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DISTRICT II

February 9, 2022

To:

Hon. Anthony G. Milisauskas
Circuit Court Judge
Electronic Notice

Christopher William Rose
Electronic Notice

Petitioner

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County
Electronic Notice

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

2020AP2045 Petitioner v. Christopher Bernau (L.C. #2020CV733)

Before Gundrum, P.J., Neubauer and Kornblum, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Christopher Bernau appeals from a circuit court order enjoining him under WIS. STAT. § 813.125 (2019-20)[1] from harassing Petitioner and from having any contact with her. Petitioner did not successfully file a respondent's brief, and we have decided this appeal without a brief from her. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We reject Bernau's claim that the order is unsupported by sufficient evidence, and we affirm.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

On August 7, 2020, Petitioner commenced this proceeding pro se by filing a petition for a harassment injunction against Bernau under WIS. STAT. § 813.125.

At the hearing on the petition, Bernau did not testify. Petitioner testified as follows. On July 8, 2020, Petitioner was in Marengo, Ohio, with her parents and a group involved in a trap shooting event. She was the event photographer. At 9:30 p.m., she was editing photos in her cabin when she heard someone trying to open the door. She unlocked the door and saw that it was Bernau, a long-time family friend. Bernau said he could not find Petitioner's father anywhere. Bernau asked her if he could use her bathroom, to which Petitioner replied, "Sure." Petitioner heard Bernau going through her belongings in the bathroom.

Petitioner then resumed editing photos while sitting at a table with a bench seat situated adjacent and perpendicular to a wall. After Bernau came out of the bathroom, he "flipped" her hair. She "asked him what he was doing." In response, Bernau asked Petitioner about a tattoo of a date on the back of her neck, and Petitioner told him it was her son's birthday.

Bernau then walked around and sat down next to Petitioner on the bench seat by the table, blocking her from getting out. After he had blocked her in, Petitioner continued editing pictures. Bernau told Petitioner she was "so hot," and she ignored him. He then asked her how old she was. She responded that she was 28 years old, and he indicated he liked women "a little bit older." She started to get "really uncomfortable" and so she said they should go outside. Bernau responded, "No."

Bernau then told Petitioner "he had a better idea." He picked up her hand and tried to hold it. She pulled her hand back. He then began groping her upper thigh. Petitioner said, "[N]o."

In the meantime, Petitioner had texted her stepmother—"Please help me." About a minute later, just as Bernau was groping Petitioner's upper thigh, her stepmother walked in. Bernau then left the cabin. Petitioner called the police.

The circuit court granted a four-year injunction. The court found Petitioner's testimony credible. The court rejected Bernau's argument that there was consent on behalf of Petitioner. The court stated, "Everything that the petitioner did was to send the message to the respondent that she did not want to have any contact with this individual." The court found that Petitioner let Bernau in "because he [was] a friend of her father." It would be "normal" to let him use the bathroom. The court then noted that Bernau's conduct in flipping her hair and talking about her age were "building up to something." Then, Bernau "block[ed] her in where she [could not] freely move in a room." While she was "not allowed to move," Bernau then started holding her hand and began rubbing her upper thigh. The court found these "facts show a threat. He's not letting her leave. He's touching her, he's blocking her, and he starts going towards her upper thigh." The court noted that there could be a threat or attempt of sexual assault under the harassment statute. The court found Bernau's conduct amounted to an attempt or a threat of physical contact.

Whether to grant an injunction is within the circuit court's discretion. ***Welytok v. Ziolkowski***, 2008 WI App 67, ¶23, 312 Wis. 2d 435, 752 N.W.2d 359. We will uphold the circuit court's factual findings unless they are clearly erroneous. ***Id.*** Whether those findings meet the legal standard for issuing an injunction is a question of law that we decide independently. ***Id.***

To grant an injunction under WIS. STAT. § 813.125, the circuit court must find "reasonable grounds to believe that the respondent has engaged in harassment with intent to harass or intimidate the petitioner." Sec. 813.125(4)(a)3. Section 813.125(1)(am)1. defines the offense of "harassment" as "[s]triking, shoving, kicking or otherwise subjecting another person to physical contact; engaging in an act that would constitute abuse under [WIS. STAT. §] 48.02(1), sexual assault under [WIS. STAT. §] 940.225, or stalking under [WIS. STAT. §] 940.32; or attempting or threatening to do the same." Under § 813.125(1)(am)2., harassment also occurs when one "[e]ngag[es] in a course of conduct or repeatedly commit[s] acts which harass or intimidate another person and which serve no legitimate purpose."[2]

Bernau argues that the evidence is insufficient to support the harassment injunction. Bernau relies on ***Bachowski*** for the proposition that "single isolated acts do not constitute 'harassment'" under WIS. STAT. § 813.125(1)(am)2., and its counterpart in WIS. STAT. § 947.013(1m)(b). *See* ***Bachowski v. Salamone***, 139 Wis. 2d. 397, 408, 407 N.W.2d 533 (1987) (citation omitted). He further argues that an "immature, immoderate, rude or patronizing manner which annoys another is not enough." *See* ***id.*** at 407 (citation omitted). We are not persuaded by Bernau's rendering of the undisputed evidence as an isolated act of mere bothersome or annoying behavior.

[2] WISCONSIN STAT. § 947.013 also defines the offense of "harassment." In § 947.013(1m)(a), a violation occurs when one "[s]trikes, shoves, kicks or otherwise subjects the person to physical contact or attempts or threatens to do the same." In § 947.013(1m)(b), a violation occurs when one "[e]ngages in a course of conduct or repeatedly commits acts which harass or intimidate the person and which serve no legitimate purpose." These provisions typically apply when an individual has violated a harassment injunction, and the issue is whether a crime has thereby been committed. As does Bernau and the cases upon which he relies, we turn to the definition of "course of conduct" set forth in § 947.013(1m)(b).

A "[c]ourse of conduct" is a "pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose." WIS. STAT. § 947.013(1)(a); ***Welytok***, 312 Wis. 2d 435, ¶25.[3] Looking to a recognized dictionary, the supreme court observed that "[h]arass" means "to worry and impede by repeated attacks, to vex, trouble or annoy continually or chronically, to plague, bedevil or badger" and "[i]ntimidate" means "to make timid or fearful." ***Bachowski***, 139 Wis. 2d at 407 (citations omitted). WISCONSIN STAT. § 813.125(1)(am)2. further requires that the acts serve no legitimate purpose. "Whether acts or conduct are done for the purpose of harassing or intimidating ... is a determination that must of necessity be left to the fact finder, taking into account all the facts and circumstances." ***Bachowski***, 139 Wis. 2d at 408.

We conclude that the facts of this case satisfy the statutory definitions of "harassment" and "course of conduct." This was not a single act. We again note that, under WIS. STAT. § 947.013(1)(a), a "[c]ourse of conduct" is a "pattern of conduct composed of a series of acts over a period of time, *however short*, evidencing a continuity of purpose." (Emphasis added.)

Here, Bernau engaged in an escalating course of conduct evidencing a continuity of purpose—to intimidate with threatening behavior that the court found was leading to unwanted

[3] WISCONSIN STAT. § 813.125 previously provided that a court could issue an injunction under § 813.125 if it found "reasonable grounds to believe that the respondent has violated [WIS. STAT. §] 947.013." WIS. STAT. § 813.125(4)(a)3. (2003-04). This provision was modified by 2005 Wis. Act 272, § 2, to remove the reference to § 947.013 and to instead provide, as it now does, that a court may issue an injunction under this statute if it "finds reasonable grounds to believe that the respondent has engaged in harassment with intent to harass or intimidate the petitioner." Sec. 813.125(4)(a)3. Nonetheless, we rely on the definition of "course of conduct" from § 947.013(1)(a) and cases interpreting the earlier versions of § 813.125 because there is no definition of that phrase within § 813.125 and courts may interpret statutory terms and phrases "in relation to the language of closely related statutes and how the court had interpreted those terms prior to the legislature enacting the statute in question." *See* ***United Am., LLC v. DOT***, 2021 WI 44, ¶6, 397 Wis. 2d 42, 959 N.W.2d 317 (citations omitted).

