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CLERK OF COURT OF APPEALS
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STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Defendant,

v.

Case No. 2020AP118CR

LEONARD D. KACHINSKY,

Defendant-Appellant.

ON NOTICE OF APPEAL FROM A JUDGMENT OF CONVICTION
AND ORDER DENYING POST-CONVICTION MOTION ORDERED
AND ENTERED IN WINNEBAGO COUNTY CIRCUIT COURT, THE
HONORABLE GUY D. DUTCHER PRESIDING

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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ISSUES PRESENTED

I. WAS THE HARASSMENT RESTRAINING ORDER VOID FOR
VAGUENESS AS APPLIED TO THE FACTS OF THIS CASE?

The trial court answered this question in the negative.

II. WAS THE EVIDENCE SUFFICIENT FOR THE JURY TO FIND BEYOND
A REASONABLE DOUBT THAT KACHINSKY INTENTIONALLY
VIOLATED THE HARASSMENT RESTRAINING ORDER?

The trial court answered this question in the affirmative.

III. DID THE TRIAL COURT ERRONEOUSLY EXERCISE ITS DISCRETION BY DENYING KACHINSKY'S MOTION TO MODIFY THE CONDITIONS OF PROBATION TO ALLOW KACHINSKY TO MAKE SOCIAL MEDIA POSTINGS NOT REFERING TO M.B. AND TO ENTER THE MUNICIPAL BUILDING WHEN M.B. WAS NOT PRESENT?

The trial court answered this question in the negative.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested as the defendant-appellant (Kachinsky) believes that the briefs of the parties will sufficiently meet and discuss the issues on appeal. This is a one judge appeal so publication would usually not be appropriate. However, there are no published cases in Wisconsin on the specificity required of a court order to support a criminal charge for its violation. This court may wish to submit this to a three judge panel on its own motion.

STATEMENT OF THE CASE

This matter was commenced by the filing of a criminal complaint (1) on April 22, 2019, charging Kachinsky with three counts of violation of an harassment restraining order on July 2, 2018; April 3, 2019 and April 9, 2019 contrary to Sec. 813.125(7), Wis. Stats. Kachinsky retained Attorney Brandt Swardinski to represent him (6). Kachinsky filed a substitution of judge against Judge Scott Woldt (7) and Judge Guy D. Dutcher was assigned the case (8).

Attorney Swardinski filed a motion to dismiss the complaint (9) which was denied at a hearing on May 30, 2019 (58). Kachinsky then entered a not guilty plea and the matter was set for a pretrial and trial. A jury trial was held on September 30, 2019 (60 and 62) which resulted in a finding of guilty on Count One and not guilty on Counts 2 and 3¹ (41). Following the verdict, the court imposed and stayed a 6 month sentence. Then the court placed Kachinsky on probation for one year with conditions (in the Amended Judgment of Conviction) that included no entry into the Fox Crossing Municipal Building, no posting on social media accounts and no contact with M.B., her immediate family, residence or place of employment and five days in the county jail in addition to the two days already served. Because of errors in the original judgment of conviction (45), Kachinsky, appearing *pro se*, filed a motion to correct it (47). An amended judgment of conviction was entered on October 24, 2019 (52 App.101-103).

Kachinsky filed a notice of intent to pursue post-conviction relief (46). On December 27, 2019, Kachinsky filed a post-conviction motion to set aside the jury's verdict on Count One or modify the conditions of probation (53; App. 106-137). The court heard oral arguments on the motion on January 13, 2020 and denied it (62; App.138-149). Judge Dutcher entered a written order denying the motion on January 13, 2020 (54; App. 104). Kachinsky subsequently filed a notice of appeal on January 14, 2020 directed at both the amended judgment of conviction and the order denying the post conviction motion (55).

STATEMENT OF FACTS

A. Proceedings in Winnebago County Case No. 18 CF 509

Because of the comments of the trial court at sentencing and at the post conviction motion hearing, Kachinsky asks the court to take judicial notice of the events in the above case on its Judicial Dashboard and CCAP. In that case, Kachinsky was arrested on July 2, 2018 following the discovery of a poster (Exhibit 2; 28; App. 105) in his municipal court office (Chapter 27 Poster). Kachinsky was released the next day without charges after being booked for stalking and violation of an harassment restraining order. On July 11, 2018, Kachinsky was charged with those offenses. The Honorable Guy D. Dutcher was assigned the case and presided over the proceedings. On December 4, 2018, an amended information was filed that included only the stalking charge. There was no explanation on the record regarding the amendment. On December 10, 2018, the jury returned a not guilty verdict on the stalking charge.

B. The Jury Trial²

During her opening statement, ADA Amanda Folger indicated that the parties stipulated to the following facts:

² Kachinsky is only presenting facts relevant to Count One in this section of the brief. The jury found Kachinsky not guilty of Counts Two and Three. A judgment of acquittal was never entered as to those counts and should be.

The facts that are deemed true are, one, Mandy Bartelt obtained an injunction against Len Kachinsky. Two, a condition of this restraining order was that all communications between respondent and petitioner shall be limited to what is necessary to perform the functions of the Village of Fox Crossing Municipal Court. Three, this injunction was valid since June 19, 2018. Four, Len Kachinsky knew about the injunction and was present at the court hearing on June 19, 2018. Five, Len Kachinsky was suspended as Municipal Court Judge by the Wisconsin Supreme Court, beginning on July 3, 2018, and continuing through the month of April 2019.

(61: 41-42). Judge Dutcher also read the stipulation into the record:

The injunction in Winnebago County case number 18-CV-102 exists and was valid with the condition of all communications between respondent and petitioner shall be limited to what is necessary to perform the functions of the Village of Fox Crossing Municipal Court. Communications related to the personal relationship or personal rapport between the respondent and petitioner are not included in the operation of the Court and are prohibited under this section since June 19, 2018.

Second, that the defendant knew about the injunction and was present at the June 19, 2018, hearing. Third, that the defendant was suspended as Municipal Court Judge by the Wisconsin Supreme Court, beginning on July 3, 2018, and continuing through April of 2019. Fourth, that the defendant filed a response to the Wisconsin Supreme Court, July, the 4th, 2018. And, fifth, that the defendant sent an e-mail with attachments to Judge-elect Tim Hogan on April 2, 2019. The content of the e-mail as well as the fact that Hogan did indeed receive the e-mail are stipulated to by the parties.

(61: 52-53).

M.B. testified that she had been the municipal court manager for Fox Crossing since May 2016 (61: 56). In a typical month, the judge was in the office five hours and never sat at his desk at the small office (61: 57-58). M.B. petitioned for a harassment injunction against Kachinsky (61: 58). On June 19, 2018, there was a hearing during which an order was entered which stated that “all communication between respondent and petitioner was limited to what is necessary to perform the functions of the Village of Fox Crossing Municipal Court” (61: 59).

