COURT OF APPEALS
DECISION
DATED AND FILED

March 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0279-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DALE R. RAPEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS and JOHN A. FRANKE, Judges. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

WEDEMEYER, P.J. Dale R. Rapey appeals from a judgment of conviction for violating § 940.32(2), STATS., Wisconsin's "Anti-Stalking" statute,[1]

[1] The Wisconsin stalking statute, § 940.32, STATS., provides:

(continued)

(1) In this section:

(a) "Course of conduct" means repeatedly maintaining a visual or physical proximity to a person.

(b) "Immediate family" means a spouse, parent, child, sibling, or any other person who regularly resides in the household or who within the prior 6 months regularly resided in the household.

(c) "Labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employe.

(cg) "Personally identifiable information" has the meaning given in s. 19.62 (5).

(cr) "Record" has the meaning given in s. 19.32 (2).

(d) "Repeatedly" means on 2 or more calendar days.

(2) Whoever meets all of the following criteria is guilty of a Class A misdemeanor:

(a) The actor intentionally engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to himself or herself or a member of his or her immediate family or to fear the death of himself or herself or a member of his or her immediate family.

(b) The actor has knowledge or should have knowledge that the specific person will be placed in reasonable fear of bodily injury to himself or herself or a member of his or her immediate family or will be placed in reasonable fear of the death of himself or herself or a member of his or her immediate family.

(c) The actor's acts induce fear in the specific person of bodily injury to himself or herself or a member of his or her immediate family or induce fear in the specific person of the death of himself or herself or a member of his or her immediate family.

(2m) Whoever violates sub. (2) is guilty of a Class D felony if he or she intentionally gains access to a record in electronic format that contains personally identifiable information regarding the victim in order to facilitate the violation under sub. (2).

(3) Whoever violates sub. (2) under any of the following circumstances is guilty of a Class E felony:

(a) The act results in bodily harm to the victim.

(b) The actor has a previous conviction under this section or s. 947.013 (1r), (1t), (1v) or (1x) for a violation against the same victim and the present violation occurs within 7 years after the prior conviction.

(3m) Whoever violates sub. (3) under all of the following circumstances is guilty of a Class D felony:

(a) The person has a prior conviction under sub. (2), (2m) or (3) o[f] this subsection or s. 947.013 (1r), (1t), (1v) or (1x).

(b) The person intentionally gains access to a record in order to facilitate the current violation under sub. (3).

(continued)

and from an order denying postconviction motions. Rapey raises two claims of error: (1) the statute is constitutionally infirm because it is vague and overbroad, and it violates his right to intra-state movement; and (2) he was denied effective assistance of trial counsel. Because the statute clearly defines the behavior forbidden, providing fair notice of the same, and does not infringe upon constitutionally protected activities, and because Rapey received effective assistance of trial counsel, we affirm.

I. BACKGROUND

The State charged Rapey with the crime of stalking his wife, Ann Rapey, in violation of § 940.32(2), STATS., at her home address, over a three-week period between September 6, 1994, and September 26, 1994. Ann had filed for divorce from Rapey in July 1994, and Rapey had moved out of the home on

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> **(4)** (a) This section does not apply to conduct that is or acts that are protected by the person's right to freedom of speech or to peaceably assemble with others under the state and U.S. constitutions, including, but not limited to, any of the following:
>
> 1. Giving publicity to and obtaining or communicating information regarding any subject, whether by advertising, speaking or patrolling any public street or any place where any person or persons may lawfully be.
> 2. Assembling peaceably.
> 3. Peaceful picketing or patrolling.
>
> (b) Paragraph (a) does not limit the activities that may be considered to serve a legitimate purpose under this section.
>
> **(5)** This section does not apply to conduct arising out of or in connection with a labor dispute.
>
> **(6)** The provisions of this statute are severable. If any provision of this statute is invalid or if any application thereof is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.

For a review of the prototype version, *see* Robert P. Faulkner & Douglas H. Hsiao, *And Where You Go I'll Follow: The Constitutionality of Anti-Stalking Laws And Proposed Model Legislation,* 31 HARV. J. ON LEGIS. 1, 50-61 (1994).

August 15, 1994. The Rapeys had been married for nine years and had two daughters, ages seven and five.

