COURT OF APPEALS
DECISION
DATED AND FILED

December 13, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 16AP765-CR **Cir. Ct. No. 2014CM3050**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GEORGE W. MALLUM, III,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MEL FLANAGAN and MICHELLE ACKERMAN HAVAS, Judges. *Affirmed.*

¶1 BRASH, J.[1] George W. Mallum III appeals from a judgment convicting him of two counts of disorderly conduct: one with the use of a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

dangerous weapon and one as an act of domestic abuse. He also appeals an order denying his postconviction motion. On appeal, Mallum makes the following arguments: (1) the conviction for disorderly conduct, domestic abuse is multiplicitous of disorderly conduct, possession of a firearm and should be vacated; (2) the domestic abuse surcharge should be vacated because the jury did not receive an instruction on the domestic abuse modifier; (3) the court incorrectly imposed a lifetime ban on possessing firearms to Mallum's sentence pursuant to 18 U.S.C. § 922(g) and the court incorrectly imposed a lifetime ban on possessing firearms as a condition of Mallum's probation; (4) that 18 U.S.C. § 922(g) is unconstitutional on its face or, in the alternative, as applied in this case; and (5) Wis. Stat. § 973.055 is unconstitutional as applied in this case. We disagree and affirm.

BACKGROUND

¶2 On June 30, 2014, George Mallum III arrived at his home at approximately 1:00 a.m. It is undisputed that Mallum was intoxicated. Upon arriving home, Mallum was unable to find his .45 caliber handgun; it was not in the dresser drawer in which he normally stored it. Mallum testified at sentencing that he kept the gun in the dresser drawer because for protection against possible intruders. Unbeknownst to Mallum, his wife, W.M., had moved the firearm to the gun safe in the spare bedroom. W.M. testified that she knew Mallum was drinking that evening and that she did not feel comfortable having the gun in the bedroom. After searching for a brief period of time, however, Mallum located the firearm in the gun safe.

¶3 Once in possession of the firearm, Mallum began arguing with W.M. about the location of the ammunition for the gun. While arguing with W.M.,

Mallum was yelling and waving the handgun around as he gestured angrily. The argument awoke Mallum's grandson, D.M., who confronted Mallum and disarmed him. At this point, W.M. called 911 and told the dispatcher that Mallum was intoxicated and was waving a gun around. Subsequently, police arrived at the house and detained Mallum without incident. After police detained Mallum, however, he again became angry and verbally aggressive towards W.M. and a female officer.

¶4 On July 2, 2014, the State charged Mallum with three counts: (1) endangering safety by use of a dangerous weapon (under the influence of an intoxicant), domestic abuse; (2) disorderly conduct, use of a dangerous weapon; and (3) disorderly conduct, domestic abuse. Following a jury trial, Mallum was convicted of disorderly conduct, use of a dangerous weapon and disorderly conduct, domestic abuse (counts two and three respectively). The jury could not reach a verdict on endangering safety by use of a dangerous weapon and the charge was dismissed. Mallum was sentenced to nine months in the House of Corrections for count two, and three months in the House of Corrections for count three to be served consecutive to the sentence for count two. Both sentences were stayed and Mallum was placed on probation.

¶5 As conditions of Mallum's probation, Mallum was not allowed to possess any weapons and was ordered to pay the applicable surcharges, including the one hundred dollar domestic violence surcharge. At sentencing, the circuit court also noted that Mallum could not possess a firearm for the rest of his life without violating the federal statute 18 U.S.C. § 922(g). On March 10, 2016, Mallum filed a postconviction motion asking the circuit court to overturn the conviction on count three as multiplicitous of count two, and to remove the sentencing condition ordering a lifetime ban on guns and the payment of a

domestic abuse surcharge. On March 23, 2016, the circuit court denied Mallum's postconviction motion.[2]

¶6 Mallum now appeals the guilty verdict for disorderly conduct, domestic abuse, on multiplicity grounds. Mallum also appeals the order to pay the domestic violence surcharge and challenges the constitutionality of 18 U.S.C. § 922(g) prohibiting persons "who ha[ve] been convicted in any court of a misdemeanor crime of domestic violence" from possessing a firearm.