On July 2, 2018, M.B. saw a poster with the definition of sexual harassment from Chapter 27 of the Personnel Manual (Exhibit Two; 28; App. 105) which highlighted the word “sexual” all through the definition (61: 60, 62, 67). The poster was hanging on the top cabinet a few feet away (61: 61). There was also a poster (Exhibit One) with a picture of the village manager on it on the desk (61: 61-62). Kachinsky never posted any other chapters from the personnel manual (61: 67). M.B. did not believe that the poster was necessary for her to do her job (61: 74).

Exhibit A was a picture of Kachinsky’s desk with other posters on it (61: 77). Exhibit B was a picture of M.B.’s desk (61: 77). M.B. was an employee of Fox Crossing and subject to the Personnel Manual (61: 79). M.B. felt that

Kachinsky was sexually harassing her though she did not accuse him of that³ (61: 82-83).

Detective Captain David Mack testified that on July 2, 2018 he saw a posted printout of Chapter 27 of the Fox Crossing Employee Handbook with the term “sexual” highlighted in each area where listed on the document (61: 85-86). On the desk itself, Mack saw a poster with a picture of the Village Manager with the words, “I’m from the government. I’m here to help you. WWRD. #NotMeToo” (61: 86). During an interview, Kachinsky stated that he had been in negotiations with the Village and wanted a stipulation that his conduct was not sexual harassment because he felt it did not meet the requirements (61: 88). Kachinsky also wanted to indicate resolve in negotiations (61: 89). On Exhibit 5, Kachinsky filed a response to the court order which stated in part⁴:

The precipitating event for the arrest was two pieces of paper I left in the municipal court office on June 29, 2018. One, which I posted at eye level, was a copy of Chapter 27 of the village personnel manual. It defined what sexual harassment was. I highlighted certain words on the document to emphasize the idea that sexual advances or creation of a sex-charged atmosphere was required, as M.B. has never alleged any conduct by me that constitutes sexual harassment under the definition. However, she insists that she's a victim of sexual harassment. This proved to be a problem in negotiations with the Village. By posting Chapter 27, I wanted to subtly suggest to M.B. that she might want to reassess her thinking.

(61: 90-91). Kachinsky also explained that the other piece of paper was not meant to communicate to M.B. (61: 91).

³ But see un rebutted testimony of Kachinsky at 61: 139 and 150 summarized below.

⁴ As Kachinsky will do throughout this document, he substituted initials for the name of the court manager.

In Exhibit 6, a transcript of the July 19, 2018 hearing, Judge Stengel stated that,

This Court has, and this Court can, and this Court does issue the restraining order prohibiting any conduct or contact between you and M.B. other than that absolutely necessitated through the course of your employment."

(61: 95). The transcript also included this dialogue between Judge Stengel and Attorney Eiden who represented M.B.:

JUDGE STENGEL: "I know what was issued in terms of the temporary restraining order. Mr. Eiden, how you wish the restrictions be stated in the injunction or the restraining order?"

"MR. EIDEN: What you just said. No contact except what is necessary to perform the functions of the Court and all the communications be related -- be work related or necessitated by the function of the Court."

(61: 98).

Kachinsky testified that he became municipal judge on May 1, 1997 (61: 122). He had lived in the municipality since 1987 (61: 122). He was aware of the terms of the written order (Exhibit C) (61: 123-124). Item 7 stated that communications between him and M.B. were

limited to what is necessary to perform the functions of the Village of Fox Crossing Municipal Court. Communications related to the personal relationship or personal rapport between respondent and petitioner are not included in the operation of the court and are prohibited under this section.

(61: 124).

The order did not state that communication had to be limited to duties as municipal judge or the duties of M.B. (61: 124). Kachinsky believed he understood the order although there was some vagueness in the language (61: 126).

Kachinsky posted Exhibit 2 on the cabinet above his desk at a time that sexual harassment was part of negotiations to resign as municipal judge (61: 139). Kachinsky had not made a sexual advance on M.B. or created a hostile atmosphere (61: 139). “Harassment” was regarded as synonymous with “sexual harassment” to many (61: 139-140). The poster was to provide information to M.B. as to what sexual harassment was (61: 144). Kachinsky was concerned that the public understand that this was not like the cases involving Bill O’Reilly, Harvey Weinstein or Matt Lauer but just an ordinary dispute between a supervisor and a subordinate (61: 145). Kachinsky did not believe that the Chapter 27 poster violated the restraining order (61: 145).

The Sturgell poster was made using an official photograph of Sturgell but Kachinsky ultimately decided not to post it (61: 146). “Sexual harassment” was a term used by the Village administration (61: 150). M.B. had claimed to have been the subject of sexual harassment in a voicemail of July 15, 2017 in which Kachinsky used the term “body language” regarding the need to talk to her in person to communicate (61: 150). In November 2017, Fox Crossing’s response to a lawsuit claimed there was a founded sexual harassment complaint and Kachinsky complained about it to the Village Board during December 2017 (61:

151). Educating employees about the personnel manual was a responsibility of both the supervisor and Human Resources Department (61: 151). Kachinsky did not hang up copies of other chapters of the Personnel Manual (61: 151-152). The restraining order was unusual so there was no case law for a similar order (61: 162-163).

The jury found Kachinsky guilty of Count One and not guilty of Counts Two and Three (61: 77)

C. Sentencing

M.B. filed a victim impact statement (VIS) on May 7, 2019 (5). She claimed to be scared of Kachinsky and wanted him to stop public harassment on social media. M.B.'s VIS asked the court to impose the maximum penalty and a computer restriction.

In her oral victim statement, M.B. stated that she had been going through hell for two years (61: 226). Kachinsky was still posting on Facebook (FB) (61: 226). Another hearing was coming up on the restraining order (61: 236). Kachinsky would not stop (61: 226-227). He posted on FB about her (61: 227).

ADA Folger stated that Kachinsky had engaged in despicable behavior (61: 228). Kachinsky acted as if it was a game (61: 228). Twelve months of probation was warranted (61: 229). Attorney Swardinski, Kachinsky's attorney, stated that M.B. went through "a lot": regarding the stalking trial when Kachinsky was found not guilty (61: 229). Kachinsky had stopped except for the two emails for which

he was found not guilty (61: 230). Probation was not appropriate as there was a restraining order in place that was extended (61: 230-231). . He asked for a fine and two days jail with credit for time served (61: 232, 233).