Trial was to the court. Ann testified that Rapey had hit her twice in the past in 1986 and in 1990 or 1991, that he threatened to kill her if he ever found her with anybody else, and that when, in July 1994, while they were camping, she told him she had filed for divorce, he told her to get in the truck or he was "going to rip [her] a new asshole." Ann indicated that she was very scared and thought she was going to die that night. She further stated that before Rapey moved out in August 1994, he became very angry, doubled up his fist, punched the side of the refrigerator, shook his fist at her and said "you are this close."

After Rapey moved out, Ann said she obtained a restraining order which was good for two years.[2] Despite this, she saw Rapey just about every day. He would drive into the apartment complex where she lived, park where everyone could see him and just sit there, watching her apartment or her, if she were outside. She said that she was scared that Rapey would hurt her if she were ever alone. She told the court about one time in particular when she got a call from the apartment manager informing her that Rapey was in a neighbor's apartment watching her with binoculars through her kitchen window. She said that he would drive by at night with the lights off on his truck just so that he could get by her apartment without her noticing. She testified that she was scared, could not sleep and was constantly looking out her window to see if Rapey was watching her. She

[2] The restraining order required that Rapey: (1) "avoid the petitioner's residence and/or any premises temporarily occupied by the petitioner now and in the future"; and (2) "avoid contacting, or causing any person other than a party's attorney to contact, the petitioner unless the petitioner consent in writing. Contact includes contact at work, school, public places, by phone or in writing."

was afraid of him and afraid of what he might do if he got mad enough. She also testified that on more than ten occasions, Rapey had threatened to take their daughters and disappear.

James Borden testified that between August 15, 1994, and September 26, 1994, he would stay with Ann in her apartment until 11 p.m. or 12 a.m., until she was confident that Rapey was not coming. He indicated that during this time, he personally observed Rapey quite often; that Rapey was in and out of the apartment complex at all hours of the night. He testified that he saw Rapey sitting in his truck watching Ann's apartment.

Officer Jeff Johnson testified on behalf of the State and said that on September 26, 1994, Ann entered the lobby of the police station and informed him that, despite an active restraining order against Rapey, he was following her from the grade school where she had just dropped off her child. He testified that Ann was crying and shaking. He also stated that approximately thirty minutes later, Rapey entered the same station and wanted to file a complaint against Ann.

Rapey testified on his own behalf and admitted hitting Ann in 1987. He testified that he never threatened her. He said that he looked into Ann's apartment on approximately five occasions to observe his daughters and that since the divorce filing, he has returned to the apartment complex to visit friends who lived there.

The trial court found Rapey guilty of the stalking charge. Rapey filed postconviction motions challenging the constitutionality of the stalking statute and alleging that he received ineffective assistance of trial counsel. The

trial court conducted a ***Machner*** hearing,[3] and then denied both motions. Rapey now appeals.

II. DISCUSSION

A. Constitutional Challenge.[4]

Rapey contends that § 940.32, STATS., is both unconstitutionally "vague" and "overbroad," and impinges on his freedom of movement. The constitutionality of a statute presents a question of law that we review independently. *See* ***State v. McManus***, 152 Wis.2d 113, 129, 447 N.W.2d 654, 660 (1989). When assessing the constitutionality of a statute, we acknowledge the strong presumption that a legislative enactment is constitutional. *See* ***State v. Cissell***, 127 Wis.2d 205, 214, 378 N.W.2d 691, 695 (1985). The party advancing a constitutional challenge bears an awesome burden. It is not enough to simply raise substantial questions as to the act's constitutionality nor is it sufficient to establish the unconstitutionality of the act as a probability. Unconstitutionality of the act must be demonstrated beyond a reasonable doubt. "Every presumption must be indulged to sustain the law if at all possible and, wherever doubt exists as to a legislative enactment's constitutionality, it must be resolved in favor of constitutionality. This court has often affirmed the well-established presumption of constitutionality that attaches itself to all legislative acts." ***State ex rel.***

[3] *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[4] The trial court considered only the constitutional "vagueness" challenge to the statute because Rapey inadequately briefed/developed his other arguments. Under the rubric of administration of justice wholeness, however, we shall address not only the challenge of vagueness but also the overbreadth and freedom of movement challenges.

Hammermill Paper Co. v. La Plante, 58 Wis.2d 32, 46, 205 N.W.2d 784, 792 (1973).

VAGUENESS

Rapey's first challenge to the constitutionality of the statute is that the language is unconstitutionally vague. He contends that its definition of "stalking" causes one to indulge in guesswork as to its meaning and applicability. This court recently rejected a vagueness challenge to the anti-stalking statute. *See* ***State v. Ruesch***, 214 Wis.2d 547, 571 N.W.2d 898 (Ct. App. 1997). We specifically held that the statute provides "fair notice" about what conduct it proscribes. *See* ***id.*** at 560-62, 571 N.W.2d at 904-05. We are bound by that holding.

OVERBREADTH

Rapey next contends that the statute is overbroad as it would cause a chilling effect on the freedoms of assembly, association and speech. Specifically, he argues the statute would force anyone who may be disdained or disliked by another person to avoid that person at nearly all cost. Thus, he contends that he has to avoid a large apartment complex based upon what his mere presence may mean or induce in the mind of the victim. We reject his claim.

"A statute is overbroad when its language, given its normal meaning, is so sweeping that its sanctions may be applied to constitutionally protected conduct which the state is not permitted to regulate." ***Bachowski v. Salamone***, 139 Wis.2d 397, 411, 407 N.W.2d 533, 539 (1987). If the statute prohibits conduct which is constitutionally protected, it is void, even if the offender's own conduct is unprotected and could properly be prohibited by a law which was more

narrowly drawn. *See* ***Milwaukee v. Wilson***, 96 Wis.2d 11, 20, 291 N.W.2d 452, 458 (1980). The evil to be avoided is the prohibition of conduct which includes constitutionally protected activity and the consequent deterrence of that protected activity. *See* ***Bachowski***, 139 Wis.2d at 411, 407 N.W.2d at 539.

If one were to synthesize this statute, it is concerned with "threats" to another by physical presence. Threats have traditionally been punishable without a violation of the First Amendment because implicit in such threats is a reasonable tendency to produce fear in the victim that the threat will be executed. *See* ***Wurtz v. Risley***, 719 F.2d 1438, 1441 (9th Cir. 1983). A true "threat" where a reasonable person would foresee that the listener will believe he or she will be subject to physical violence is not protected by the First Amendment. *See* ***United States v. Merrill***, 746 F.2d 458, 462 (9th Cir. 1984). That a threat is subtle does not make it any less of a threat. *See* ***United States v. Gilbert***, 884 F.2d 454, 457 (9th Cir. 1989). Thus, in the logical order of things, there is no necessity that a "threat" contain a verbal component. The statute speaks only of actions and only of actions that are threatening, i.e., inducing fear. Behavior not threatening from a subjective or objective standpoint is not in jeopardy of prohibition.

Protected expression is not reached by this statute. The statute is not directed at exposition of ideas, but at preventing intolerable behavior which harms another. The zone of conduct that the statute proscribes is clear. It does not "sweep within its ambit actions which are constitutionally protected so as to render it unconstitutionally overbroad." *See* ***Bachowski***, 139 Wis.2d at 411-12, 407 N.W.2d at 539.

FREEDOM OF MOVEMENT

Rapey makes a brief allegation that the stalking statute is unconstitutional because it impinges on his right to move freely about within his neighborhood. We again reject this claim. This same argument was rejected in ***Ruesch***. This court held that the stalking statute does not violate the right to intrastate travel. *See* ***Ruesch***, 214 Wis.2d at 555-60, 571 N.W.2d at 902-04.

B. Ineffective Assistance of Counsel.

Rapey claims that the trial court erred in denying his motion for a new trial based on ineffective assistance of trial counsel. For a defendant to establish a violation of this fundamental right he or she must prove two things: (1) that trial counsel's performance was deficient; and, if so, (2) that this deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 686 (1984); ***State v. Sanchez***, 201 Wis.2d 219, 224, 548 N.W.2d 69, 71 (1996).

A lawyer's performance is not deficient unless errors made were so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *See* ***Strickland***, 466 U.S. at 687. A defendant must show that counsel's representation fell below an objective standard of reasonableness viewed at the time of counsel's performance. A reviewing court should afford counsel's performance a high degree of deference. *See* ***State v. Pitsch***, 124 Wis.2d 628, 636-37, 369 N.W.2d 711, 716 (1985). "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." ***Strickland***, 466 U.S. at 691. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of

counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Id.*** at 689.

"In order to show prejudice the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Sanchez***, 201 Wis.2d at 236, 548 N.W.2d at 76 (citation omitted).

In assessing a claim that counsel was ineffective, a reviewing court need not address both the deficient-performance and prejudice components if the defendant does not make a sufficient showing on one or the other. *See* ***Strickland***, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. Findings of historical fact will not be upset unless they are clearly erroneous, *see* § 805.17(2), STATS., and questions of whether counsel's performance was deficient and, if so, whether it was prejudicial are questions of law given independent review. *See* ***Sanchez***, 201 Wis.2d at 236-37, 548 N.W.2d at 76.

Rapey's ineffective assistance of counsel claim has four parts: (1) failure to object to "other acts" evidence; (2) evoking "other acts" evidence by his own questions; (3) failure to object to the admission of a diary; and (4) failure to move for dismissal at the close of the State's case or at the conclusion of trial.

1. EVIDENCE ADMITTED UNDER RULE 904.04(2), STATS.

Rapey first claims his right to effective assistance of counsel was violated by his counsel's failure to properly object to a substantial quantity of "other acts" evidence that was received into evidence.[5]

To understand the essence of Rapey's contention, one must keep in mind: first, the effective date of § 940.32, STATS.–December 25, 1993; and second, that the alleged course of conduct as stated in the criminal complaint took place between September 6, 1994, and September 26, 1994. Rapey complains that his counsel failed to either object or properly cross-examine a witness testifying to RULE 904.04(2), STATS., acts without specifying the dates the acts occurred, and failed to object if the dates specified fell outside the time frame of the complaint or before the statute became effective.

[5] Rapey sets forth numerous examples of such evidence. We list them for reference purposes: statements attributed to Rapey regarding abducting his children if the victim was found with another man; statement that Rapey would kill the victim if she was found with another man; statements that Rapey hit the victim twice in the past, one event occurring in 1986; statements that Rapey physically harmed the victim in 1990 or 1991; statement that Rapey was going to slap one of his children in 1990 or 1991; statement that Rapey got angry and stated to the victim on July 3, 1994, that he was going to "rip [her] a new asshole"; statement that Rapey punched a refrigerator and shook his fist at the victim on an unspecified date; testimony regarding the victim filing a restraining order and further discussions regarding Rapey being arrested for violating the restraining order; statement that Rapey should have ripped off the face of the victim; speculation from a witness that the words "you're about this close" meant that Rapey was on the verge of "slugging" the victim and that the victim appeared to be frightened; statement that Rapey had grabbed his daughter at least a half dozen times and threw her on a couch; statements that Rapey had, on five previous occasions, slapped his other daughter in the mouth with the back of his hand; statement that if Rapey had missed hitting the refrigerator and struck the victim, it would have caused her harm; statement that in the past Rapey had thrown tools when he was angry; statement that Rapey had engaged in inappropriate discipline of his children; and description of Rapey's arrest history.

Because the nature of each example is not determinative of this appeal, only several examples will be discussed.

Here, in the trial court decision, it is evident that "other acts" outside the time parameters of both the criminal complaint and the effective date of the statute were taken into account in rendering the decision of guilt. The question is was this proper? If not, counsel may have been deficient in his performance and the attendant consequences prejudicial.

