STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No.: 2020-AP-118CR

v.

LEONARD D. KACHINSKY,

Circuit Court
Case No.: 2019-CM-347

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

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

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

There are three issues before this court: whether the restraining order was ambiguous and prosecution of its violation violated the defendant's right to due process; whether the evidence presented at trial was sufficient to support a guilty verdict; and whether the trial court abused its discretion in ordering specific conditions of probation. The trial court answered the first issue in the negative, the second issue in the affirmative, and the third issue in the negative.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral arguments or publication as the matter involves only the application of well-settled law to the facts of the case.

STATEMENT OF THE CASE

The State believes the defendant's recitation of the facts of the case is generally accurate, but there appear to be several errors with his citations.[1] All factual references require accurate citations to the record. Wis. Stat. § 809.19(1)(d); SCR 20:3.3(a)(1). Further, the State objects to any reference

[1] For example, he cites M.B.'s testimony regarding her employment at Fox Crossing since May 2016 as "(61:56)," however, that portion of her testimony is actually at R.61:55. He also cites the verdict as being read at "61:77," but that occurred at R.61:215 and the written verdict is R.41. This is only a small sample of the errors in citations.

made to facts not supported by the record as it relates to Winnebago County Case Number 2018CF509 (*see* Defendant's Brief (DB):4 (page); 28-29), which is a wholly independent case and not a part of the record in the case at hand. The State also objects to any reference made to additional facts not supported by the record, specifically, the restraining order hearing from February 2018 (DB:29.), and the judicial commission trial (DB:28-29.), neither of which were part of the record in the case at hand. Appellate review is limited to the record before the appellate court. *State v. Sahs*, 2013 WI 51, ¶ 50, 347 Wis. 2d 641, 832 N.W.2d 80.

On September 30, 2019, a jury trial[2] was conducted in Winnebago County Case Number 2019CM347, presided over by the Honorable Guy Dutcher. The parties stipulated to several facts which were entered into the record. (R. 17.) The stipulation included that the injunction ordered in Winnebago County Case No. 2018CV102 was valid since June 19, 2018 and included the condition that "[a]ll communications between Respondent and Petitioner shall be limited to what is necessary to perform the functions of the Village of Fox Crossing Municipal Court." (R. 17.) The injunction also

[2] As in the defendant's brief, the State is only including facts as they pertain to Count One as Counts Two and Three resulted in not guilty verdicts.

stated, "[c]ommunications 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." (R. 61:124.) The stipulation also included the facts that the defendant knew the injunction existed and he was present at the June 19, 2018 hearing. (R. 17.)

Mandy Bartelt (hereinafter referred to as M.B.) testified first, stating that she was the petitioner in 18CV102 and that her former boss, the defendant, was the respondent. (R. 61:58.) She testified that she was employed as the Fox Crossing Municipal Court Manager since 2016 and the defendant was the elected Municipal Court Judge. (R. 61:55-56.) She testified that in a typical month, a municipal court judge for Fox Crossing is in the office for approximately five hours and never sits at the desk located in their small shared office. (R. 61:57.)

M.B. testified that on July 2, 2018, she came to work and saw a poster on the defendant's desk. (R. 61:60.) This poster (R. 28.[3]) contained a page from the municipality's sexual harassment policy and had the word "sexual"

[3] Index No. 28 (State's Exhibit 2) can be found in the State's appendix on page 103. However, the version that the defendant attached to his brief (DB:105) does not appear to match the Court's copy. The State is confused as to why the defendant might choose to manufacture this exhibit, but the content of the defendant's version is still accurate from the State's perspective.

highlighted on it seven times. (R. 61: 60.) This poster was hung on the cabinet, within view of the customer service window. (R. 61: 61.) There was also another poster (R. 27.) on the defendant's desk which had a picture of the village manager on it. M.B. testified that the defendant had never posted any portion of the village handbook prior to this date. (R. 61:67.) The defendant later testified that he had never posted any other chapters from the village personnel manual. (R. 61: 151-152.) M.B. testified that she did not believe that the poster (R. 28.) was necessary for her to do her job. (R. 61: 74.) M.B. stated that as an employee of Fox Crossing, she was subject to the personnel manual. (R. 61:79.) M.B. believed that the defendant was sexually harassing her, though she did not accuse him of that officially. (R. 61: 82-83.)

Detective Captain David Mack also testified about his investigation into the July 2, 2018 incident. He testified about his interview with the defendant during which the defendant 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. (R. 61:88.) The defendant admitted to highlighting the document. (R. 61:88.) When asked if the defendant gave any other reason for posting Chapter 27, Captain Mack

stated that no other reasons were given. (R. 61:88.) The defendant told Captain Mack that he did not intend for the village manager poster, which had been brought to the office at the same time as the Chapter 27 poster, to communicate anything to M.B. and agreed it was unprofessional and unrelated to court functions (R. 61:89-91.)

