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January 21, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2013AP2040-CRNM State of Wisconsin v. Bruce R. Peterson (L.C. # 2012CM174)

Before Lundsten, J.

Bruce Peterson appeals a judgment convicting him, following a jury trial, of violating a harassment injunction. Attorney Steven Grunder has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14)[1]; ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403

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

N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the sufficiency of the evidence to support the verdict; whether there are any issues that would support a motion for a new trial; and whether there is any basis to challenge the imposition of probation. Peterson was sent a copy of the report, and has filed a response addressing his right to confrontation; whether the injunction was unconstitutionally vague; selective prosecution and/or prosecutorial bias; and the terms of his probation. Upon reviewing the entire record, as well as the no-merit report and response, we conclude that there are no arguably meritorious appellate issues.

Sufficiency Of The Evidence

We begin by addressing whether there is any non-frivolous basis to challenge the sufficiency of the evidence, both because discussing the evidence produced at trial places many of the other potential issues in context, and because a successful claim on that issue would result in a vacation of the conviction and directed verdict for acquittal rather than a retrial.

The general test for sufficiency of the evidence is whether the evidence is "'so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (quoting ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)). With respect to the charge in this case, the elements the State needed to prove were that: (1) an injunction had been issued against Peterson in favor of the petitioners; (2) Peterson had violated the terms of the injunction; and (3) Peterson knew both that the injunction had been issued and that his actions violated its terms. *See* WIS. STAT. § 813.125(4) and (7) (2009-10); WIS JI—CRIMINAL 2040.

The State introduced a certified copy of a harassment injunction that barred Peterson from having any contact with his former sister-in-law J.L.O.,[2] her three children, or any of the petitioners' "significant others" "via mail, phone, e-mail, myspace, or any other form of electronic communication," and further directed Peterson to avoid the petitioners' residences, schools, places of employment, sporting events, church, or any other place where Peterson would have reason to believe any of the petitioners might be present. The exhibit satisfied the first element of the offense.

J.L.P. was one of the children identified in the harassment injunction. J.L.P. testified that she had been dating C.F. pretty steadily, with some on-and-off-again periods, for about six years. J.L.P. stated that she was with C.F.—during a period when they were actively dating and seeing each other daily—when C.F. received a Facebook text message on his cell phone from Peterson. C.F. and J.L.P. both identified an exhibit as an accurate photographic screen capture of the text message, which stated:

> You are on my [brother's] friend list, as well as my [nephew's] friend list. According to my brother, you are no longer dating his daughter and that this situation is more than 1 year old. He also stated that you read my FB page irregularily [sic]. Like most brothers, he tells me a lot of personal information—and sometimes gets the story wrong.
>
> If his information is incorrect, please disreguard [sic] this email and no further emails will be sent by me.
>
> As an adult friend of the family, if you want to be on my friend's list, please send me a friend request. I will be making all my FB stuff about my family "for friend's only" soon. Nobody can see my friend's list unless they are already on my friend's list.

[2] At the time the injunction was issued, J.L.O.'s initials were J.L.P. We will use the initials J.L.O. to take into account J.L.O.'s subsequent marriage to differentiate her from her daughter, whose initials are also J.L.P.

> I have 2 college degrees and am attempting to get my teaching licenses renewed. I am listed on DPI's license look-up page. I am attempting to enroll in the spring and take 6 graduate credits.
>
> Neither this email nor a FB frienship [sic] require the approval or permission of my brother's ex-wife, or any court. I am assuming this FB belongs to you. I am assuming that you do not live in Waupaca County and that you will not open it there.
>
> Best wishes! Bruce

J.L.P.'s testimony that she had been dating C.F. for six years was sufficient evidence from which the jury could reasonably conclude that C.F. was her significant other, and the exhibit of the text message was sufficient to establish that Peterson had electronically contacted C.F. This evidence satisfied the second element of the offense.

As to the third element, the jury could reasonably infer from the content of the text message itself that Peterson was aware of the injunction. Specifically, Peterson's assertion that he did not require the approval of his brother's ex-wife or the court to send the text—assuming that C.F. did not live in Waupaca County and would not open the text message there—demonstrates his knowledge of the existence and terms of the injunction.