Early in the trial, during the direct examination of the victim, defense counsel objected to the admission of "other acts," i.e., incidents between the parties that occurred prior to the enactment of the statute. The trial court overruled the objection. At that juncture, the State volunteered its reason for this line of questioning: "I am offering this evidence to show reasonable fear on the part of the victim." The court responded: "I understand that." There was no further explication. From that point on, the victim testified without objection on direct to at least a dozen incidents of "other acts" directed at her. At the ***Machner*** hearing, trial counsel testified that he did not enter a continuing objection because when the trial court overruled his first RULE 904.04(2) objection, it sent him a message it was admitting such evidence. Consequently, trial counsel concluded that further objections would be of no avail.[6] Retorting, Rapey argues "just given the sheer volume of the [RULE 904.04(2)] evidence that went before the trier-of-fact, unobjected to and extending back over a decade, there is an inherent prejudice which was so serious that it deprived the Defendant of a fair trial." We are not convinced. The challenged evidence was admissible under RULE 904.04(2), thus trial counsel was not deficient in failing to prevent its admission

[6] Rapey faults his trial counsel for failure to bring an "in limine" motion to object to "other acts evidence." At the ***Machner*** hearing, trial counsel recounted that he planned to make two types of RULE 904.04(2) objections: one aimed at any "other acts" that occurred before the effective date of § 940.32, STATS., and the second aimed at "other acts" outside the time frame established in the criminal complaint.

and Rapey's ineffective assistance claim fails regardless of any prejudicial effect of the evidence.

The standards for admission of the challenged evidence is embodied in RULE 904.04(2), STATS., which provides that "evidence of other crimes, wrongs, or acts" may be admissible "when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Doubtless, the type of evidence contemplated by RULE 904.04(2) could come into play in creating the context for a "stalking" determination.

Under RULE 904.04(2), STATS., a defendant's "other acts" directed at a victim could tend to establish a defendant's: (1) intent to stalk that person; (2) intent to intimidate; (3) knowledge that his conduct will place that person in fear; and (4) absence of a mistake or accident. Of equal importance, "bad acts" evidence could be relevant to demonstrate the existence of fear and that the fear is reasonably based. Finally, since most intimidation statutes in their application are circumstance-driven, "other bad acts" logically can be evidence used for a full presentation of the case. *See* ***State v. Pharr***, 115 Wis.2d 334, 343-47, 340 N.W.2d 498, 502-03 (1983); ***State v. Chambers***, 173 Wis.2d 237, 256, 496 N.W.2d 191, 198 (Ct. App. 1992).

After reviewing the testimonial evidence and oral decision of the trial court, it is manifest that the court, in its discretion, wanted to learn of the circumstances that gave rise to the incidents that occurred between September 6 and September 26, 1994, in deciding whether the calls of the statute had been met both from the standpoint of the knowledge of the defendant and the reasonableness

of any fear induced in the victim. Thus, there are several reasons why the evidence was admissible.[7] This claim for ineffectiveness fails.

2. COUNSEL'S OWN QUESTIONS EVOKING "OTHER ACTS."

As part of this same "other acts" objection, Rapey claims ineffectiveness because his very own counsel, in his questioning of witnesses, evoked objectionable "other bad acts."[8] In addressing this issue, we ought not turn our backs on the probability of proofs to be offered and the stratagy of the defense. The very concept of "stalking" reasonably implies some hostility of relationship and competing self-interests. In reviewing the ***Machner*** hearing transcript, it is evident that Rapey and his counsel intended an aggressive defense. Rapey intended to and, in fact, did testify. The tactic of the defense, while conceding that many of the "other acts" occurred, was to cast the "other acts" in a different light in order to demonstrate that it would not be reasonable for the victim to fear Rapey and, in fact, that she did not fear him. This was not an unreasonable strategy. Thus, we conclude that trial counsel's conduct in evoking objectionable "other acts" during questioning of witnesses was not deficient. Because we have concluded that Rapey has failed to prove this conduct constituted deficient performance, we need not address the prejudice prong of the ***Strickland*** test.

[7] Rapey's motion criticizes his trial counsel for failure to seek more specificity as to time and place of some of the "other bad acts." We cannot conclude that this alleged failure constituted ineffective assistance. Counsel's approach in not exploring the "other acts" with greater specificity was a strategy call. Many times the introduction of unfavorable evidence is better left alone rather than highlighting it by clarification.

[8] The list of topics explored by defense counsel that included "other acts" evidence includes Rapey's criminal record, the first restraining order that existed between the parties, punching of the victim during an argument about their children, hitting the refrigerator in a moment of frustration, actions by him after his wife informed him she was seeking a divorce, and evidence that Rapey struck his children.

3. ADMISSION OF DIARY.

Rapey's next claim of ineffective counsel relates to a failure to object to the admission of certain handwritten notes constituting a diary made by the victim, reflecting the relationship of the parties. The nature of Rapey's complaint is not altogether clear. The record clearly indicates that when the State originally offered the diary into evidence, trial counsel reserved objection until after his cross-examination of the victim. When the cross-examination was completed, trial counsel objected to the admission of any part of the diary about which the victim writer had not testified. After some confusing discussion between the parties and the court, the trial court finally received the entire document with the exception of notes entered by a witness, Borden, a boyfriend of the victim.[9] Because of the ambivalent nature of this contention, we could decline to address this issue altogether. *See* ***State v. Pettit***, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992). Nevertheless, because it is such a significant part of Rapey's appeal, we briefly address the issue in terms of prejudice.

Based on the record, the contents of many of the entries became part of the record in testimonial form. As with the oral evidence presented by the State, it was the strategy of the defense to impeach the victim as to many of the entries. Thus, admission of much of the contents was inevitable if the tactic of the defense was to be successful. The mere fact that the tactic may have backfired is irrelevant. We think here the defense "protesteth too much!" There is no prejudice shown.

[9] We note also that when Borden testified for the State and was asked about an entry he had made in the notes, after he indicated that his entry was what the victim told him, trial counsel objected on hearsay grounds, but the objection was overruled.

4. FAILURE TO MOVE TO DISMISS.

Lastly, Rapey contends his trial counsel was ineffective for failing to move for dismissal of the action at the close of the State's case and at the conclusion of trial.

A motion challenging the sufficiency of the evidence may not be granted unless the trial court is satisfied that, considering all credible evidence in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such a party. *See* § 805.14(1), STATS.

This claim is based on what Rapey believes is the absence of evidence to support a finding that two or more incidents took place directed at the victim. The record, however, belies any basis for this claim. The record bowl "runneth over" with evidence that Rapey was seen observing or following the victim as an everyday routine between September 6 and September 26. The evidence came from the direct testimony of the victim and was partly corroborated by neighbors of the victim. This evidence, if believed by the trier of fact, was sufficient to defeat any motion to dismiss. Of importance also was trial counsel's response to why he had not moved to dismiss. He thought that the victim's direct testimony about the actions directed toward her was "powerful" and, as a result, he

could not in good faith move to dismiss. Counsel's assessment was not faulty. His failure to act was not prejudicial.[10]

By the Court.—Judgment and order affirmed.

Recommended for publication in the official reports.

[10] Rapey, in his brief, includes an additional ground for reversal that the trial court erred in denying a motion for a new trial because of ineffective assistance of counsel. We regard this contention as repetitive or subsumed in our disposition of his claim that he should be granted a new trial for ineffective assistance of counsel. Zero plus zero equals zero!

SCHUDSON, J. *(concurring).* Although I believe the majority has reached the correct conclusions in this case, I do not join in the opinion or agree that it merits publication. *See* RULE 809.23(1), STATS.

In numerous ways that, hopefully, need not be detailed, the majority opinion fails to reflect the careful preparation, research and reasoning required in a case of this nature. Thus, it stands in stark contrast to ***State v. Ruesch***, 214 Wis.2d 547, 571 N.W.2d 898 (Ct. App. 1997), in which this court addressed almost all the constitutional issues present here, and did so in a thoughtful and thorough manner.

Stalking statutes have become increasingly important as America's legal systems have struggled to combat violence against women. *See* VIOLENCE AGAINST WOMEN GRANTS OFFICE, U.S. DEP'T OF JUSTICE, DOMESTIC VIOLENCE AND STALKING: THE SECOND ANNUAL REPORT TO CONGRESS UNDER THE VIOLENCE AGAINST WOMEN ACT (1997). States look to each other's statutes and appellate decisions as they attempt to shape laws to both protect citizens and preserve civil liberties. *See* ***id***. Thus, a published appellate opinion on Wisconsin's stalking statute not only sheds light on Wisconsin's efforts, but also offers a beacon for the nation. Unfortunately, however, the majority opinion is so hopelessly lost in fog that it fails to illuminate and, if published, succeeds only in obscuring ***Ruesch***'s clear guidance.