Captain Mack testified that he reviewed a document submitted to the Wisconsin Supreme Court by the defendant, which stated, in part:

> "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 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." (R. 61: 90-91; R. 31.)

Captain Mack introduced at trial the transcript of the June 19, 2018 hearing in Winnebago County Case Number 2018CV000120, reading the following statement from Judge Stengel:

> "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." (R. 61:95; R. 32.)

Further, Captain Mack read the following exchange from the transcript between Judge Stengel and M.B.'s attorney, Attorney Eiden, into the record:

> "JUDGE STENGEL: I know what was issued in terms of the temporary restraining order. Mr. Eiden, how do 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." (R. 61: 98.)

The defendant also testified at trial. He stated that he had been a JAG officer from June 1978 until July 1, 2007. (R. 61: 121.) He stated that he had been a municipal judge since May 1, 1997. (R. 61: 122.) He had been an attorney for about forty years as well. (R. 61:147.) He testified repeatedly about his ability and expertise in interpreting court orders. (R. 61: 121-122; 125; 126; 144-145; 146; 159; 163-164.) The defendant testified that he believed he understood the order although there was some vagueness in the language. (R. 61:126.)

The defendant further testified that the Village had a Human Resources Department and it was their job to educate employees on policies and handbooks. (R. 61: 151.) The defendant believed it was also the responsibility of an employee's supervisor to ensure that the employee is educated on the personnel manual. (R. 61: 151.)

The defendant testified that he did not believe that posting Chapter 27 (R. 28) violated the restraining order. (R. 61:145.) He testified that he reviewed the draft copy of the restraining order as well as the Wisconsin Circuit Court Access Program (CCAP) entry prior to deciding to post Chapter 27 in the Municipal Court office. (R. 61: 142; 159.)

Immediately after the verdict, finding the defendant guilty of Count One and not guilty of Counts Two and Three, the Court proceeded to sentencing. M.B. addressed the Court. (R. 61:225-227.) The Court also reviewed her Victim Impact Statement. (R. 5; R. 61-225.) The State recommended probation. (R. 61:229.) A social media post made by the defendant in August 2019 was read 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." (R. 61-232.)

The defense requested two days jail, as time served, and court costs. (R. 61:233.) Finally, the defendant addressed the Court, indicating that this was a nasty personnel situation. (R. 61: 233.) He stated that he felt bad about M.B. and her reaction to "this stuff." (R. 61:234.) He stated that he feels as though this was, and still is, an overreaction on M.B.'s part. (R. 61-234.)

In imposing sentence, the Court stated that M.B. was not overreacting and the defendant had, in fact, terrorized her over the last two years. (R. 61:237.) The Court stated that even after the Court Commissioner ordered the original restraining order, the defendant stuck his middle finger up at the Court Commissioner in requesting a *de novo* hearing. (R. 61:239.) The Court explained, that while the defendant had the right to a *de novo*, in the face of these facts, it is "demonstrative of the fact that you just weren't getting and were not appreciating the overwhelming message that [M.B.] was sending to you." (R. 61:239.) The Court expressed surprise and disdain at

the defendant's August 2019 Facebook post, viewing it as a message about M.B. and this situation. (R. 61:241-242.) The Court viewed the defendant's testimony that he claimed to have interpreted the order to allow this conduct as less than credible. (R. 61:242.) The Court stated "It's time for somebody to call bullshit, and that's me." (R. 61:242.) The Court imposed a six month jail sentence, but stayed that and placed the defendant on probation for one year. (R. 61:245.) The Court ordered conditions of probation including a prohibition on making any Facebook communications and any type of social media postings. (R. 61:245.) The Court also ordered no contact with M.B., her immediate family, or the Village of Fox Crossing Municipal Building. (R. 61-245-246.)

ARGUMENT

A. THE RESTRAINING ORDER WAS NOT AMBIGUOUS AS TO WHETHER THE CONDUCT IN COUNT ONE VIOLATED THE ORDER AND PROSECUTION OF THE DEFENDANT FOR THAT VIOLATION DID NOT VIOLATE DUE PROCESS.

"A collateral attack is an 'attempt to avoid, evade or deny the force and effect of a judgement in an indirect manner and not in a direct proceeding prescribed by law and instituted for the purpose of vacating, reviewing, or annulling it.'" *Schramek v. Bohren*, 145 Wis.2d 695, 713, 429 N.W.2d 501, 508 (Ct.App.1988). Attacking the validity of the injunction is a collateral

attack under *Schramek*. *Id.* This is specifically prohibited by *State v. Bouzek,* 168 Wis.2d 642, 484 N.W.2d 362, which holds that a person convicted of violating a harassment injunction may not collaterally attack the validity of the underlying injunction in a subsequent criminal prosecution for its violation. Neither *Bouzek* nor *Schramek* made any exceptions for constitutional challenges. Rather, they permitted collateral attacks only when the injunction was obtained by fraudulent means.

The question as to whether the order was violated and whether the defendant knowingly violated the order was appropriate for the jury to consider, as these questions directly related to the elements of the crime. It is not proper, under *Bouzek*, for the defendant to pursue a collateral attack after conviction for violation of the injunction.

In the case at hand, the defendant does not claim that the injunction was fraudulently obtained. Thus, the defendant cannot now collaterally attack the injunction's validity. This is especially true since during the jury trial the defendant argued that the order was not violated or, in the alternative, if it was violated, he did not knowingly violate it. Additionally, many times within the defendant's trial testimony, he personally attested to his ability to understand and interpret court orders and this injunction in particular. (*See*

R. 61: 121-122; 125; 126; 144-145; 146; 159;163-164.) This testimony contradicts the defendant's assertion that the injunction was ambiguous.

The defendant also alleges that the order in Winnebago County Case Number 2018CV000102 was not entered in the circuit court until July 2, 2018. It is unclear why he brings this up, as he does not directly argue why that is relevant. Regardless, the defendant stipulated at jury trial that the injunction was valid since June 19, 2018 and that he was present at the injunction hearing on that date. Evidence presented at the jury trial showed that at this June 19, 2018 hearing, Judge Stengel orally ruled that, as it relates to this injunction, "[t]his 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." (R. 61:91.) Under *State v. O'Dell*, 193 Wis.2d 333, 532 N.W.2d 741, oral remarks made by a judge relating to the scope of an injunction issued under Wis. Stat. § 813.125 modify the terms of the written order. Therefore, the evidence shows that the injunction permitted only communications between the defendant and M.B. which were "necessary to the functioning of the municipal court," but also that the contact and conduct must only be that which is "absolutely necessitated through the course" of

his employment. There is nothing vague or ambiguous about this court order; and even if there was, collaterally attacking this order is not permitted under *Bouzek.*

B. THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT TO SUPPORT A GUILTY VERDICT AS TO COUNT ONE

The standard for reviewing the sufficiency of evidence is highly deferential to a jury's verdict and requires that no reversal occur "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). Further, if "[r]easonable inferences drawn from the evidence can support a finding of fact and, if more than one reasonable inference can be drawn from the evidence, the inference which supports the finding is the one that must be adopted...." *Johnson v. State,* 55 Wis.2d at 147, 197 N.W.2d 760, *quoting Bautista v. State,* 53 Wis.2d 218, 223, 191 N.W.2d 725 (1971). Additionally, the trier of fact is free to choose the weight to give evidence which can support contrary inferences. *Poellinger*, 153 Wis. 2d 493, 506, 451 N.W.2d 752, 757. It is even permissible for the trier of fact

to, "within the bounds of reason, reject that inference which is consistent with the innocence of the accused." *Id.*

As it applies to this case, the jury heard testimony from M.B., law enforcement officers, and the defendant. Their credibility was assessed by the jury. The defendant claims that the evidence of whether his conduct violated the harassment injunction was insufficient to prove his guilt beyond a reasonable doubt. However, this statement does not account for the extensive evidence supporting the fact that no part of posting of the Sexual Harassment policy was for a legitimate purpose and was, in fact, a direct violation of the injunction.

To start, despite the defendant's trial testimony that he posted this section for the purpose of educating his employee, the evidence showed that this explanation was not previously made to law enforcement at the time of his arrest. When asked by law enforcement about why he hung up this poster, he did not claim that it was to educate an employee. (R. 61:91.) Rather, the evidence showed that the defendant's true intent in hanging up this poster was to "subtly suggest to [M.B.] that she might want to reassess her thinking" regarding the negotiations with the Village. (R. 61:88.)

In further support, on cross examination, the defendant admitted that he had never posted any other portion of the municipality's personnel manual. (R. 61:151-152.) He also acknowledged that the Human Resources Department has the responsibility to ensure that employees understand and comply with the personnel manual. (R. 61:151.) There is no dispute that the defendant is not part of the Village's Human Resources Department.

The evidence further showed that in posting this single page from Chapter 27, the defendant highlighted, in yellow, the word "sexual" seven times. (R. 61:60; 88; 91 and R. 28.) There can be no rational basis for his behavior if the defendant's argument is that this was an educational tool. As it relates to the defendant's intent or state of mind when posting Chapter 27, it is relevant to consider the fact that he displayed at the same time he brought the village manager poster, which even the defendant admitted was a "jab" at the village manager, unprofessional, and unrelated to court functions. (R. 61:89-90.)

Finally, as to the element of knowing his conduct violated the restraining order, the evidence was overwhelmingly sufficient to show that the defendant was an experienced attorney, former JAG officer, and former municipal judge with an ability to understand and interpret court orders. (R.