Peterson argues in his response to the no-merit report that he reasonably believed that the term "significant others" applied only to couples who were living together. He did not, however, offer any testimony or other evidence to that effect at trial. Rather, the jury could reasonably infer from Peterson's suggestion—that C.F. could disregard the text message if it was incorrect that C.F. was "no longer dating" J.L.P.—that Peterson understood that C.F. would be considered a "significant other" if he was still dating J.L.P.

Next, Peterson relies on his own assertion in the text message that his brother had told him that J.L.P. and C.F. were no longer dating, as well as C.F.'s "single" Facebook status, to

show that he lacked knowledge that C.F. was J.L.P.'s significant other. C.F. acknowledged that he had never changed his Facebook status from "single" to "in a relationship," explaining that it was "really not that important" to him because he only used his Facebook account to keep in touch with friends. However, J.L.P. testified that C.F. had accompanied her to family events attended by her father, including her father's birthday and sister's wedding, in the months prior to the text message, and that she did not recall having told her father anything that would have led him to believe that she and C.F. had broken up. C.F. similarly testified that he and J.L.P. had been dating "[m]ore on than off" for years, that their relationship was "[v]ery strong" in the year preceding the text, and that he had been to multiple family events at which J.L.P.'s father was present during that time frame.

It was for the jury to determine whether or not J.L.P.'s father had in fact told his brother that C.F. and J.L.P. were no longer dating and what, if any, significance to attribute to C.F.'s Facebook status. We are satisfied that J.L.P. and C.F.'s testimony that J.L.P.'s father had no reason to believe—and therefore no reason to tell Peterson—that they had broken up provided a sufficient evidentiary basis for the jury to disbelieve Peterson's assertion in the text message and to conclude that Peterson knew that C.F. was J.L.P.'s significant other.

Validity Of The Injunction

Peterson filed a pretrial motion arguing that the term "significant other" was not defined in the injunction and was unconstitutionally broad. He renews that argument in his response to the no-merit report. However, the law is clear that a defendant cannot collaterally challenge the validity of a harassment injunction in a subsequent criminal prosecution for its violation. ***State v.***

Bouzek, 168 Wis. 2d 642, 643-45, 484 N.W.2d 362 (Ct. App. 1992). It would be frivolous to raise an issue that would be outside the scope of an appeal from his criminal conviction.

Prosecutorial Bias And Selective Prosecution

Peterson contends that the district attorney was biased against him because J.L.O. worked in the district attorney's office, and that prosecuting Peterson, without also prosecuting his brother for giving a false statement to police, constituted selective prosecution.

A defendant advancing a selective prosecution claim must show that he or she has been singled out for prosecution while others similarly situated have not (discriminatory effect) and that the prosecutor's discriminatory selection was based on an impermissible consideration, such as race, religion, or another arbitrary classification (discriminatory purpose). ***State v. Kramer***, 2001 WI 132, ¶18, 248 Wis. 2d 1009, 637 N.W.2d 35. Here, Peterson's brother was not similarly situated to Peterson because he was not the subject of an injunction, and there is no indication that the district attorney decided to prosecute based upon an impermissible consideration. Furthermore, we are not aware of any conflict of interest statute or other legal authority that would mandate the appointment of a special prosecutor in these circumstances.

Confrontation Of Witnesses

Peterson contends that his Sixth Amendment right to confront the witnesses against him was violated because neither J.L.O. nor the investigating police officer testified. This argument is frivolous because the State did not present into evidence any statements made by either person. Therefore, neither person acted as a "witness" against Peterson, and Peterson had nothing to cross-examine either one about.

Terms Of Probation

The circuit court withheld sentence and imposed one year of probation, subject to sixty days of conditional jail time—fifty days of which was stayed. As conditions of probation, the court directed that Peterson would be prohibited from using a computer without advanced permission from his agent, and that he must perform a combined total of 40 hours of work or community service each week. Peterson complains about the conditions but does not cite any legal authority that would prohibit them. We note that the prohibition on Peterson's computer usage was directly linked to the crime of conviction, which involved the use of Facebook, and that maintaining employment or performing community service are both standard conditions of probation. In any event, we agree with counsel that any issue regarding the terms of probation is moot, since the term of probation has now run.

Conclusion

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

IT IS ORDERED that the judgment of conviction is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Steven Grunder is relieved of any further representation of Bruce Peterson in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals