Grasso had Grasso refused to answer questions and tried to leave but he never told Grasso that.

¶13 The trial court held that Grasso was not in custody, finding that there was no indication of coercion, that Grasso was questioned for a short period of time in his own van with his son present, that he was not impaired, was not restrained or threatened, that he made his statement voluntarily, and that any uncommunicated plan to arrest Grasso had no bearing on a reasonable person's assessment of actual custody. The court concluded that the ***Miranda*** warnings therefore were not necessary.

¶14 These findings are not clearly erroneous. The deputies responded to circumstances in a state of flux. The developing situation involved several people, two apparently injured, who gave conflicting stories. In an effort to sort things out and determine what happened, the officers interviewed the participants and witnesses. "When general on-the-scene questions are investigatory rather than accusatory in nature, the ***Miranda*** rule does not apply." ***State v. Leprich***, 160 Wis. 2d 472, 477, 465 N.W.2d 844 (Ct. App. 1991).

¶15 The deputies did not deprive Grasso of his freedom of action in any significant way. He drove his own vehicle back to the scene. He was not frisked, restrained, handcuffed, put in a squad car, or told he was under arrest or that he could not leave. He was not questioned in isolation, threatened, intimidated with a gun or other show of force or questioned by numerous officers at a time.

¶16 Grasso makes much of the testimony that Zuerlein would have arrested him had he refused to answer questions or tried to leave. However, Zuerlein did not impart this information to Grasso. As noted, Zuerlein's unarticulated plan is immaterial to whether Grasso was in custody. The only

relevant inquiry is how a reasonable person in Grasso's shoes would have understood his situation at the time. *See* ***Gruen***, 218 Wis. 2d at 593. We conclude that a reasonable person in Grasso's situation would not have considered himself in custody and that, based on the totality of the circumstances, he was not. Grasso therefore was not entitled to the ***Miranda*** warnings. *See* ***Kramer***, 294 Wis. 2d 780, ¶9.

Habit Evidence

¶17 Grasso's defense was that Glenn was the primary aggressor in the road rage episode. Grasso sought to introduce the investigation reports and witness statements generated from the 1999 domestic disturbance involving the Franzes to show that Glenn's conduct on this occasion was in conformity with a habit for violence. *See* WIS. STAT. § 904.06. The trial court ruled that the domestic disturbance was insufficiently similar to the road rage incident to rise to the level of habit or routine practice, reducing its probative value. Grasso contends the trial court erred because, although the reports arose from a single incident in 1999, they refer to and are evidence of Glenn's lifelong habit for violence made worse by drinking.

¶18 A trial court has broad discretion to admit or exclude evidence, and we will uphold its decision unless it has erroneously exercised that discretion. ***State v. James***, 2005 WI App 188, ¶8, 285 Wis. 2d 783, 703 N.W.2d 727, *review denied,* 2005 WI 150, 286 Wis. 2d 100, 705 N.W.2d 661, *cert. denied,* 546 U.S. 1108 (Jan. 09, 2006) (No. 05-7422). The admissibility of habit evidence depends on the court's evaluation of the particular facts of the case. ***Steinberg v. Arcilla***, 194 Wis. 2d 759, 768, 535 N.W.2d 444 (Ct. App. 1995).

¶19 "Habit" is a regular, repeated response to a repeated, specific situation. ***Balz v. Heritage Mut. Ins. Co.***, 2006 WI App 131, ¶15, 294 Wis. 2d 700, 720 N.W.2d 704. Evidence of a person's habit is relevant because it is more probable that a person acted consistently with that habit. ***French v. Sorano***, 74 Wis. 2d 460, 466, 247 N.W.2d 182 (1976). But evidence of a person's character—a sweeping description of his or her nature or disposition in respect to a general trait such as honesty, temperance or peacefulness—generally is not admissible. ***Balz***, 294 Wis. 2d 700, ¶16. Habit and character evidence therefore must be distinguished. ***Id.***, ¶15. One commentator offers this caution:

> The concept of "routine practice" has, in some instances, been stretched to the point of breaking. In particular, one should not lose sight of the importance of the "regularity" component. Just because something occurs more than once does not mean it is therefore "routine" or "customary." The temptation to draw this erroneous inference is especially tempting in cases involving prior, similar accidents.