DISCUSSION

¶7 On appeal, Mallum makes the following arguments: (1) the conviction for count three is multiplicitous of count two; (2) the domestic abuse surcharge should be vacated because the jury did not receive an instruction on the domestic abuse modifier; (3) the court incorrectly imposed a lifetime ban on guns to Mallum's sentence pursuant to 18 U.S.C. § 922(g) and the court incorrectly imposed a lifetime ban on guns as a condition of Mallum's probation; (4) that 18 U.S.C. § 922(g) is unconstitutional on its face or as applied in this case; and (5) Wis. Stat. § 973.055 is unconstitutional as applied in this case. We address each argument in turn.

[2] The Honorable Mel Flanagan presided over the jury trial and sentencing. The Honorable Michelle Ackerman Havas issued the order denying the postconviction motion.

I. Multiplicity.

¶8 As a preliminary matter, we recognize that the multiplicity issue has a somewhat complicated procedural history. Nevertheless, the issue before us on appeal is whether Mallum's conviction for count three is multiplicitous of count two. The parties, however, have not adequately briefed the multiplicity issue and, therefore, we are not required to address the issue. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (we will not address issues on appeal that are inadequately briefed). Even after considering the merits, however, Mallum's argument in this regard fails.

¶9 Mallum argues that the domestic abuse modifier in count three is the only factor distinguishing it from count two, while asserting in a conclusory manner that there is no evidence of a new volitional departure and that the charges arose out of a single course of conduct. We disagree.

¶10 In analyzing a multiplicity challenge, we use a two-step test to determine if the charges are multiplicitous. *See* ***State v. Reynolds***, 206 Wis. 2d 356, 363, 557 N.W.2d 821 (1996). First, charges are multiplicitous if they are identical in law and fact. *See* ***State v. Rabe***, 96 Wis. 2d 48, 63, 291 N.W.2d 809 (1980). Second, if the charges are not identical in law and fact they may still be multiplicitous if the legislature intended the charges to be brought as one single charge. *See* ***id.*** Charges are not identical in fact if they "are either separated in time or are of a significantly different nature in fact." ***State v. Eisch***, 96 Wis. 2d 25, 31, 291 N.W.2d 800 (1980). Whether a conviction is multiplicitous is a question of law that we review *de novo*. *See* ***State v. Kelty***, 2006 WI 101, ¶13, 294 Wis. 2d 62, 716 N.W.2d 886.

¶11 Here, there is evidence that shows there were two separate acts of disorderly conduct. The first act of disorderly conduct was when Mallum argued with his wife and waved the gun around. The second act of disorderly conduct was when Mallum became belligerent and used profanity against his wife and the female police officer. Although the acts occurred in a short time frame, the two acts, for which Mallum was convicted, were separated by Mallum's grandson disarming Mallum and Mallum briefly calming down. These two sets of facts are sufficiently different in nature for the jury to convict Mallum on both counts two and three. Furthermore, Mallum has identified no authority to support the notion that the legislature intended counts two and three to be brought as a single charge, and we are aware of none. *See* ***Rabe***, 96 Wis. 2d at 63. Accordingly, we conclude that counts two and three are not multiplicitous.

II. The Jury Instructions on Count Three & The Domestic Abuse Surcharge

¶12 Mallum argues that the domestic abuse modifier is a separate element that needed to be presented to the jury and we should therefore review the domestic abuse issue *de novo* and vacate the domestic abuse surcharge. We disagree.

¶13 A critical flaw in Mallum's argument is that he was convicted of disorderly conduct under WIS. STAT. § 947.01, which does not contain an element of "domestic abuse." The elements of disorderly conduct are that the defendant has "engage[d] 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." Sec. 947.01(1). Mallum does not argue that the jury was not informed of the elements under the statute. He argues,

however, that because the criminal complaint listed WIS. STAT. § 968.075(1)(a), the jury needed to be instructed on "domestic abuse" as an element of the crime.

