COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2527 **Cir. Ct. No. 2014CV188**

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

JENNA L. SCHMITZ,

PETITIONER-RESPONDENT,

V.

GARY R. SCHMITZ,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Shawano County: JAMES R. HABECK, Judge. *Affirmed*.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Gary Schmitz appeals an order enjoining him from harassing or intimidating his ex-daughter-in-law, Jenna Schmitz. Gary argues the injunction petition was vague and the evidence at trial was insufficient. He also requests a new trial in the interests of justice. We reject his arguments and affirm.

¶2 Geoffrey Schmitz and Jenna divorced in early 2014. Gary was authorized by the family court to facilitate child placement transfers. On August 25, 2014, Jenna filed an injunction petition in circuit court, alleging in the form petition as follows:

> Gary Schmitz through texts, phone calls and face-to-face meetings continually creates a hostile environment where he verbally harasses and threatens me, Jenna Schmitz. This is on-going and has happened on several occasions. I have felt so threatened by his actions that I have called the police, for fear of my safety. Even after being warned to stop the harassment by Brown County Officers he continues to follow me during child custody exchanges swearing … calling me a "piece of shit" mom and "fat ugly bitch" in front of my 2 & 3 yr. old and blocking me in the doorway of the backseat of my car to scream at me and threaten me further. I have requested several times for Gary to not be present at exchanges and to stop calling and texting me and my family. He continues his means of intimidation and harassment.

¶3 Following a trial on September 3, 2014, the circuit court granted an injunction. This appeal follows.

¶4 Gary argues the injunction petition was so vague that he was unable to understand the nature of the claims and present a defense. Due process requires notice that "reasonably convey[s] the information required for parties to prepare their defense and make their objections." *See* ***Bachowski v. Salamone***, 139 Wis. 2d 397, 412, 407 N.W.2d 533 (1987). In ***Bachowski***, our supreme court addressed the general harassment statute, WIS. STAT. § 813.125,[1] and concluded a petition that complied with § 813.125(5)(a) "would provide adequate notice."[2] ***Id.***

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] WISCONSIN STAT. § 813.125(5)(a) provides, as relevant:

(continued)

at 412-13. Jenna's petition identified facts which constitute the type of acts that must be alleged under § 813.125(5)(a).[3] At trial, Gary presented direct evidence in response, and he fails to provide sufficient argument about evidence he was unable to present due to a lack of notice. We decline to undo the results of the trial based on Gary's allegations of vagueness of the harassment petition.

¶5 The evidence was also sufficient to support the injunction. Under WIS. STAT. § 813.125(4)(a)3., a court may grant an injunction ordering a person to cease or avoid harassment of another if it finds "reasonable grounds to believe" that the person has "engaged in harassment with intent to harass or intimidate the petitioner." As relevant to this appeal, harassment is defined as follows: "Engaging in a course of conduct or repeatedly committing acts which harass or intimidate another person and which serve no legitimate purpose." WIS. STAT. § 813.125(1)(b). Whether acts or conduct are done for the purpose of harassing or intimidating is a determination that must be left to the fact finder, taking into account all the facts and circumstances. *See* ***Bachowski***, 139 Wis. 2d at 408.

¶6 This case turned on credibility. Jenna testified regarding a course of conduct or repeated acts of harassment and intimidation, and the circuit court found Jenna credible. The credibility of witnesses and conflicts in the testimony

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(a) The petition shall allege facts sufficient to show the following:

1. The name of the person who is the alleged victim.

2. The name of the respondent.

3. That the respondent has engaged in harassment with intent to harass or intimidate the petitioner.

[3] There is no indication in the record that Gary was precluded from conducting pretrial discovery.

are resolved by the trier of fact, not this court. *See* ***State v. Owen***, 202 Wis. 2d 620, 630, 551 N.W.2d 50 (Ct. App. 1996).[4]

¶7 Gary insists he "had legitimate purposes of coming into contact with [Jenna]." As the circuit court properly observed, "clearly there is a legitimate purpose for Gary Schmitz to be present at these different things. There is authorization [from] the family courts for exchanges and those kinds of things ... it's not that part that's at issue." However, conduct or repetitive acts that are intended to harass or intimidate do not serve a legitimate purpose. The court found Gary's harassing or intimidating conduct "would not be justified even if you are authorized to be present at a child exchange." The court properly exercised its discretion in granting the injunction.

¶8 Gary is also not entitled to a new trial in the interests of justice. The record reveals that the real controversy has been tried and justice has not miscarried. *See* WIS. STAT. § 752.35. Gary insists the circuit court improperly limited his cross-examination of Jenna. Gary also claims the court improperly limited his testimony and his right to introduce evidence. However, the court exercised reasonable control over the mode and order of witnesses and the

[4] In this regard, we note Jenna testified regarding a dispute with Gary in a gas station parking lot on Father's Day: "He came up to the car, like, demanded I roll my window down. I would not roll my window down, and then he just started screaming at me from outside the car." Gary testified under oath in open court that "I never got out of my truck. I never walked over to her car." Jenna had recorded on her cellphone a portion of this incident, which recording was played in court. Although the videotape was not entered into the record, the court noted after playing the videotape, "All right. So he walked by it. It did appear he had some kind of papers." It is reasonable to infer from the court's comments the videotape showed that Gary got out of his truck and walked over to Jenna's vehicle, contrary to his sworn testimony in court. In addition, Gary failed to refute Jenna's contention in her response brief that the videotape contradicted Gary's testimony that he never got out of his truck, and therefore we consider the issue conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

presentation of evidence in order to ascertain the truth, avoid needless consumption of time, and protect the witnesses from harassment or undue embarrassment. *See* WIS. STAT. § 906.11. The court also properly exercised its discretion in controlling repetitive, irrelevant and hearsay testimony.

¶9 In this regard, we note Gary did not identify at trial specific witnesses who would testify on his behalf, nor how such witnesses would testify if called. Gary's complaints that he was prevented from calling witnesses with important evidence under these circumstances will not be considered at this time, as such allegations are largely speculative and self-serving. Furthermore, although Gary complains that he had a "tape recording that would have contradicted [Jenna's] testimony," he failed to make an offer of proof concerning its purported contents.

¶10 Finally, Gary contends, without support, the circuit court "appeared to prejudge this case and to show bias against Gary." We reject this serious allegation as unwarranted. We also reject as unsupported Gary's assertion that the circuit court's clerk "rudely replied" to a request to determine how much time had been set aside for trial.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.