ADA Folger read the August 8, 2019 FB post by Kachinsky into the record:

"Len Kachinsky is feeling grateful. Being a dedicated cat dad and cat socializer can carry over into other aspects of life. Bucky and Rascal like it when I speak their native language, but one former coworker claimed it made her afraid to be in the same room as me when I occasionally spoke feline. The Wisconsin Supreme Court did not like it, either. It was a bit late, but Kate Havlet(Phonetic) provided me with a solution to put on the desk. Now if I feel a meow coming on, I will just point to the meow sign. This will prevent the recurrence of the mother of all personnel problems

(61: 232). To Swardinski, the FB post was not inflammatory, harassing, annoying or mocking (61: 231-232).

Kachinsky stated he was in a nasty personnel situation in which both sides had problems in the way they handled (61: 233). Fox Crossing was aligned with Bartelt against Kachinsky and spent over \$90,000 (61: 234). Kachinsky was a cat socializer at the Neenah Animal Shelter and a tour guide at the Veterans Museum (61: 234). He would not be able to be a mentor for veterans court in Outagamie County (61: 234). Kachinsky felt bad about M.B. and her overreactions to some things (61: 234). The Village had a lot of self-help mechanisms through Sturgell's order of July 13, 2018 which barred Kachinsky from the building without permission from a department head (61: 225).

In imposing sentence the court stated that it respected Kachinsky's service as a veteran, attorney and longevity which inspired people (61: 236-237). Kachinsky had terrorized M.B. over the last two years and she had not overreacted (61: 237-238), Kachinsky misconstrued M.B.'s respect and admiration as a license to allow a professional relationship to become a very personal relationship (61: 237-238). The court was going to consider the events in the stalking trial in its sentence (61: 238). M.B. had the right to not have to deal with personal messages or personal interaction (61: 238: 239). Kachinsky stuck his middle finger at the Court Commissioner by requesting a de novo hearing even though Kachinsky had the right to do so. (61: 239). M.B. sent a number of text messages to Kachinsky telling him that he "rocked." (61: 239). The court stated that M.B. did not make a specific allegation of sexual misconduct, but the court "did not fall off the back of a turnip truck, Len. It's pretty easy to read between the lines of what innuendos were taking place here and your unwillingness to take "no" for an answer." (61: 240). M.B. had to work in the very same room with a supervisor who was pursuing and trying to lay the groundwork for something to happen (61: 241). Kachinsky got a pass in December and should have treated M.B. as if she had passed away and no longer existed (61: 241-242). The court viewed the idea of carefully reviewing the order to determine if conduct violated it as "bullshit" and "chicken shit." (61: 242). Anyone who knew anything about the situation would know the FB post made reference to M.B. (61: 242). M.B. wanted nothing to do with Kachinsky (61: 243).

The court imposed a six month jail sentence but stayed it and placed Kachinsky on probation for one year (61: 245). The court prohibited any social media postings and contact with M.B. and her immediate family (61: 245). The court also barred Kachinsky from being on the premises of the Village of Fox Crossing Municipal Building for any reason (61: 246). Finally the court imposed seven days in the Winnebago County Jail as a condition of probation with credit for two days served (61: 246). .

D. Post conviction proceedings

Kachinsky's post conviction motion sought to set aside the conviction on the grounds that the restraining order was unconstitutionally vague as applied to the facts of the case and that the evidence was insufficient. In the alternative, he sought to modify the conditions of probation as to posting on social media and access to the Municipal Building (53; App. 106-137).

At the motion hearing on January 13, 2020, Kachinsky offered to swear to the truthfulness of assertions in his motion that were not in the record of this case or Winnebago County Case No. 18 CF 509 (62; 2; App. 139). The State offered to file a brief but the court did not take the State up on the offer (62: 3; App. 140).

In rendering its decision, the court termed Kachinsky's motion as "absurd" and found that the communication was "wholly and totally unrelated to any circumstances related to the Court" (62: 3-4; App. 140-141). Judge Dutcher found that the order was not ambiguous (62: 5; App. 142). Judge Dutcher also criticized

the request to drop or modify social media restrictions as “ridiculous” (62: 5; App. 142). The only way to “disengage Mr. Kachinsky from the behavior he has been involved with...relation to the complainant was to prohibit him from going on social media because he knows no boundaries (62: 7; App. 144). The court also denied the motion to allow Kachinsky to be present in the municipal building during such time that M.B. was not in the building, stating “If you need a cat license, you might want to send someone else to the municipal building.....If I give you an inch, you will take a yard and I will not allow that to occur (62: 10-11; App. 147-148). The trial court did not address the issue of whether it imposed its sentence based upon inaccurate information.

Further facts will be stated in the argument below.

ARGUMENT

I. THE RESTRAINING ORDER AT ISSUE IN THIS CASE WAS AMBIGUOUS AS TO WHETHER THE CONDUCT IN COUNT ONE VIOLATED THE ORDER. THUS, AS APPLIED TO THE FACTS OF THIS CASE, PROSECUTION OF KACHINSKY BASED UPON THAT ORDER VIOLATED DUE PROCESS.

This case was about Kachinsky posting a copy of Chapter 27 of the Village Personnel Manual (28; App. 105) on the panel above his desk following a wedding on June 29, 2018 (61:90-91, 140) which M.B. discovered upon arriving for work on July 2, 2018 (61:60). The applicable section of the restraining order

was that “ all communications between respondent and petitioner shall be limited to what is necessary to perform the functions of the Village of Fox Crossing Municipal Court. Communications related to the personal relationship or personal rapport between the respondent and petitioner are not included in the operation of the Court and are prohibited.” (61 52-53).

The offense of violating a restraining order is equivalent to a finding that a person is in contempt of court. In both proceedings, an individual is brought to court to determine if he/she violated not a general statute but a specific court order directed at the person. But, like a statute, the order must be understandable. The United States Supreme Court stated, “The power of judicial contempt is not only potent but "deadly," if "it is founded upon a decree too vague to be understood." *International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76, 88 S.Ct. 201, 208, 19 L.Ed.2d 236, 245 (1967). *International Longshoremen's Ass'n*, supra, dealt with contempt in relation to Rule 65(d), F.R.Civ.P., which specifically requires that injunctions and restraining orders "be specific in terms" and "describe in reasonable detail ... the act or acts sought to be restrained." Its rationale, however, is just as valid in situations such as this in which there is a need for clarity, although no statute or procedural rule expressly requires clarity in court orders. To hold someone in contempt for violating a court order, the order must have been clear, specific and unambiguous. See, e.g., *International Longshoremen's Ass'n*, supra, 389 U.S. at 76, 88 S.Ct. at 208 (orders must be such that "those who must obey them will know what the

court intends to require and what it means to forbid"); *In re Weeks*, 570 F.2d 244 (8th Cir.1978) (the court's order must be specific); *Berry v. Midtown Serv. Corp.*, 104 F.2d 107 (2nd Cir.1939) (the order should inform in definite terms the duties thereby imposed); *Ex parte Slavin*, 412 S.W.2d 43, 44 (Tx.1967) (the order "must spell out the details of compliance in clear, specific and unambiguous terms so that such person will readily know exactly what duties or obligations are imposed upon him"); 14 Cal.Jur.3rd, Contempt Sec. 24 (1974) (the order must express "in clear, specific, and unequivocal language the act required"); 14 Cal.Jur.3rd, supra Sec. 25 ("acts forming the basis of the charge must be clearly and specifically prohibited by the terms of the order, for contempt cannot be predicated upon violation of an ambiguous or uncertain order").

