**COURT OF APPEALS
DECISION
DATED AND FILED**

November 19, 2008

**David R. Schanker
Clerk of Court of Appeals**

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP2732-CR

Cir. Ct. No. 2006CF15

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL J. PECK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed*.

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. A jury convicted Daniel J. Peck of three counts of identity theft, finding that he engaged in conduct intended “to harm the reputation, property, person, or estate” of his ex-wife, contrary to WIS. STAT. § 943.201(2)(c)

(2005-06).[1] Peck argues on appeal, as he did on motions after verdict, that the word "harm" is unconstitutionally vague and that the State failed to prove that he intended to harm his ex-wife's reputation, property, person or estate. The trial court denied his motions, concluding that the jury permissibly gave the word its ordinary meaning, and that the evidence was sufficient. We agree and affirm.

¶2 Peck and Barbara Robinson divorced in October 2004.[2] In the spring of 2005, Robinson, a teacher, received by mail an unsolicited twenty-volume set of books on the Civil War. Then unsolicited magazines began arriving, up to three or four a week. They included *Playboy*, *Hustler*, *Deer Hunter*, *Ebony*, *North American Wildlife*, *U.S. News*, *Newsweek*, *American Woodworker, Runner's World, Golf Digest* and *Wired*.

¶3 Robinson next discovered that she was subscribed to an adult-themed matchmaking website through her personal e-mail account. An e-mail from the site informed her that her profile was approved and all the site's members could view and respond to it. It also advised her of her sexually explicit username to access her profile and those of other members. Robinson's profile contained her correct birth date, height and bust size. The gist of her posting was that a female couple was advertising for an Asian lesbian lover. When Robinson discovered the posting, she found that a woman already had responded to it.

¶4 The adult website subscription and the mailings coincided with some vandalism to Robinson's yard, so she contacted the police. Robinson told an

[1] All references to the Wisconsin Statutes are to the 2005-06 version.

[2] Robinson's surname now is Cesarec. We will use Robinson, the name used in the complaint and information.

investigating officer that she feared being home alone because she thought the person responsible might be stalking her. The police obtained copies of the subscription cards that launched the delivery of the Civil War books and two magazines, *Golf Digest* and *Wired*. The cards bore Robinson's correct name, address and telephone number and one bore her forged signature. Robinson recognized the handwriting as Peck's. Feeling "extremely distraught," "threatened" and "violated" by Peck's actions, Robinson told family members so that "if something ever happened to me they knew that he was targeting me."

¶5 In January 2006, the State charged Peck with one count of identity theft. Peck admitted to police that he filled out and mailed the subscription cards with Robinson's information and created the profile associated with Robinson's e-mail address and provided it to the adult website. Peck told the investigating officer that he did it to "get under [Robinson's] skin" and "make her life as miserable as she made mine." The State filed a four-count[3] information alleging that Peck intentionally used Robinson's personal identifying information without her consent for the purpose of harming her reputation. On the day before trial, the court permitted the State to amend the information to include intent to harm Robinson's property, person or estate. *See* WIS. STAT. § 943.201(2)(c). Peck objected on grounds that amending so close to trial would prejudice the defense and that "harming another's 'person' is vague [and is] undefined in the statutes."[4] The court denied Peck's motion.

[3] Three counts related to the publication subscriptions for which the police obtained subscription card copies. The other related to the online subscription.

[4] Peck does not renew his prejudice argument on appeal.

¶6 At trial, the court instructed the jury according to WIS. JI—CRIMINAL 1458, which tracks WIS. STAT. § 943.201(2).[5] During deliberations, the jury sent out a note: "Jury would like to use a dictionary." The court declined access to any reference materials and advised them to continue deliberating using the jury instructions. An hour later, the jury sent out another note: "The jury would like a legal definition of the word 'harm' and miserable." The court and counsel discussed a response, but before they could send a reply, the jury returned guilty verdicts on three of the counts and a not-guilty verdict on the count relating to *Golf Digest*. The court denied Peck's post-verdict motions challenging the constitutionality of the statute and the sufficiency of the evidence.

¶7 On appeal, Peck contends the statute is unconstitutionally vague as to the word "harm." We begin by emphasizing that we presume a statute to be constitutional and the challenger must prove it unconstitutional beyond a

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[5] WISCONSIN STAT. § 943.201(2)(c) provides in relevant part:

> **943.201 Unauthorized use of an individual's personal identifying information or documents.**
>
> ….
>
> **(2)** Whoever, for any of the following purposes, intentionally uses … any personal identifying information or personal identification document of an individual … without the authorization or consent of the individual and by representing that he or she is the individual, that he or she is acting with the authorization or consent of the individual, or that the information or document belongs to him or her is guilty of a Class H felony:
>
> ....
>
> (c) To harm the reputation, property, person, or estate of the individual.

reasonable doubt. ***State v. Wickstrom***, 118 Wis. 2d 339, 351, 348 N.W.2d 183 (Ct. App. 1984). We resolve any doubt in favor of constitutionality. ***State v. Quintana***, 2008 WI 33, ¶77, 308 Wis. 2d 615, 748 N.W.2d 447. Whether a statute is unconstitutionally vague is a question of law. ***State v. Jensen***, 2004 WI App 89, ¶13, 272 Wis. 2d 707, 681 N.W.2d 230, *aff'd*, 2005 WI 31, 279 Wis. 2d 220, 694 N.W.2d 56 (per curiam).

¶8 Vagueness essentially is a procedural due process concept driven by notions of fair play. ***State v. Ruesch***, 214 Wis. 2d 548, 561, 571 N.W.2d 898 (Ct. App. 1997). Thus, a statute is void for vagueness if it lacks fair notice of the prohibited conduct and an objective standard for enforcement of violations. ***Id.*** A statute is not unconstitutional, however, merely because it fails to define all its terms or "because the boundaries of the prohibited conduct are somewhat hazy." ***State v. McCoy***, 143 Wis. 2d 274, 286, 421 N.W.2d 107 (1988) (citation omitted). It must be so vague and uncertain that it is impossible either to implement or to make out the legislative intent with reasonable certainty. *See* ***State ex rel. Smith v. City of Oak Creek***, 139 Wis. 2d 788, 802, 407 N.W.2d 901 (1987).

¶9 A threshold question is whether WIS. STAT. § 943.201(2)(c) clearly proscribes Peck's conduct. *See* ***City of Milwaukee v. K.F.***, 145 Wis. 2d 24, 33-34, 426 N.W.2d 329 (1988). If it does, he lacks standing to challenge the statute as unconstitutionally vague. *See* ***id.*** at 34.

¶10 To convict Peck of identity theft, the State had to prove that Peck (1) intentionally used Robinson's personal identifying information (2) for the purpose of harming her reputation, property, person, or estate (3) by intentionally representing that he was Robinson (4) without her consent. *See* WIS JI-CRIMINAL 1458. Peck challenges only the second element, asserting that

"harm" is unconstitutionally vague. He contends that the record bears out his claim of vagueness because the jury asked first for a dictionary and then for legal definitions of "harm" and "miserable."

¶11 We disagree. The record does not reveal why the jury requested a dictionary. Speculation will not support a finding of unconstitutionality. *See* ***Wisconsin Prof'l Police Ass'n v. Lightbourn***, 2001 WI 59, ¶188, 243 Wis. 2d 512, 627 N.W.2d 807. As to the definition of "harm," granted, the legislature left it undefined. As a non-technical word, however, it can be given its "common and approved usage." *See* WIS. STAT. § 990.01(1). Accepted dictionaries define the verb form of "harm" similarly: "(1) to cause hurt or damage to: injure." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1034 (1993). In any event, the jury answered its own question, confirming that it needed no further explanation.

¶12 Moreover, Peck focuses too narrowly on the single word "harm." The statute does not require proof of harm, but of *intent to harm* through certain specified conduct. A reasonable interpretation is that the legislature was less concerned with imagining and limiting the various types of harm that could flow from the relatively new crime of identity theft than it was with preventing the conduct. A statute must be sustained as constitutional if we can conceive of any reasonable basis for the statute. ***Quintana***, 308 Wis. 2d 615, ¶77.

¶13 The jury was entitled to infer Peck's intent to harm from his conduct. *See* ***State v. Drusch***, 139 Wis. 2d 312, 326, 407 N.W.2d 328 (Ct. App. 1987) (stating that intent may be inferred from conduct and the general circumstances of the case). The jury could infer that Peck intended to harm Robinson financially, reputationally and personally. The numerous publications had associated financial

obligations if she did not undertake the potentially onerous task of cancelling the subscriptions. Enrollment in the adult website offended her personally and came with conceivable reputational ramifications, given her profession as a teacher. The website subscription on her personal e-mail account coupled with the mysterious arrival of publications—not all as innocuous as *Golf Digest*—at the home where she lived alone plausibly could cause fear or emotional harm. Indeed, thinking someone might be stalking her, she contacted the police. Such inferences are strengthened by Peck's admission that he wanted to make Robinson's life "miserable." We conclude that WIS. STAT. § 943.201(2) proscribes Peck's conduct with sufficient clarity despite lacking a specific definition of "harm." Peck lacks standing to challenge it as unconstitutionally vague.

¶14 Peck next contends that insufficient evidence supports the jury verdict. An appellant attacking a jury verdict on grounds of insufficiency of the evidence has a heavy burden because the rules governing our review strongly favor the verdict. ***State v. Allbaugh***, 148 Wis. 2d 807, 808-09, 436 N.W.2d 898 (Ct. App. 1989). Evidence is insufficient to support a conviction only if, when viewed most favorably to the State, it is so insufficient in probative value and force that we can say as a matter of law that no reasonable trier of fact could have found guilt beyond a reasonable doubt. ***State v. Booker***, 2006 WI 79, ¶22, 292 Wis. 2d 43, 717 N.W.2d 676. Only the trier of fact may resolve conflicts in the testimony, weigh the evidence and draw reasonable inferences from the facts. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990).

¶15 Peck challenges the evidence relating only to one of the four elements the State had to prove: intent to harm Robinson. He argues that the only piece of evidence the State offered in that regard was his confession that he wanted to "get under her skin" and "make her life … miserable." Evidence that he

tried to *annoy* her, he asserts, does not constitute evidence either of an intent to *harm* her or of actual harm.

¶16 We reject that argument. We already have determined that the consequences flowing from Peck's conduct amounted to "harm" within the meaning of WIS. STAT. § 943.201(2)(c). Juries often must infer intent which, by its very nature, rarely is susceptible of proof by direct evidence. ***State v. Williams***, 2002 WI 58, ¶79, 253 Wis. 2d 99, 644 N.W.2d 919. The jury reasonably could have inferred that Peck intended reputational harm to Robinson, a schoolteacher who, according to the profile Peck created, was seeking a lesbian *ménage-a-trois*. Robinson's first initial, last name and her city formed part of her e-mail address at the time, and Peck used that address and her name to set up the profile.

¶17 The jury also reasonably could have inferred that Peck intended emotional harm. Robinson, who lived alone, began getting unsolicited subscriptions to her home and personal e-mail account from an unknown source. Her name and address were correct. She worried she might be being stalked, and grew afraid to be home alone.

¶18 Another reasonable inference was that Peck intended to cause Robinson to expend time, energy and potentially money to end the subscriptions. In fact, Robinson testified that it took "quite a bit of effort" to stop the magazines:

> [O]ne [magazine] would come, and then it would take hours and hours to contact the company to have them stopped. Meantime the bills would come for that one. And then another one would come. And it just seemed like one right after another was coming …. Even [with the involvement of the police] sometimes the magazines would not be cooperative, and so the magazines would still keep coming …. Even after I wrote letters and talked to the publisher they still would come. Came to a point that I had to get a post office box because it was so stressful every time I went and got my mail. And then the invoices started

> coming so the bills started coming as well, and I was afraid for my credit rating.

¶19 The State contends Peck "had to know" his actions would burden Robinson. Peck responds that the State's assumption easily could "swing the other way" because Robinson might simply have discarded the unwanted items and marked "Cancel" on the invoices. Perhaps so. But the jury was free to choose among conflicting inferences of the evidence and, within reason, to reject an inference consistent with Peck's innocence. *See* ***Poellinger***, 153 Wis. 2d at 506. Robinson's testimony is not incredible as a matter of law. Therefore, although the record supports more than one inference, we must accept and follow the inference the jury drew. *See* ***id.*** at 506-07.

¶20 Peck also argues that the State offered no evidence of actual harm to Robinson. The State did not have to. Actual harm is not an element of WIS. STAT. § 943.201(2). Nevertheless, as discussed above, Robinson was "extremely distraught." She spent considerable time and effort to terminate the subscriptions, had to rent a post office box and enlisted the aid of the police to resolve the matter. The evidence was sufficient to support the guilty verdicts.

By the Court.—Judgment affirmed.

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