61:121-122; 125; 126; 144-145; 146; 159; 163-164.) With those experiences, the defendant certainly knew that his conduct violated the order and the jury had sufficient evidence to so find.

Therefore, taking all of the evidence regarding the violation of restraining order in Count One in a light most favorable to the State and conviction, the evidence was sufficient to support a verdict of guilty.

C. THE TRIAL COURT APPROPRIATELY EXERCISED ITS DISCRETION IN SETTING PROBATION CONDITIONS WHICH PROHIBITED THE DEFENDANT FROM POSTING ON SOCIAL MEDIA AND FROM ENTERING THE FOX CROSSING MUNICIPAL BUILDING

1. The court properly exercised its discretion and did not rely upon inaccurate information when sentencing the defendant.

The defendant properly cites the appropriate standard of review regarding the discretion a sentencing court has in setting conditions of probation. He takes issue primarily with the Court's finding that M.B. did not overreact to the defendant's conduct in Count One. The defendant does note that he believes that the conditions of probation are appropriate only if the Court really believed that M.B. did not overreact. During its sentencing remarks, the Court spent quite a lot of time discussing why it believed M.B.'s reaction was appropriate under the circumstances and why the defendant's

failure to recognize this fact was so concerning. It is clear from the record that the Court sincerely believed that M.B.'s reaction was legitimate and, therefore, the conditions put in place were appropriate.

2. The probation conditions of no social media posting and no contact with the Fox Crossing Municipal Building are not overly broad and are reasonably related to the defendant's rehabilitation.

As was addressed in the above section, the Court found M.B.'s reaction to the defendant's actions to be credible and reasonable. M.B. was employed as Municipal Court Manager at the time of sentencing. Additionally, the harassment injunction was still in place, prohibiting contact between the defendant and M.B. unless said contact was related to functioning of the Fox Crossing Municipal Court. Thus, a ban on contact with the Fox Crossing Municipal Court, where M.B. worked, for the duration the term of probation was certainly appropriate given the facts of the case and to accomplish the Court's goals at sentencing.

As far as this condition interfering with the defendant's civic duties, the defendant cites *Krebs v. Schwarz*, 212 Wis.2d 127, 131, 568 N.W.2d 26 (Wis.App. 1997), for the premise that a condition of probation may impact an offender's constitutional rights so long as the condition is not overly broad

and is reasonably related to his rehabilitation. This case involves a municipal court judge who ignored a valid court order and specifically violated the injunction. His actions around this time ultimately led to the Wisconsin Supreme Court suspending him from office. (R. 17.) Thus, as the Court stated at sentencing,

> "[y]ou've basically thumbed your nose at the court order that was issued. You've thumbed your nose at the Wisconsin Supreme Court. You've thumbed your nose at everybody at the Village of Fox Crossing, because you think you are better, and you are smarter, and it's for you to determine what is right and what is wrong, and all of the rest of them are simply overreacting." (R. 61:244.)

The Court concluded by stating that since no one else has been able to get the message through to the defendant, the Court had the obligation to do so, in imposing probation with these conditions. (R. 61:244-245.)

It is somewhat concerning that the defendant, in his appellate brief, goes into detail about how he knows when M.B. is working, what type of vehicle she drives, and where she parks said vehicle. (DB:36-37.) In light of these circumstances, a condition that he have no contact with the Municipal Building is not only appropriate, but also essential to the defendant's rehabilitation.

Regarding the prohibition on social media posting, the Court heard that a mere six weeks before trial, the defendant had posted a message specifically related to the case at hand on his Facebook account. (R. 61:226, 227, 232.) M.B. also made reference to the defendant's posting on social media about her in her Victim Impact Statement. (R. 5.) It was appropriate and related to the defendant's rehabilitation to limit his ability to post on social media, if for no other reason than it could prevent future violations of the injunction. It should also be worth noting, that the defendant is not prohibited from having social media accounts; the prohibition is only on his ability to post on social media accounts. It does not prevent his ability to write letters to the editor, send mail to family or friends, or email his favorite non-profits. For that reason, and under all of these circumstances, a prohibition on social media posts is reasonably related to the defendant's rehabilitation and is narrow in scope.

CONCLUSION

For the reasons set forth above, due process was not violated in prosecuting based upon the language of the restraining order, evidence presented at trial was sufficient to support a guilty verdict, and the conditions of probation were reasonable and appropriate under the circumstances.

Dated at Oshkosh, Wisconsin on this ___ day of May, 2020.

By:_____

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4,001 words.

I further 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 pursuant to Wis. Stat. § 809.19(b)(12)(f) that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

I further certify that on the date of signature I routed the enclosed briefs to our office station for first class US Mail Postage to be affixed and mailed to:

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Dated this __ day of May, 2020 at Oshkosh, Wisconsin by:

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