In Wisconsin, there is no similar provision to that in Rule 65(d), F.R.Civ.P regarding the form of court orders in either Chapter 785 or Chapter 813. .

However, the federal requirements simply restate the requirements of substantive and procedural due process. Kachinsky does not claim that Sec. 813.125(7), Wis. Stats. is unconstitutionally vague⁵. However, the provision of the restraining order that limited communication between Kachinsky and M.B. to "to what is necessary to perform the functions of the Village of Fox Crossing Municipal Court" was ambiguous and uncertain as to exactly what conduct or communication was prohibited. Exact words contained in court orders matter. Kachinsky was the

⁵If Kachinsky was challenging the constitutionality of the statute, he would have been required to serve a copy of this motion upon the Attorney General. Sec. 806.04(11), Wis. Stats. Kachinsky is only challenging the application of the order issued under that statute to the facts of this case.

municipal judge responsible for the functioning of the court. To comply with the order, Kachinsky needed clear rules as to what communication was necessary for the operation of the court as to subject matter and method. The explicit prohibition on communication regarding personal rapport or personal relationships was the only meaningful definition of “necessary” that the order provided. There is no serious dispute that Kachinsky’s conduct complied with that requirement.

“Necessary” is a matter of judgment as applied to many activities. The first question anyone subjected to the restraining order in this case would be, “What does that mean?” There is no clear definitive answer other than the one sentence regarding personal rapport and relationships. Reasonable persons may differ as to their opinion as to what communication was permissible under the order. After the injunction of June 19, 2018, Kachinsky was still M.B.’s supervisor and responsible for her development and well-being as an employee. Sec. 755.10, Wis. Stats. provided that the hiring, termination, hours of employment and work responsibilities of municipal court personnel were under the judge’s authority. As M.B. testified, she was a village employee and subject to the Personnel Manual. (61: 79). The municipal court was a part of the Village government. See Sec. 755.01, Wis. Stats. and Chapter 19, Village of Fox Crossing Ordinances.

It is common knowledge and practice that personnel manuals and the policies contained therein should be continuously made known to and complied with by a workplace’s personnel. See <https://www.convergepoint.com/policy->

[management-software/policy-procedure-best-practices/5-steps-ensure-compliance-policies-procedures/](#) (last visited on October 21, 2019). A Google search using the terms in the first sentence of this paragraph will produce dozens of similar results. Kachinsky also testified to the same at trial (61: 151). To argue, as the State did at trial, that a reminder about the provisions of a Village Personnel Manual as to an issue that arose in the workplace was not necessary and thus unlawful in this case criminalized routine office management. There was nothing in the evidence at trial (or even in the complaint) that supported the comment the court made when denying the motion to dismiss Count One on May 30, 2019 that it was “essentially defiance of her [M.B.’s] position that she felt harassment⁶” (58: 3).

Vagueness means that “ individuals of ordinary intelligence must guess as to its meaning and disagree as to its applicability,” *Schramek v. Bohren*, 145 Wis2d 695, 429 N.W2d 501, 506 (Wis. App. 1988).

The constitutional foundation of a vagueness challenge to a statute is the procedural due process requirement of fair notice. *State v. Nelson*, 2006 WI APP 124, ¶ 35, 294 Wis.2d 578, 718 N.W.2d 168. A criminal statute is unconstitutionally vague if it either fails to afford proper notice of the conduct it seeks to proscribe or fails to provide an objective standard for enforcement. *Gross v. Woodman's Food Mkt., Inc.*, 2002 WI App 295, ¶ 56, 259 Wis.2d 181, 655 N.W.2d 718.

⁶ The court also stated that Kachinsky posted items on M.B.’s desk (TR5-30-19: 3). Nothing in the record of this case or 18 CF 509 supports such an allegation with respect to the incident of July 2, 2018.

Metz v. Veterinary Examining Bd., 2007 WI App 220, fn4, 305 Wis. 2d 788, 741 N.W.2d 244

For purposes of a vagueness as applied analysis, the focus should be on the actual conduct engaged in by Kachinsky: , the posting the Chapter 27 Poster with certain terms highlighted for emphasis. Kachinsky's motives were irrelevant as long as his conduct complied with the order. On its face, the posting of the Chapter 27 Poster simply communicated a desire that M.B. understand what sexual harassment meant.

Informing or reminding an employee of the provisions of an employee manual was a duty of Kachinsky's job. He did so in the simplest, most direct and least intrusive way possible by posting a copy of a chapter in the personnel manual on the cabinet above his desk with highlighted references to what Kachinsky regarded as the most problematic portion of the chapter. It was at least as important for M.B. to understand the applicability of Chapter 27 as it was for her to know about minimum wage, discrimination complaints and other matters that are required by law to be posted in a workplace. It was necessary for the functioning of the Municipal Court as a part of the Fox Crossing government for Kachinsky to insure that M.B. was aware of Chapter 27 and what it meant. In the "MeToo" era, it was important to distinguish between sexual harassment and other problems in the workplace. It is contrary to good order and discipline in the

workplace for employees to claim “sexual harassment”⁷ for conduct that may be annoying but does not meet the legal definition. Such claims unfairly stigmatize the person accused by an employee and undermine workplace productivity and teamwork.

In this case, the term “necessary” was unconstitutionally vague because it contained no objective standards. For example, it was clear that M.B., if left to her own devices, would have preferred Kachinsky never be in the court office or communicate with her except on the bench during court sessions. However, such laissez-faire supervision would have constituted neglect by Kachinsky of his statutory duties. Such a policy was also not required by terms of the restraining order.

This is not a collateral attack on the order of June 19, 2018 which would not be permitted in a criminal prosecution arising out of the order. *Schramek v. Bohren*, 145 Wis2d 695, 429 N.W2d 501, 508 (Wis. App. 1988). Kachinsky is only challenging the order as applied to the facts of this case. Further, the order in 18 CV 102 was not entered in circuit court so that it was appealable until July 2, 2018, the date of the incident in question. See Sec. 808.03(2), Wis. Stats.

The communication by Kachinsky to M.B. of the contents of Chapter 27 was not prohibited by the other provision of the order dealing with personal relationship or personal rapport. It was, on its face, a reminder to M.B. of what

⁷ See M.B.’s testimony at trial for a perfect example of this phenomenon (61: 82-83).

constituted sexual harassment. By implication, it also reminded her of what was not sexual harassment. Since the court was a part of Fox Crossing government, Kachinsky's communication was carefully tailored to promote understanding and compliance with Chapter 27 without personal references or unnecessary interruptions of M.B.'s other duties. A sarcastic or caustic email or text conveying the same information might violate the injunction. But not this. No person of reasonable intelligence could read the restraining order and think it clearly prohibited posting a copy of a chapter of the Village's written personnel policies. It is no answer to say that defining "necessity" should be left up to a jury. An harassment restraining order carries criminal penalties for violations and is a mandatory arrest offense. Sec. 813.125(6) and (7), Wis. Stats. It is an infringement upon liberty. Due process required that to sustain a conviction for violation that a restraining order be clear and understandable as to its application to a communication such as this which was clearly part of court administration in connection with Village policies. Contrary to the assertion of the trial court (61: 142) , is not "bullshit" or "chicken shit"⁸ to engage in this analysis. It is what courts are supposed to do. Even without the consideration of other evidence as in (II) below, the restraining order as applied to communications that simply reminded M.B. of Village policies in an unobtrusive way was ambiguous,

⁸The undersigned is disappointed that the court described the process of determining the meaning and application in such words. Although the undersigned used negative terms such as "weakling" in communicating with M.B., neither the record in 18 CF 509, 18 CV102, the report of the Judicial Conduct Panel or the opinion of the Wisconsin Supreme Court in 18AP628-J reflect use by Kachinsky of vulgarities or profanity in communicating with M.B. or anyone.

uncertain, not clearly understandable by an ordinary person and could not support a conviction. The conviction on Count One should be vacated.

II. THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT AS A MATTER OF LAW FOR THE JURY TO FIND KACHINSKY GUILTY OF VIOLATION OF A RESTRAINING ORDER AS CHARGED

A. *Standard of Review and Applicable Law*

When an appellate court reviews a challenge to the sufficiency of the evidence, it views the evidence in the light most favorably to the State and to the conviction. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). If more than one reasonable inference can be drawn from the evidence presented at trial, an appellate court accepts the inference most favorable to the verdict, even if other inferences could be drawn. *State v. Routon*, 2007 WI App 178, ¶17, 304 Wis. 2d 480, 736 N.W.2d 530. The test is whether "the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true." *State v. Schutte*, 2006 WI App 135, ¶14, 295 Wis. 2d 256, 720 N.W.2d 469 (quoting *Poellinger*, 153 Wis. 2d at 503-04; one set of internal quotations marks omitted). This highly deferential standard of appellate review of a challenge to the sufficiency of the evidence is the same whether the fact finder is a jury or the trial court. *Routon*, 304 Wis. 2d 480, ¶17. Whether the evidence viewed most favorably to the verdict satisfies the legal elements of the crime presents a question of law, which appellate courts review *de novo*. *Id.* It is the jury's function to decide the credibility of witnesses. See *Poellinger*, 153 Wis. 2d at 506.

In this case, the State was required to prove the following beyond a reasonable doubt:

1. An injunction was issued against Leonard D. Kachinsky, the respondent, in favor of M.B., the petitioner, under §813.125(4) of the Wisconsin Statutes. An injunction is a court order prohibiting specified conduct by a respondent.
2. The defendant committed an act that violated the terms of the injunction.
3. The defendant knew that the injunction had been issued and knew that his acts violated its terms.

Wis JI *Criminal* 2040 and (61: 179).

B. Application to Facts of Case

The State's theory was that displaying the Chapter 27 Poster violated the harassment injunction because it was not a necessary communication between Kachinsky and M.B. for the functioning of the court. For the reasons stated in (1) above, Kachinsky believes that based upon the subject matter and the careful way the information was provided that the evidence that there was a violation of the order would be insufficient.

However, the record established as a matter of law that reasonable doubt existed regarding the claim that the communication was not necessary for the operation of the court. M.B. had made a complaint to Fox Crossing which Fox Crossing characterized as a founded sexual harassment complaint sometime before November 2917 when it disclosed the finding in circuit court pleadings (61: 151)..

M.B. was the only possible source of information for the complaint. Further, at a hearing during February 2018, M.B. had stated she considered a voicemail to be sexual harassment when it used the term “body language.” (61: 150) . M.B. felt that Kachinsky was sexually harassing her though she claimed that she did not accuse him of that (61: 82-83). Despite the lack of specific instances or a pattern of conduct by Kachinsky that constituted sexual harassment, M.B. insisted she was a victim of sexual harassment and objected to a statement to the contrary as part of an agreement for Kachinsky to resign (61: 90-91, 139). This was not a matter of “he said/she said.” The facts claimed by M.B., even if true, did not constitute sexual harassment.

The ignorant or intentional misunderstanding by M.B. as to what constituted sexual harassment under the Village Personnel Manual impeded the effective functioning of the court. It gave M.B. the status as a #MeToo victim even though she was not. Erroneous self-designation as a sexual harassment victim, even if encouraged by the Fox Crossing Administration, was contrary to good order and discipline in the Fox Crossing municipal work force. It also was a barrier to progress in negotiations to end the legal battles between the judicial and executive branches of Fox Crossing government. Further, an erroneous concept of what constituted sexual harassment impeded understanding of and enforcement of Chapter 27 by the Village. Supporting Village personnel policies was part of Kachinsky’s job as Municipal Judge.

Kachinsky's testimony that he did not believe he was violating the order (61: 146) was not binding upon the jury or this court.. However, Kachinsky had a reasonable belief based upon the vague language in the order alone that he was not violating the order. On its face the Chapter 27 Poster dealt with something that was essential to the operation of the court as part of Fox Crossing government: understanding of and compliance with Chapter 27 of the Personnel Manual. To characterize such a communication as a violation of the injunction criminalized what was ordinarily routine office management. Taken together, all the facts established reasonable doubt as a matter of law as to both the second and third elements of the offense. No reasonable jury could have decided otherwise.

This was not a bread-and-butter restraining order violation case. Most of such cases are violations of strict no contact orders in which a former romantic partner sought to re-establish a relationship or otherwise communicate with a petitioner who was granted an injunction. It is difficult, if not impossible, to effectively regulate the interaction of two persons in a two person office by court order. M.B. did not want a strict no contact order because it might result in the loss of her job. Under most circumstances, the two persons with an ongoing conflict that resulted in a restraining order would have been transferred to different departments within the same employer or one of them would have been terminated. However, the wisdom of putting a restraining order in place was not the issue. If an order, which carries criminal penalties and mandatory arrest as a sanction, is put in place it must be specific enough regarding workplace conduct so

that everyone clearly understands what is and is not permissible. That was not the case with paragraph 7 of Judge Stengel's order. It is not "bullshit"⁹ to carefully review the order and its application to the facts of this case. The evidence of a violation or a knowing and intentional violation was insufficient to establish Kachinsky's guilt beyond a reasonable doubt.