¶14 While references to WIS. STAT. § 968.075(1)(a) appear in the circuit court's documents, the statute, entitled "[d]omestic abuse incidents; arrest and prosecution," plainly governs law enforcement procedures in domestic abuse cases. It does not create criminal penalties for a domestic abuse perpetrator. Mallum was convicted of disorderly conduct under WIS. STAT. § 947.01 and was then subject to the domestic abuse surcharge under WIS. STAT. § 973.055, which provides that if a court imposes a sentence for specified crimes, including disorderly conduct, and the offense "involved an act by the adult person against his or her spouse or former spouse, against an adult with whom the adult person resides or formerly resided or against an adult with whom the adult person has created a child," the circuit court is required to impose a domestic abuse surcharge. *See* § 973.055(1)(a)2. The jury was properly informed of the elements of disorderly conduct and, subsequently, convicted Mallum based on these instructions. The circuit court then correctly imposed the domestic abuse surcharge based on the circumstances involved. Accordingly, we conclude that the domestic abuse surcharge was correctly applied to Mallum.

III. Firearm Possession Ban

¶15 Mallum argues that the lifetime firearms ban was imposed as a part of Mallum's sentence and that 18 U.S.C. 922(g) does not apply to him because the jury did not decide his guilt on domestic abuse and, therefore, the circuit court was incorrect to impose it. Mallum further argues that the circuit court extended the condition of his probation prohibiting him from possessing firearms beyond its two year term. These arguments are misguided.

¶16 Mallum appears to present these arguments because, at the sentencing hearing, the circuit court stated, "[n]ow you are to have no firearms in your possession." The circuit court further stated:

> [U]nder federal law, you cannot have a gun for the rest of your life.... And that is a requirement of federal law. It's also a condition of your probation. So under federal law if you had a gun in any state in the union now or any time after this date, you could be charged with a new offense.

Mallum argues that by using the language above the circuit court was extending a condition of probation to a lifetime ban on guns.

¶17 It is clear from the record, however, that the circuit court was not itself imposing a lifetime ban on possessing firearms, but was instead notifying Mallum that 18 U.S.C. 922(g) could apply to him because of the nature of this offense. The circuit court docket summarizes the sentencing from October 15, 2015. Under the heading "Conditions of Probation" is a bulleted list of conditions. Among other things, included in the list is "[n]o firearms; weapons. No knives or weapons in his possession or on his person." Immediately after the list, as a separate item and not a part of the bulleted list, it is noted that "[1]8 U.S.C. Section 922(g)(9) prohibits possession of a firearm and/or ammunition after a conviction of a misdemeanor crime of domestic violence." Accordingly, we conclude that the circuit court did not itself impose a lifetime ban on possessing firearms, but instead properly informed Mallum that 18 U.S.C. § 922(g) may apply to him. As such, we reject Mallum's argument.

¶18 Additionally, Mallum argues that 18 U.S.C. § 922(g) is facially unconstitutional or unconstitutional as applied to Mallum. Mallum contends that the federal statute violates his Second Amendment right to bear arms and that his conviction does not meet the elements of 18 U.S.C § 922(g). We do not address

these issues, however, as they are not yet ripe for determination. Mallum has not been charged under 18 U.S.C. § 922(g) and is currently challenging a federal statute based on a hypothetical factual scenario. As such, we decline to address this argument.

¶19 Finally, Mallum argues that Wis. Stat. § 973.055—the domestic abuse surcharge statute—is unconstitutional as applied to him in this case. Mallum's argument, however, is wholly undeveloped. He cites no authority and simply concludes that § 973.055 is unconstitutional as applied. As such, we decline to address it. *See* ***Pettit***, 171 Wis. 2d at 647 (we will not address issues on appeal that are inadequately briefed).

¶20 For the foregoing reasons, we affirm.

By the Court.—Judgment and order affirmed.

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