Daniel D. Blinka, *Evidence of Character, Habit, and "Similar Acts" in Wisconsin Civil Litigation*, 73 Marq. L. Rev. 283, 316 (1989).

¶20 We agree with the trial court that the proffered evidence was irrelevant as proof of habit. The reports from 1999 reveal that Ruth Franz and the Franzes' adult daughter and teenage grandson came home to find Glenn intoxicated and argumentative. Ruth called 911 when Glenn's behavior grew more abusive and frightening to her. Ruth and her daughter told the deputy that Glenn had a several-year history of physical, psychological and verbal abuse of them which Ruth tied to his drinking.

¶21 The records from Glenn's five-year-old alcohol-fueled domestic disturbance describe a particular family incident and refer generally to prior

instances of domestic abuse. This does not establish a "habit" of violence when measured against the facts of this case. It does not constitute a "regular repeated response to a repeated, specific situation," *see* ***Balz***, 294 Wis. 2d 700, ¶15, predictive of Glenn's response to a chance roadway encounter with a stranger. This is especially so when, although Grasso contends he smelled alcohol on Glenn's breath, the deputies made no mention of it in their reports. We conclude the trial court reasonably exercised its discretion when it excluded the evidence of Glenn's "habit" for violence.

Sufficiency of the Evidence

¶22 We last address Grasso's argument that the evidence was insufficient to support the finding of guilt for the two counts of aggravated battery. The statutory elements of WIS. STAT. § 940.19(6)[5] are: (1) the defendant caused bodily harm, (2) the defendant intended to cause bodily harm, (3) the defendant's conduct created a substantial risk of great bodily harm, and (4) the defendant knew that the conduct created a substantial risk of great bodily harm. WIS JI—CRIMINAL 1226. The jury was instructed that: "'Great bodily harm' means serious bodily injury. Injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury is great

---

[5] WISCONSIN STAT. § 940.19(6) provides in relevant part:

> **(6)** Whoever intentionally causes bodily harm to another by conduct that creates a substantial risk of great bodily harm is guilty of a Class H felony. A rebuttable presumption of conduct creating a substantial risk of great bodily harm arises:
>
> (a) If the person harmed is 62 years of age or older ….

bodily harm." ***Id.*** A defendant's conduct presumptively creates a substantial risk of great bodily harm if the victim is age sixty-two or older. Sec. 940.19(6).

¶23 Grasso's challenge focuses on the third element, that his conduct created a substantial risk of great bodily harm. He asserts that it was not clear whether the jury applied the presumption when the victim is sixty-two years of age or older, or concluded that his conduct alone created the requisite risk. Grasso contends that a verdict must be set aside where the evidence supports the verdict on only one of two grounds and it is impossible to tell which ground the jury selected. *See* ***State v. Crowley***, 143 Wis. 2d 324, 334-35, 422 N.W.2d 847 (1988). He submits that we therefore must reverse his conviction unless it can be sustained on both grounds.

¶24 The State debates and distinguishes ***Crowley*** at some length. We do not think that exercise necessary, however, beyond noting a key difference. In ***Crowley***, a jury found the defendant guilty of aggravated battery of a disabled person in violation of WIS. STAT. § 940.19(3)(b) (1987-88), the counterpart to the current WIS. STAT. § 940.19(6)(b). ***Crowley***, 143 Wis. 2d at 327. The State had sought to prove its case on alternate grounds, both presumptive and direct. It tried to establish that the victim's physical frailty and blindness invoked the statutory presumption of conduct creating a high probability of great bodily harm, and also to prove directly that Crowley's assaultive conduct itself created a high probability of great bodily harm. ***Id.*** at 331. The grounds for conviction therefore were not clear. ***Id.*** at 331-32.

¶25 Here, by contrast, the State pursued one theory from the beginning: that this was a "sixty-two-or-over" case. Counts one and two of the Information alleged "aggravated battery—battery to elderly person … contrary to [WIS. STAT.

§] 940.19(6)(a)." It did not allege "generic" aggravated battery under § 940.19(6). The prosecutor's opening statement was peppered with references to Glenn's and Ruth's ages and again established their ages in their first few moments on the stand. And he continued in the same vein at the beginning of the substance of his closing argument by stating that "there's no real dispute the [Franzes] are over 62 years of age," and, shortly after that, "[t]hey are not young people." When the prosecutor recounted the elements of the charged offenses, he reminded the jury again that the Franzes were over sixty-two years of age and the Wisconsin legislature provided a way "to protect our older people." Indeed, when Grasso's attorney spoke to the jury about great bodily harm during his argument, he immediately mentioned that if the jury found that Glenn or Ruth "was 62 years of age or greater, you may find from that fact alone that the defendant's conduct created a substantial risk of great bodily harm." In his rebuttal argument, the prosecutor once again emphasized that the jury could make the requisite finding from the Franzes' ages alone. Finally, we note that when the trial court instructed the jury on the third element of aggravated battery, the court stated that if the jury found that the victims were sixty-two years of age or older, the jury could find from that fact alone that Grasso's conduct created a substantial risk of great bodily harm. In summary, this case was not charged, tried or argued, nor was the jury instructed, on alternative theories.

¶26 The question, then, is whether Grasso rebutted the presumption that his conduct created a substantial risk of great bodily harm. *See* WIS. STAT. § 940.19(6)(a). Grasso stresses that, by their own testimony, neither Glenn nor Ruth suffered serious injury. In fact, Glenn testified that he did not immediately seek medical attention because "[i]t did not seem that bad," and Ruth testified that she also did not seek immediate treatment, had "red spots[,] [t]hat was all" and,

when she ultimately did go to the emergency room because of a headache, was told that "it was all right."

¶27 We must view the evidence in the light most favorable to the State and the conviction. ***State v. Johnson***, 184 Wis. 2d 324, 347, 516 N.W.2d 463 (Ct. App. 1994). Besides the testimony Grasso highlights, other testimony showed that Grasso blocked the Franz vehicle with his own, got out and, without warning, reached through Glenn's van window and pushed Glenn down to the steering wheel and started beating the back of Glenn's head with his fist. Glenn's glasses were knocked off and he had cuts and blood on his head and ear.

¶28 Ruth testified that Grasso hit Glenn "a lot" of times and that Glenn tried to, but could not, back up their vehicle as he was being struck, nor could he fight back because of his position behind the steering wheel and Grasso leaning in the window. She also testified that she got out of the vehicle to "either try to drag [Glenn] out of the van, get [Grasso] off my husband, do something…. [Glenn] couldn't keep on being hit on the head." Grasso then hit her three times in the forehead and once on the shoulder, causing her glasses to fall off and almost knocking her down.

¶29 Robert Mickelsen, a witness, testified that he saw Grasso "slugging" Glenn, who was "moving back as if to duck the punches," and that Glenn had a stream of blood from his head onto his forehead. Tammy Behringer also testified that she witnessed Grasso first punch Glenn and, when Ruth approached, Grasso "turned to her and started hitting her in the head … quite a few times." Behringer saw that Glenn's head was bleeding. Both Mickelsen and Behringer called 911.

¶30 The upshot of the testimony is that Grasso suddenly stopped his vehicle, blocking the Franzes' path of travel. Then, in a surprise action, he began

beating the sixty-three-year-old Franzes' heads with his fists, knocking off their glasses, drawing blood and leaving red marks. Glenn, behind the wheel, was unable to escape the blows. Two passersby, independent of each other, were sufficiently concerned to call 911. The evidence did not have to establish that Glenn or Ruth actually *sustained* great bodily harm, only that Grasso's conduct created a substantial *risk* of great bodily harm. *See* ***id.*** "[T]here is an appropriate nexus between the fact of age and the presumption that violence against the aged will create a high probability of great bodily harm." ***Crowley***, 143 Wis. 2d at 340. This case was not tried on alternative theories and the evidence supports the State's theory that Grasso committed aggravated battery to persons sixty-two years of age or older.

¶31 We affirm the judgment in its entirety.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.