sexual contact. Bernau provided a pretext for entering Petitioner's cabin. He ignored her nonverbal and verbal rebuffs, her lack of engagement in response to his attempt to have a conversation, and then moved on to sexual suggestions—touching her hair, commenting that she was "so hot," and indicating his preferences regarding a woman's age. He then blocked her into a bench seat next to a table. When she asked to go outside, he said no. Then, when he grabbed her hand, she pulled it away. Undeterred, Bernau then began rubbing her upper thigh. She said no. Bernau only stopped when Petitioner's stepmother interrupted him. Again, this was not an isolated act, but a clear course of conduct composed of a series of acts—increasingly aggressive and predatory behavior—evidencing a continuity of purpose.

For the same reasons, we reject Bernau's suggestion that his behavior was merely annoying or immature and his continued suggestion that Petitioner somehow consented by failing to be more verbal in rebuffing his advances from the outset. As did the circuit court, we reject Bernau's contention that there was insufficient evidence to find that Bernau intended to harass or intimidate Petitioner. For purposes of WIS. STAT. § 813.125(1)(am)2., intent means "that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." *See* WIS. STAT. § 939.23(4). Intent is nearly always proven by circumstantial evidence and by inference from the acts and statements of the person and the circumstances. ***W.W.W. v. M.C.S.***, 185 Wis. 2d 468, 489, 518 N.W.2d 285 (Ct. App. 1994). If the circuit court's inference on this factual issue is reasonable, we must accept it, even if other inferences are also reasonable. ***Id.***

Here, the evidence allowed the circuit court to reasonably infer that Bernau intended to harass and intimidate Petitioner. Again, the court noted Bernau's unwanted escalating advances, stopped by the entrance of Petitioner's stepmother. We conclude that reasonable grounds

support the court's conclusion that Bernau engaged in a course of conduct which harassed or intimidated Petitioner and which served no legitimate purpose.

Moreover, Bernau ignores that this incident involved unwanted physical contact with Petitioner, as the circuit court found. Under WIS. STAT. § 813.125(1)(am)1., harassment also means "[s]triking, shoving, kicking or otherwise subjecting another person to physical contact; engaging in an act that would constitute abuse under [WIS. STAT. §] 48.02(1), sexual assault under [WIS. STAT. §] 940.225, or stalking under [WIS. STAT. §] 940.32; or attempting or threatening to do the same." While Bernau relies on ***Bachowski*** for the proposition that "single isolated acts" do not constitute harassment, that case addressed the predecessor statute, which contained the same language of § 813.125(1)(am)2., defining harassment as a "course of conduct" or repeated acts. *See* ***Bachowski***, 139 Wis. 2d at 407 (citation omitted). Here the applicable provision is § 813.125(1)(am)1., which addresses physical behavior without the qualifications in § 813.125(1)(am)2. Consequently, the statute plainly allows an injunction for even one incident of physical contact or an attempt or threat to do the same, where intent to harass or intimidate is found. No other reasonable interpretation of this subdivision is available. Bernau's acts of unwanted physical contact, particularly his groping Petitioner's upper thigh, were therefore also sufficient to warrant issuing the injunction.[4]

[4] While Bernau contends that there is no crime of attempted fourth-degree sexual assault under WIS. STAT. § 940.225(3m) (generally, sexual contact without consent, including intentional touching of another's intimate parts for purposes of sexually degrading or humiliating the other, or sexually gratifying the defendant), we agree with the circuit court that a harassment petition is not a criminal proceeding. To the extent that the circuit court concluded that Bernau would have continued with his unwanted touching and was stopped by the entrance of Petitioner's stepmother, the harassment statute clearly and plainly encompasses a threat or attempt. However, given our disposition set forth above, we need not reach this issue. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (if we resolve an appeal based on one issue, we need not decide the other issues).

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals