COURT OF APPEALS
DECISION
DATED AND FILED

October 22, 2009

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. 2008AP2117-CR

Cir. Ct. No. 2007CF132

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEREMY C. TRUSTY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jackson County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Jeremy Trusty appeals the circuit court judgment convicting him of disorderly conduct after a jury trial. I affirm the judgment.

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Background

¶2 Trusty was involved in a Trempealeau County divorce proceeding assigned to Judge Gerald Laabs. Over Trusty's objection, Judge Laabs scheduled a hearing at the Jackson County Courthouse. Before the date of the hearing, Judge Laabs became aware of an internet posting in which Trusty described a story Trusty had read about the murder of a judge by a disgruntled divorce litigant. In the posting, Trusty expressed negative feelings toward the judicial system and appeared to approve of the killer's actions. Concerned by the posting, Judge Laabs arranged to have bailiffs at the scheduled hearing, and alerted courthouse employees.

¶3 On the day of the hearing, Trusty was waiting in the hallway for his case to begin when a court employee overheard him say to another individual that "We could just go in and shoot everybody." The State charged Trusty with threat to a judge, in violation of WIS. STAT. § 940.203, and disorderly conduct, in violation of WIS. STAT. § 947.01. The jury acquitted Trusty on the threat to a judge charge, but found him guilty on the disorderly conduct charge.

Discussion

¶4 Trusty makes several arguments. I address each of them below, referencing additional facts as needed.

¶5 Trial Exhibits 1 and 2 appear to be printed copies of Trusty's internet posting, his MySpace page. Trusty argues that the circuit court should have excluded these exhibits at trial because his MySpace page was tampered with and not authentic. He asserts that an authentic MySpace page, as exemplified by

other MySpace pages he offered, shows a user's sign-up date. Exhibits 1 and 2 do not show such a sign-up date.

¶6 The State concedes that Trusty preserved an objection to the exhibits, and the record shows that Trusty disputed the admissibility of his MySpace page both at his preliminary hearing and in a motion *in limine*. The record does not, however, contain a complete transcript showing what occurred at trial, including whether the circuit court made any particular rulings or fact findings when the exhibits were admitted.

¶7 As the appellant, Trusty is responsible for ensuring that the appellate record contains all materials necessary to address the issues he raises. ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26, 496 N.W.2d 226 (Ct. App. 1993). Without the trial transcript, the record is incomplete and I cannot determine whether the circuit court erred by admitting the exhibits. Given an incomplete record, I must assume that the missing material supports the circuit court's decision to admit the exhibits. ***Id.*** at 27. Accordingly, I reject Trusty's argument that the circuit court erroneously admitted exhibits appearing to show Trusty's MySpace page.

¶8 Trusty seems to also be arguing that use of his MySpace page violated his free speech rights under the First Amendment. Trusty cites no case law supporting this argument and does not otherwise develop it. Consequently, I reject the argument. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals may decline to address inadequately developed

arguments).[2] I note that, even if I were to take up and decide the merits of what seems to be Trusty's argument, it is difficult to imagine how he would prevail. So far as can be discerned from the record, Trusty's MySpace page is not the speech on which the disorderly conduct charge was based. Rather, the MySpace page shows context for the statement Trusty made at the courthouse. I know of no prohibition on using protected free speech for that purpose.

¶9 Trusty also argues that the circuit court failed to properly instruct the jury on the disorderly conduct charge. Trusty asserts that the court instructed the jury to find him guilty if "any disturbance occurred." Trusty argues that the jury should have been instructed that he was guilty of disorderly conduct only if his conduct caused the disturbance.

¶10 Again, the pertinent portion of the trial transcript is not in the record. In particular, the record does not contain a transcript of the portion of the trial in which the circuit court read the instructions to the jury. The record does contain written copies of jury instructions, which the State indicates are the instructions the jury actually received. The written instructions, consistent with the law, informed the jury that it could find Trusty guilty of disorderly conduct only if Trusty's conduct "tended to cause or provoke a disturbance." *See* WIS. STAT. § 947.01; ***State v. Schwebke***, 2002 WI 55, ¶24, 253 Wis. 2d 1, 644 N.W.2d 666. Thus, Trusty's argument is not supported by the record before me.

[2] I recognize that Trusty is proceeding *pro se*, but "[*pro se* litigants] are bound by the same rules that apply to attorneys on appeal. The right to self-representation is '[not] a license not to comply with relevant rules of procedural and substantive law.'" ***Waushara County v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992) (citation omitted). While courts may allow some leniency, they do not have "a duty to walk *pro se* litigants through the procedural requirements or to point them to the proper substantive law." ***Id.***

¶11 Trusty asserts, without further explanation, that he could not have caused a disturbance and could not have committed disorderly conduct because the jury found that he did not threaten a judge. I reject this argument because it is insufficiently developed, *see* ***Pettit***, 171 Wis. 2d at 646-47, and because Trusty again fails to provide necessary portions of the trial transcript, *see* ***Fiumefreddo***, 174 Wis. 2d at 26.

¶12 Moreover, it is not apparent why the jury's not guilty verdict on the threat to a judge charge precluded a guilty verdict on the disorderly conduct charge. The crime of threat to a judge requires proof of several elements that the crime of disorderly conduct does not require.[3] Although here there is no dispute

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[3] The Wisconsin pattern jury instruction includes six elements for threat to a judge:

> 1. The defendant threatened to cause bodily harm to (name of victim).
>
> ….
>
> 2. (Name of victim) was a (judge) ….
>
> ….
>
> 3. The defendant knew that (name of victim) was a (judge) ….
>
> 4. [The judge was acting in an official capacity.] [The threat was in response to an action taken in the judge's official capacity.]
>
> ....
>
> 5. The defendant threatened to cause bodily harm without the consent of (name of victim).
>
> 6. The defendant acted intentionally. This requires that the defendant acted with the mental purpose to threaten bodily harm to another human being.

WIS JI—CRIMINAL 1240B (footnotes omitted). The elements for disorderly conduct are:

(continued)

that both charges were based on the same alleged threat, that does not necessarily mean that a finding of not guilty on one precludes a finding of guilty on the other. Further, because Trusty has not supplied a copy of the relevant portions of the trial transcript, it is impossible for me to review the evidence that was before the jury in order to determine whether the jury's verdicts could be considered inconsistent in light of that evidence.

¶13 Trusty also argues that the circuit court erred by telling the jury to continue deliberations after the jury asked the court to dismiss the disorderly conduct charge and indicated that it was "hung" on that charge. For this argument, Trusty has provided the relevant portion of the trial transcript. Trusty has not, however, accurately characterized what occurred.

¶14 The record shows that the jury sent a note to the circuit court, which stated:

> Are the counts separate as far as the whole trial being over or a mistrial because of the following:
>
> We've decided on the first [threat to a judge] count a unanimous decision and now we're not unanimous on the Count 2 [disorderly conduct].
>
> Does our decision for the first count stand … and then the second count be thrown out or do both counts have to be unanimous to have this settled?

> 1. The defendant engaged in (violent) (abusive) (indecent) (profane) (boisterous) (unreasonably loud) (or otherwise disorderly) conduct.
>
> 2. The conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance.

WIS JI—CRIMINAL 1900 (footnote omitted).

The circuit court suggested possible responses to these questions to counsel, and consulted with counsel on how they wished to proceed. The court and counsel agreed that the jury's note fell short of a deadlock, and the court determined that the best approach was to tell the jury that it "must reach unanimous verdicts on each count."

¶15 Because Trusty's counsel did not object with particularity to the response sent to the jury, Trusty has forfeited any argument that the circuit court erred in its response to the jury's question. *See* ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612 ("[S]ome rights are forfeited when they are not claimed at trial; … failure to object constitutes a forfeiture of the right on appellate review.").

¶16 Even if Trusty had not forfeited this argument, however, I would reject it because the approach the circuit court took was reasonable. The circuit court could reasonably find, based on the jury's question and its indication that it was not "*now* … unanimous," that the jury was not deadlocked (emphasis added). The court could also reasonably conclude that the jury should be told that it "must reach" a unanimous verdict on each count. *Cf.* WIS JI—CRIMINAL 520 (instructing jurors that, although they will not be made to agree or be kept until they do agree, they should "not be obstinate," should listen to the arguments of other jurors, and should "make an honest effort to come to a conclusion on all of the issues presented to them").

¶17 Trusty also argues that we should not accept the State's responsive brief because the brief was filed late. However, even if I rejected the State's brief, I would still reject Trusty's arguments for the same reasons. Regardless of any response by the State, all of Trusty's arguments are deficient in some respect.

¶18 Finally, Trusty requests that he be awarded his attorney's fees and other expenses related to this litigation, along with a sum of money to compensate him for the attendant humiliation, stress, and inconvenience. There is no authority permitting the type of award Trusty seeks, even if Trusty prevailed on appeal, which he has not.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.