While courts rarely reverse a jury's verdict, the facts of this case justify it. The State did not present facts sufficient for a rational jury to find beyond a reasonable doubt that Kachinsky committed the offense the State charged him with in this case. In *Burks v. United States*, 437 U.S. 1, 12-14, 57 L.Ed.2d 1, 98 S.Ct. 2141 (1978), the United States Supreme Court held that the double jeopardy clause precludes a second trial once a reviewing court has found the evidence legally insufficient, and the only available remedy is the direction of a judgment of acquittal. Because the evidence was insufficient for a conviction as a matter of law, the only remedy is dismissal with prejudice.

III. THE TRIAL COURT ERRONEOUSLY EXERCISED ITS DISCRETION IN TOTALLY BANNING KACHINSKY FROM POSTING ON SOCIAL MEDIA AND FROM ENTERING THE MUNICIPAL BUILDING WHERE HE WAS A RESIDENT.

A. Standard of Review

⁹ See court's remark at sentencing at (61:: 242)..

Section 973.09(1)(a) grants a circuit court broad discretion in imposing conditions of probation. The circuit court may impose, according to Wis. Stat. § 973.09(1)(a), "any conditions which appear to be reasonable and appropriate." Reasonable and appropriate conditions of probation are those that rehabilitate the offender and protect the interests of society. See *State v. Heyn*, 155 Wis. 2d 621, 627, 456 N.W.2d 157 (1990); *Huggett v. State*, 83 Wis. 2d 790, 798, 266 N.W.2d 403 (1978). *State v. Oakley*, 2000 WI 37, 234 Wis.2d 528, 534 609 N.W.2d 786.

Probation conditions are within the sentencing court's discretion. See *State v. Nienhardt*, 196 Wis. 2d 161, 167, 537 N.W.2d 123 (Wis. App. 1995). A condition of probation may impinge upon a constitutional right as long as the condition is not overly broad and is reasonably related to the defendant's rehabilitation. See *Krebs v. Schwarz*, 212 Wis. 2d 127, 131, 568 N.W.2d 26 (Wis.. App. 1997).

The court "exercises the appropriate discretion when it examines the relevant facts, applies a proper standard of law, uses a demonstrative rational process, and reaches a conclusion that a reasonable judge could reach." *State v. Olson*, 222 Wis.2d 283, 293, 588 N.W.2d 256 (Wis..App.1998). (internal quotation marks and quoted source omitted). In this case, Kachinsky submits the record failed to show that the court examined the relevant facts or apply a proper standard of law.

B. Erroneous Exercise of Discretion.

1. *Reliance Upon Misinformation.*

"Defendants have a due process right to be sentenced on the basis of accurate information. *State v. Johnson*, 158 Wis. 2d 458, 468, 463 N.W.2d 352, 357 (Wis.. App. 1990). A defendant, who requests resentencing based on inaccurate information must show both that the information was inaccurate, and that the court actually relied on the inaccurate information in the sentencing." *Id.*

The first piece of inaccurate information was the court's claim that M.B. did not overreact as Kachinsky had stated during his allocution (61: 237). In his post conviction motion, Kachinsky offered to prove a number of facts (53: 19-20; App. 124-125) . First, during the stalking trial in 18 CF 5091, four of M.B.'s former co-workers from Outagamie County testified that she tended to exaggerate. That certainly contributed to the verdict. Further, M.B. articulated fears not based upon fact since the beginning of her difficulties with Kachinsky which began during April 2017. They included but are not limited to the following:

1. Claims that Kachinsky was stalking M.B. and her mother (B.S.) by informing M.B. that B.S. showed up on Kachinsky's FB feed for "Nearby Friends" when he was near Richfield as he drove to Froedtert for treatments and once on a Sunday when B.S. was at M.B.'s residence near Hortonville. (testimony by M.B. at the trial in 18 CF 509 and the Judicial Conduct hearing).

2. Claims that Kachinsky had a device in the municipal court office which enabled me to eavesdrop (May 2018 interview of CPT Mack with M.B. and M.B. testimony at the Judicial Conduct hearing).

3. Claims that Kachinsky went by her house in rural Hortonville and was watching her, resulting in M.B. and her husband, D.B., having to turn a security system on and off (testimony of M.B. and her husband, D.B. at the trial in 18 CF 509).

4. Claims that Kachinsky parked outside of Xperience Gym where M.B. worked out and was watching her so that she called the police to check out the license number (Raised by M.B. at a December 28, 2017 meeting and testified about at the trial in 18 CF 509).

5. Claims that Kachinsky developed a plan for the municipal court to function in the event of her short term absence as a preparation for him to sabotage her vehicle (testimony of M.B. at the trial in 18 CF 509).

6. Claims that Kachinsky's request that she inform Kachinsky if co-workers were wearing Packer gear on a casual day was a form of sexual harassment. During the trial in 18 CF 509, several jurors were visibly skeptical as M.B. tried to avoid direct answers to Swardinski's cross-examination on that subject.

7. Claims that a voicemail using the phrase "body language" was a form of sexual harassment (testimony in this case and in an injunction hearing during February 2018).

8. Claims that Kachinsky might Photoshop pictures of her in Kachinsky's possession if he did not comply with her demand to delete them (testimony in an injunction hearing in 18 CV 102 during February and June 2018).¹⁰

M.B. may have felt emotional distress about the strained relationship in the workplace. However, the jury's verdict in 18 CF 509 was a sign that many jurors doubted the circumstances M.B. was in would have caused an average person to show the level of emotional distress that she did. The court's strict conditions on social media posting and entry into the Fox Crossing Municipal Building only made sense if the court really believed, as it stated, that M.B. did not overreact. The court did not address this at the post conviction motion hearing when it had the opportunity to do so.

Second, the court all but stated during sentencing that Kachinsky was trying to groom M.B. for an extramarital affair. (61: 239-240). Nothing could be further from the truth. The court's comments were not supported by the record or additional facts Kachinsky offered to prove (53: 21-23; App. 126-128) that were set forth below. First, nothing in the record supported a finding that there was any romantic or physical relationship between M.B. and Kachinsky at any time or any efforts to establish one. At the trial in 18 CF 509, Kachinsky testified that he initiated physical contact only once. Kachinsky hugged M.B. to comfort her

¹⁰ Kachinsky possesses some digital photos sent to him by M.B. and some taken by him at the office or copies from FB.. None of them are intimate or embarrassing in any way. Kachinsky does know how to Photoshop and has no desire to do so.

while she was crying before court on December 15, 2016 over Kachinsky's lack of enthusiasm for her Christmas gift¹¹. .

The relationship of Kachinsky and Bartelt at its best was characterized by the following FB message exchanges from Exhibit B in 18 CF 509:

JUDGE K: [O]f all the stuff that happened this year, you coming to Fox Crossing and all that happened since from that, directly and indirectly, has definitely been the best. It is personally very gratifying to make others happier even if it is just a by-product of doing my job properly.

10/19/2016 7:08am



MB: U got that right 👍😊

JUDGE K: We are all in the Happy Zone, including Doug. I assumed somehow he had not gotten his mail yet. In the Happy Zone we give each other the benefit of a doubt. We are not emotionally volatile. We do not blame clerical personnel for our own mistakes or force them to play middle person when it is inappropriate. Some of these things are driving me crazy in closing down the office. 😡--but not for long. Venting over. .



Right on happy zone it is! 😊😊😊😊

12/16/2016 12:53pm

JUDGE K: Mandy--Getting to know you and your family better was one of the best things that happened in 2016.

MB: Judge K: You made my year by hiring me, and trust me my family and I all thank u for that! I have been the happiest I have been in a long time!!!! Thank you! Yes hugs to all of you! You are a very patient person and strong and great your are D all of the above! Thank you for being you! You will get better and we will run again next summer... and hell I will walk I'm good with that too! We got this! Stand strong you r not only my boss u r buddy.... so stay strong buddy!

12/16/2016 6:42pm

¹¹ The reason for the lack of enthusiasm was Kachinsky increased symptoms of GVHD. After all the cases were heard, Kachinsky suffered severe GI symptoms before leaving the building.. . Kachinsky was admitted to Froedtert that night and remained until February 1, 2017.



M.B.: Judge K: You r honestly the most thoughtful person ever! I have told my family all about u.... my Parents want to take u to their cabin and have u eat and drink like the do from pizza to ice cream and all sorts of goodness and then no exercise to put weight on... they have said bring it on! I'm wishing u a quick recovery! I will send you a pic...

Pages 33 and 34 of Exhibit B in 18 CF 509.

On March 16, 2017, just prior to M.B. leaving for vacation with D.B. and without children, the following FB message exchange occurred:

M.B. Judge K:

You are inspiring to many! That is amazing, you also have made me look at life in a whole new way, cherish what you have today for tomorrow is never promised! You have always been a fighter and that has made me think the same! You rock and I will see you tonight for Court. Should be an interesting if they all remain on 🙄

Mar 16th, 7:41am

JUDGE K: Same here. Hope you had a good workout. See you tonight.

Mar 16th, 9:37pm

JUDGE K: Thanks again for the shadow box. It was a very personal and thoughtful gift. I will leave it there on display until next Thursday. It is great having you as a coworker and friend. Go Badgers!! 🙌🐾



M.B.: You are very welcome! Sorry it took me so darn long to get it back to the happy zone! Geepers! That sounds good people can stop by and check it out ! Likewise great having you as a boss and friend!

Page 55 of Exhibit B in 18 CF 509.

None of the above in any way provided a reasonable inference that Kachinsky was a Peter Strzok trying to recruit M.B. to be his Lisa Page.¹²

During August or September 2016, Kachinsky made a point of letting M.B. know that his habit not wear a wedding ring was not a reflection of Kachinsky's sexual morals. It was simply a reaction to loss of the ring several times at the Y when Kachinsky took it off. M.B. informed Kachinsky that her father, M.S., had the same practice. Further, during an office meeting during February or March 2017, Kachinsky discussed with M.B. that they had a close emotional bond due to his medical situation but that they needed to avoid anything that crossed the line into something else. She understood and agreed.

Kachinsky regarded M.B. at times as a surrogate for his daughter¹³ since M.B. was about 23 months older than Kachinsky's daughter. Both Kachinsky and M.B. were the first members of their respective families to graduate from college. Kachinsky openly respected how M.B. was able to balance work with an active family life involving her two young boys and a husband who held down three jobs. He did not see M.B. as a potential mistress.

Kachinsky still wonders what really happened when M.B. and her husband went on an out-of-state vacation without their children during late March 2017. Things became dramatically different after that. Kachinsky's comment on M.B.'s

¹² Peter Strzok and Lisa Page were FBI employees involved in the Crossfire Hurricane investigation into the Donald Trump campaign. They used their government issued cell phones to facilitate an extramarital affair.

¹³ Especially during the Judge K Challenge runs as Kachinsky sometimes ran with his daughter, Noelle Kachinsky.

FB page about a second honeymoon¹⁴ was, with 20/20 hindsight, a mistake.

However, the comment seems unlikely to have caused M.B.'s coworkers at Fox Crossing to question the stability of her marriage (as he claimed it did). What is obvious is that after M.B. went to Sturgell on May 24, 2017, they formed a pact to do whatever was necessary to remove Kachinsky from the position of Municipal Judge to which he had been last elected in 2015. But the reason could not have been sexual harassment or attempts to groom M.B. for an extramarital affair.

Kachinsky was investigated by the Winnebago County Sheriff Department, the Fox Crossing Police Department, the Judicial Commission and the Judicial Conduct Panel. They interviewed dozens of people and reviewed hundreds of emails from Fox Crossing and M.B.'s personal email account. None of those entities found that Kachinsky engaged in any behavior that amounted to sexual harassment or preparation for an extramarital affair as the court implied at sentencing.

Neither the State nor the court commented upon Kachinsky's offer of proof nor did nor did the court accept Kachinsky's offer to swear to the accuracy of the matters in his offer of proof. This effectively conceded that Kachinsky's claims were accurate and that an important portion of the court's factual recitation at sentencing was inaccurate. The court's findings of fact lead to the conditions of probation that Kachinsky challenges as an erroneous exercise of discretion.

¹⁴ The comment was in response to a post by another friend of M.B. whom Kachinsky did not know wondering why M.B. did not respond to the friends's FB messages.

2. Erroneous Application of the Law and Overly Broad Conditions.

The court's sentencing remarks were remarkable for their almost total lack of comment upon the offense of conviction. Instead the court seemed to imply that the jury in 18 CF 509 and this case erred in the not guilty verdicts that they rendered. While the court was allowed to consider prior acquittals in its sentencing, the extent to which it relied upon it to the exclusion of the offense itself seemed to display disdain for the fact-finding process by a cross section of the community. The court commented that the verdict in 18 CF 509 was merely a "pass" and that Kachinsky should have regarded M.B. as dead after that (63: 241). It failed to consider that M.B. was employed by the municipality in which Kachinsky resided. As an occasional recipient of municipal services and a person subject to Fox Crossing ordinances and a citizen of Fox Crossing, Kachinsky had reason to be concerned about the functioning of Fox Crossing government. The court's comment showed a lack of understanding of Kachinsky's civic duties.

The court also showed a disregard for Kachinsky's right to exercise his legal rights when it stated that Kachinsky stuck his middle finger at the Court Commissioner by requesting a de novo hearing even though Kachinsky had the right to do so. (61: 239). It was inappropriate for the court to penalize Kachinsky for exercising his statutory rights.

At the post conviction motion hearing, the court further showed its failure to apply judicial reasoning to the issues presented by its criticism of Kachinsky for even bringing the motion (62:3; App. 140) and its use of derogatory adjectives regarding Kachinsky's arguments rather than a reasoned analysis (62: 3-5; App. 140-142).

The entire tone and tenor of the court's remarks at both sentencing and the post conviction motion hearing did not reflect judicial reasoning. It reflected a desire by the court to impose its personal will upon Kachinsky and its frustration that Kachinsky pursued legal remedies to challenge the appropriateness of what the court did.

It appears likely this erroneous information affected the disposition of this case.. Based upon a more accurate view of Kachinsky's character, the court might have more carefully considered the modifications of probation that Kachinsky proposed in his post conviction motion.

The amended judgment of conviction (JOC) prohibited any entry into the Fox Crossing Municipal Building. As noted during sentencing, entry was also controlled by Sturgell's letter of July 13, 2018 which contained no expiration date. M.B. usually works 8:00 a.m. through 4:30 p.m. However, she often had court on Thursday nights and/or takes shorter lunch hours than permitted so she could leave early afternoons on Friday. Her presence in the building was easily determined by the habitual presence of her car with custom plates at the far end of the employee

parking lot.. M.B.'s vehicle was visible to persons driving to the front entrance of the municipal building. Further, the required advance call to a department head under the Sturgill order minimized the possibility of accidental contact.

The Fox Crossing Municipal Building included not only administrative offices but also the police department and municipal garage to which access was needed to use the prescription drop off box, participate in recycling events, etc. Village Board meetings were held in the building during the evening when M.B. was no longer in the building. The court's absolute bar from entry into the building prevented Kachinsky from utilizing these services or observing the Village Board. . During January 2019 (the month after the trial in 18 CF 509) , Kachinsky complied with the Sturgell letter and arranged to get his cat licenses during the late afternoon on a Friday when M. B. was not in the office. During April 2019, Kachinsky also attended a Village Board meeting which started on a Monday at 6:00 p.m, . .Kachinsky, has legitimate business to conduct in the Municipal Building. Limiting the exclusion period to those times when M.B. is not in the building was a reasonable condition of probation.. A total ban was not.

The amended JOC also prohibits posting on social media. Social media was not related to any of the counts charged in this case. As previously noted, M.B. complained in her VIS about being continuously bashed by Kachinsky on social media. However she did not provide specific examples. At sentencing, the State surprised the defense by suddenly deciding to present an August 8, 2019 post

to the court by reading it in the record.. The entire copy of the August 8, 2019 post is reproduced at 53: 27; App. 132.

This post did not mention M.B. by name nor was it critical of the unnamed “former co-worker.” It reported in a neutral fashion M.B.’s testimony in 18 CF 509 and before the Judicial Conduct Panel. It also accurately and respectfully reported the opinion of the Wisconsin Supreme Court on the issue. This was not “bashing” by any stretch of the imagination.

To some extent, M.B. has become a public figure. Her name is posted on the Municipal Court page of the Village of Fox Crossing website. Her image was included on the Facebook page created by her husband during his successful campaign for coroner in Outagamie County in 2018. During the trial in 18 CF 509, Gannet Media and the Law and Crime Network used M.B.’s name in their news accounts. As a result, the first page of a Google search , (as of December 6, 2019) using M.B.’s name produced the information contained in the post conviction motion (53: 9; App. 134).

The screenshot described above is only the beginning of what someone might find if they “Googled” M.B. Although she might wish otherwise, M.B. is in the public eye. She does not have a reasonable expectation that no one will ever mention or reference her on social media. It is certainly not against the law.

There was no rehabilitative purpose served by a total ban on lawful posts on social media by Kachinsky. “Harassing” posts are already forbidden by the restraining order in 18 CV 102. Kachinsky frequently posted or commented on Facebook prior to the court’s ban on numerous topics including happy events in the lives of his over 700 FB friends, including family members. He also commented or posted on political topics occasionally in a thoughtful and civil matter. The Neenah Animal Shelter and Military Veterans Museum and Education Center were also subjects of Kachinsky’s posts which promoted those organizations. Exercise of Kachinsky’s right to freedom of expression should not have been curbed unless absolutely necessary for a lawful purpose and then only to the extent needed to promote that purpose.

M.B. has FB friend(s) who apparently review Kachinsky’s FB page on a regular basis. They have and could report posts they regard as inappropriate or contrary to probation conditions to M.B. or directly to the probation agent. That is how the August 8, 2019 post came to the attention of M.B. and ADA Folger.

If the court believes curbs on Kachinsky FB posts are still needed, it could simply ban posts or comments “that directly or indirectly mention M.B. or any former co-workers.” This is sufficiently definite to avoid any serious argument that it was vague and failed to give Kachinsky sufficient notice of the behavior he was to refrain from. It was carefully phrased so that circumvention of it was difficult if not impossible. It is an undue infringement on Kachinsky’s First Amendment rights and contrary to the court’s goal that Kachinsky not think about

M.B. to impose unnecessary restrictions on Kachinsky's use of social media.

Kachinsky did much good by inspiring, thanking or praising others with his FB posts that have not occurred since the evening of September 30, 2019. Curbs on social media use cause a sense of isolation which is contrary to the court's rehabilitative aims

The trial court erroneously imposed social media restrictions or overly restrictive conditions as a condition of probation. It should have not done so at all or simply prohibited direct or indirect comments about M.B. or former co-workers as suggested above.

CONCLUSION

For the reasons stated above, the undersigned requests that this court reverse the trial court's amended judgment of conviction and order denying post conviction motion and remand this matter to the trial court with instructions to vacate it or to modify the conditions of probation regarding posting on social media and access to the Fox Crossing Municipal Building. The court should also direct that a judgment of acquittal be entered on Counts 2 and 3 which were not done in the court below.

Dated this 17th day of February 2020

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CERTIFICATION AS TO BRIEF LENGTH

I hereby certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief and appendix produced with a serif proportional font. This brief has 10, 066 words, including certifications.

Dated this 17th day of February 2020

LEN KACHINSKY

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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies the requirements of Rule 809.19(12).

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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CERTIFICATION AS TO CONTENTS OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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