STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2018AP1515-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL K. LORENTZ,

Defendant-Appellant.

ON APPEAL OF A JUDGMENT OF CONVICTION
ENTERED IN THE PIERCE COUNTY CIRCUIT COURT,
THE HONORABLE JOSEPH D. BOLES, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

SEAN E. FROELICH
District Attorney
State Bar No. 1084551

Pierce County Courthouse
414 W. Main Street
P.O. Box 808
Ellsworth, WI
Pierce County
(715) 273-6750

Attorney for Plaintiff-Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

STATUTES:

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2018AP1515-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL K. LORENTZ,

Defendant-Appellant.

ON APPEAL OF A JUDGMENT OF CONVICTION
ENTERED IN THE PIERCE COUNTY CIRCUIT COURT,
THE HONORABLE JOSEPH D. BOLES, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

STATEMENT OF THE ISSUE

1. Once Mr. Lorentz stipulated to the injunctions, did the circuit court err in publishing the unredacted injunctions to the jury?

The trial court ruled that the words that appeared on the injunctions "Domestic Abuse/Child Abuse" were inadmissible, but published the injunctions with a cautionary instruction, telling the jury to not consider the words.

2. As applied to Mr. Lorentz, were Wisconsin Statutes §§ 813.12 and 813.122 unconstitutional in failing to provide him with notice of the prohibited conduct?

The circuit court answered "no" in denying Mr. Lorentz's pretrial motion.

3. Was sufficient evidence produced at trial to prove that Mr. Lorentz's conduct failed to "avoid the residence" of his former spouse in driving on a public roadway standing between the house and fields on either side of an extended driveway?

The jury found Mr. Lorentz guilty on all counts and the court denied Mr. Lorentz's motion for a directed verdict.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The parties' briefs will adequately address the issue presented, and oral argument will not significantly assist the court in deciding this appeal.

The State does not take a position on publication of this Court's decision and opinion.

STATEMENT OF THE CASE

As plaintiff-respondent, the State exercises its discretion to not present a statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a)2. The State cites to relevant facts in the Argument section below.

ARGUMENT

A. ONCE MR. LORENTZ STIPULATED TO THE INJUNCTIONS, THE COURT DID NOT ERR WHEN IT PUBLISHED THEM TO THE JURY AS THEY WERE NOT PREJUDICIAL AND THEY WERE RELEVANT.

Mr. Lorentz argues the court erred when it published unredacted copies to the jury under theories of prejudice and lack of relevance given the stipulations of the defense.

In his brief, Mr. Lorentz classifies the first element in the injunction as a status element. The State disagrees, as

status offenses relate to traffic offenses and juvenile cases based on the State's research.

Mr. Lorentz's application of *State v. Alexander*, 214 Wis. 2d 628, 517 N.W. 2d 662 (1997) is misplaced. That case is an operating while intoxicated case with prior offenses, which are status offenses. Alexander argued that the circuit court erroneously exercised its discretion by submitting to the jury the element that he had two or more prior convictions, revocations or suspensions. *Id*. at 640.

Mr. Lorentz writes in his brief that the circuit court erred in *Alexander*. (App. Br. at 15.) However, he fails to point out that it was harmless error. "However, because of the overwhelming nature of the evidence as to the defendant's guilt in this case, we also conclude that the error was harmless. Accordingly, we affirm." *State v. Alexander*, 214 Wis. 2d 628, 634, 571 N.W.2d 662, 665, 1997 WL 775598 (1997).

In his brief, Mr. Lorentz again falls short by attempting to correlate his circumstances with a felony offense case by citing to *State v. McAllister*, 153 Wis. 2d 523, 451 N.W.2d 764, 1989 WL 180612 (Ct. App. 1989). In *McAllister*, the state refused to accept the defendant's stipulation that he was a convicted felon in the prosecution of felon in possession of a firearm. *Id.* at 526. Over the defendant's objection, the trial court allowed the state to introduce evidence that McAllister's prior felony was a robbery conviction. *Id.*

> The trial court ruled that it could not compel the state to accept McAllister's stipulation. As a general proposition, "a party is not required to accept a judicial admission of his adversary, but may insist on proving the fact." *United States v. Allen,* 798 F.2d 985, 1001 (7th Cir.1986), (quoting *Parr v. United States,* 255 F.2d 86, 89 (5th Cir.), *cert. denied,* 358 U.S. 824, 79 S.Ct. 40, 3 L.Ed.2d 64 (1958)). The principle is that "[a] cold stipulation can deprive a party 'of the legitimate moral force of his evidence,' 9 *Wigmore on Evidence,* sec. 2591 at 589 [(3rd ed. 1940)], and can never fully substitute for tangible, physical evidence or the testimony of witnesses." *Allen,* 798 F.2d at 1001 (quoting *United States v. Grassi,* 602 F.2d 1192, 1197 (5th Cir.1979), *vacated on other*

> *grounds*, 448 U.S. 902, 100 S.Ct. 3041, 65 L.Ed.2d 1131 (1980)). We have found no Wisconsin case in point.

Id. at 527.

The *McAllister* Court concluded the admission of robbery conviction was harmless error. *Id.* at 769. Mr. Lorentz attempts to draw a comparison between the above cases and his case which are completely incongruous.

Additionally, Mr. Lorentz argues "extreme" prejudice while citing to *Whitty v. State*, 34 Wis. 2d 278, 149 N.W. 2d 557 (1967). "Evidence against an accused should be confined to the very offense charged…" *Id.* at 292. There was no unfair prejudice cast on Mr. Lorentz. Mr. Lorentz uses inflammatory language citing "extreme" prejudice. (App. Br. at 18-19.) Mr. Lorentz was charged based on the allegations in the criminal complaint. The simple language that entitled the charge and injunction bear a resemblance. There is no pretext or prior offense language that is extreme. It is what it purports to be.

Mr. Lorentz was charged with four counts:

Count 1: KNOWINGLY VIOLATE A DOMESTIC ABUSE INJUNCTION

Count 2: KNOWINGLY VIOLATE CHILD ABUSE INJUNCTION

Count 3: KNOWINGLY VIOLATE CHILD ABUSE INJUNCTION

Count 4: KNOWINGLY VIOLATE CHILD ABUSE INJUNCTION

The words "Injunction-Child Abuse" and "Injunction-Domestic Abuse" are relevant as they describe the legal documents. This important background information educates the jury. The words directly correlate to the offenses charged. The evidentiary value could not be more probative. *See* Wis. Stat. § 904.01. The trial court disagreed however.

The trial court reflected, "I don't think it's appropriate even though those injunctions are going to be evidence, I don't believe it's appropriate either in the arguments or actually in the instructions either to actually refer to them as domestic abuse injunctions or child abuse injunctions." (R. 53:79.)

According to the State, "but that is what they are, Your Honor. They are injunctions of domestic abuse and child abuse. The State certainly won't utter the words, but that's certainly what they are…I think the jury should be permitted to know exactly what they are because all the jury is going to know is there is an injunction. But why are these injunctions important? It's an injunction." (R. 53:13.)

In responding the trial court stated, "I think that it's a danger of unfair prejudice. I don't see that. I see this as a combination of context and background that is important, but without undue emphasis on it. I think that's where I think this is balanced that way. I think the documents themselves are admissible as they are because they are court orders. That whole thing is a court order. I do think it's appropriate to put those in. I'll give a curative instruction." (Id.)

The trial court offered the following cautionary instruction: "These injunctions have some titles that contain language you are not to consider. In reviewing these, look at the orders themselves from the Court. There is a stipulation that even though those on their face expired in July of 2016, they were extended and were in effect on the date of this incident. These were the actual court orders in effect at the time of the incident. I want you to disregard any of the labels on the top of these documents that might label them as a certain type of injunction. You cannot use them as evidence." (R. 53:130.)

After this instruction was read the State published to the jury the injunctions bearing the words "domestic abuse" and "child abuse." (Id.)

The evidence produced at trial did not emphasize the printed words "domestic abuse" and "child abuse" on the

injunctions that the jury observed at one point during the full-day of trial. The words themselves were never spoken by the State in the presence of the jury during the trial or in opening/closing statements. The jury was specifically instructed by the trial court to disregard the words and not to use them as evidence.

Mr. Lorentz's conclusions that the words that title the injunctions are character evidence or evidence of prior bad acts is unsupported. Pursuant to Wis. Stat. § 813.12(4)(a), "A judge or circuit court commissioner may grant an injunction ordering the respondent to refrain from committing acts of domestic abuse against the petitioner, to avoid the petitioner's residence, except as provided in par. (am), or any other location temporarily occupied by the petitioner or both, or to avoid contacting or causing any person other than a party's attorney or a law enforcement officer to contact the petitioner unless the petitioner consents to that contact in writing, to refrain from removing, hiding, damaging, harming, or mistreating, or disposing of, a household pet, to allow the petitioner or a family member or household member of the petitioner acting on his or her behalf to retrieve a household pet, or any combination of these remedies requested in the petition, or any other appropriate remedy not inconsistent with the remedies requested in the petition."

The purpose of an injunction as identified within this statute is to order the respondent to refrain from committing acts of domestic abuse against the petitioner. Nowhere in this statute does it suggest that prior bad acts had to occur in order to obtain an injunction, but rather, the statute is aimed to prevent bad acts. Furthermore, Wisconsin Statute § 813.12(5)(a)(3) outlines the requirements necessary for an injunction, and while this section requires sufficient facts that the respondent engaged in domestic abuse of the petitioner, it also allows for an issuance of an injunction when based on prior conduct of the petitioner and respondent may engage in domestic abuse of the petitioner.

There was no character evidence admissible at trial that prior bad acts had occurred between Mr. Lorentz and the

petitioner. The documents, therefore, were not prejudicial because there was nothing admissible at trial that would suggest prior bad acts had occurred to support an order for an injunction. As previously stated, the injunction documents themselves were relevant because the charges being tried to the jury surrounded a violation of these injunction documents.

In the alternative, if it was error for the trial court to allow the State to publish the unredacted injunctions, it was harmless. Under harmless error the test is whether there is a reasonable possibility that the error contributed to the conviction. *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222, 232 (1985).

> We conclude that, in view of the gradual merger of this court's collective thinking in respect to harmless versus prejudicial error, whether of omission or commission, whether of constitutional proportions[10] or not, the test should be whether **232 there is a reasonable possibility that the error contributed to the conviction. If it did, reversal and a new trial must result. The burden of proving no prejudice is on the beneficiary of the error, here the state. *Billings*, 110 Wis.2d at 667, 329 N.W.2d 192. The state's burden, then, is to establish that there is no reasonable possibility that the error contributed to the conviction.

State v. Dyess, 124 Wis. 2d 525, 543, 370 N.W.2d 222, 231–32 (1985).

Mr. Lorentz was charged with violating a term of the injunctions. The words "domestic-abuse/child-abuse" were never spoken during the presence of the jury by the State and the court provided a cautionary instruction. Specifically the court cautioned, "I want you to disregard any of the labels on the top of these documents that might label them as a certain type of injunction. You cannot use them as evidence." (R. 53:130.) More importantly, the evidence at trial was compelling.

Officer Langer was asked at trial what Mr. Lorentz said what he was doing in the area, Mr. Lorentz informed the officer, "he was driving by the residence hoping to see his

children briefly." (R. 53:137.) Mr. Lorentz's former wife testified the driver's side door was facing and the truck drove by "very, very slowly." (R. 53: 126.) She also testified at that time Mr. Lorentz was living in Iowa. (R. 53:131.) Officer Langer testified he believed Mr. Lorentz told the officer he was working in Red Wing at the time. (R. 53:138.) At trial, the officer testified that Mr. Lorentz confirmed he knew about the restraining orders but Mr. Lorentz indicated to the officer that Mr. Lorentz did not believe he violated them because he was on a public roadway. (Id.)

"We hold that once the jury has been properly instructed on the principles it must apply to find the defendant guilty beyond a reasonable doubt, a court must assume on appeal that the jury has abided by those instructions." *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752, 758 (1990).

B. AS APPLIED TO MR. LORENTZ, WISCONSIN STATUTES §§ 813.12 AND 813.122 ARE CONSTITUTIONAL.

Under Wisconsin Statutes §§ 813.12 and 813.122 Mr. Lorentz claims the phrase "avoid the residence" is "vague" and "overbroad" and therefore unconstitutional as applied to him.

Mr. Lorentz relies on a hyper-technical rather than a common-sense reading of the injunctions, which includes his interpretation of the word "avoid." The word "avoid" is not mysterious or ambiguous. Mr. Lorentz's reference to the New Oxford Dictionary, online, defines "avoid" as "Keep away from" or "Contrive not to meet someone." (App. Br. at 24.)

Mr. Lorentz's argument is eclipsed by his conduct. The petitioner's residence is identified by a fire number and 390th Avenue. (R. 53:122.) Mr. Lorentz drove down public road 390th Avenue in the hopes of seeing his children. (R. 53:137.) Mr. Lorentz intentionally drove down 390th Avenue with a specific purpose. Mr. Lorentz did the opposite of avoid the residence, he drove right toward it for the purpose of trying to see his children that day. If anything, Mr. Lorentz had to know where the residence was so he knew where to travel to so he

could have the opportunity to get a possible view of his children. Why else was Mr. Lorentz driving on 390th Avenue when he lives in Iowa and was doing some work in Red Wing [Minnesota]?

Mr. Lorentz raises a new issue by arguing that the statute as applied interfered with his fundamental right to travel. (App. Br. 25). The State will not address a new issue argued for the first time on appeal. *See State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) (issues not presented at the trial court level generally will not be heard for the first time on appeal).

C. SUFFICIENT EVIDENCE WAS PRODUCED AT TRIAL TO ESTABLISH THAT MR. LORENTZ VIOLATED THE INJUNCTIONS' REQUIREMENT THAT HE AVOID THE RESIDENCE.

Mr. Lorentz was well aware of the location of his former wife's residence. The former wife's residence is identified by a fire number and 390th Avenue. (R. 53:122.) At trial, Officer Kellen Langer was questioned regarding what information Mr. Lorentz provided to the officer regarding the complaint. (R. 53:136.) The officer testified that Mr. Lorentz told the officer that Mr. Lorentz drove by the residence. (Id.) The officer was asked if [Mr. Lorentz] indicated for what purpose. (Id.) The officer replied, "[Lorentz] stated he hadn't seen his children in several years, and he missed them." (R. 53:137.)

When Officer Kellen Langer was asked at trial as to what Mr. Lorentz said as to what he was doing in the area, Mr. Lorentz told the officer, "he was driving by the residence hoping to see his children briefly." (Id.) Officer Kellen Langer testified that he believed the speed limit on 390th Avenue is 55 [miles per hour]. (Id.) Officer Langer also testified that the manner in which Mr. Lorentz self-described [Lorentz] drove by was "slowly." (Id.)

It was Mother's Day, May 14, 2017, and the petitioner returned home from church with her boys. (R. 53:124.) The petitioner and her children, J.L., Z.L., B.L., and L.L. were all

outside. (R. 53:125.) The injunctions in place were for the petitioner, Z.L., B.L., and L.L. (R. 53:130.) At trial the petitioner testified, "[t]hen I think one of the boys saw that there was a black truck coming down the road, and they said, that looks like papa. Everyone was like, is that papa? That's papa. So then I became alarmed and wondered what was going on." (R. 53:125.) The petitioner testified that the driver's side door was facing and the truck drove by "very, very slowly." (R. 53:126.)

The petitioner testified at that time Mr. Lorentz was living in Iowa. (R. 53:131.) The officer testified that he believed Mr. Lorentz told the officer he was working in Red Wing at the time. (R. 53:138.) The officer testified that Mr. Lorentz confirmed he knew the restraining orders were in place but Mr. Lorentz indicated to the officer that Mr. Lorentz did not believe he violated them because he was on a public roadway. (Id.)

J.L. testified at trial; "I saw my dad drive passed the top of the driveway in his truck." (R. 53:109.) When asked to estimate how far away he and the other kids were from his father's truck J.L. testified, "I would say like 300 feet, 200 feet. I don't know. Somewhere around there." (R. 53:109.) J.L. described his father's truck "driving passed slowly." (Id.) After his father's truck drove by everyone went inside and his mother called police. (R. 53:110.)

When Mr. Lorentz drove down slowly on 390th Avenue on Mother's Day hoping to see his children with the injunctions in place, he exhibited stalking-type behavior. Is it not the point of an injunction to allow the petitioner to enjoy her residence free from alarm by not having the respondent drive by reminding the petitioner of the need of why the injunction was needed in the first place? Is this not the precise conduct the injunction aims to prevent? If the petitioner's residence is no longer a place of safety and security and Mr. Lorentz can exploit that by simply driving down that public road the injunction has lost all meaning.

CONCLUSION

For the reasons stated above, the State respectfully requests that this Court affirm the decision of the circuit court.

Dated this ___ day of November, 2018.

Respectfully submitted,

SEAN E. FROELICH
District Attorney
State Bar No. 1084551

Pierce County Courthouse
414 W Main Street
P.O. Box 808
Ellsworth, WI
(715) 273-6750

Attorney for Plaintiff-Respondent

CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Wis. Stat. § (Rule) 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,015 words.

Dated this ____ day of November, 2018.

Signed:

SEAN E. FROELICH
District Attorney
State Bar No. 1084551

Pierce County Courthouse
414 W Main Street
P.O. Box 808
Ellsworth, WI
(715) 273-6750

Attorney for Plaintiff-Respondent

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this ____ day of November, 2018.

Signed:

_____

SEAN E. FROELICH
District Attorney
State Bar No. 1084551

Pierce County Courthouse
414 W Main Street
P.O. Box 808
Ellsworth, WI
(715) 273-6750

Attorney for Plaintiff-Respondent

CERTIFICATE OF MAILING

I certify that this brief was deposited into the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expedition, on November 29, 2018.

I further certify that on November 29, 2018, I served three copies of this brief via United States Mail upon all opposing parties.

I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this ____ day of November, 2018.

Signed:

_____

SEAN E. FROELICH
District Attorney
State Bar No. 1084551

Pierce County Courthouse
414 W Main Street
P.O. Box 808
Ellsworth, WI
(715) 273-6750

Attorney for Plaintiff-Respondent