COURT OF APPEALS
DECISION
DATED AND FILED

October 30, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1013-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MAURICE CLARK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: JACK F. AULIK, Judge. *Affirmed.*

DEININGER, J.[1] Maurice Clark appeals a judgment convicting him of violating the terms of a harassment injunction, in violation of § 813.125(7), STATS. Clark claims the trial court should have dismissed the criminal charge because the injunction he was accused of violating was "null and void." He also

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

cites as error the trial court's admission of two threatening letters Clark had written to the victim, which had formed the basis for obtaining the harassment injunction, but which were not the basis for the instant criminal charge. We conclude that the terms of the harassment injunction Clark was accused of violating are not subject to collateral attack in this criminal proceeding, and that the trial court did not erroneously exercise its discretion in admitting the two letters. Accordingly, we affirm the judgment of conviction.

BACKGROUND

Under § 813.125(4), STATS., a person may obtain an injunction ordering an individual "to cease or avoid the harassment of another person," upon a showing that there is reasonable grounds to believe the individual has violated § 947.013, STATS.[2] Christina Weber obtained a harassment injunction against Clark in August 1995, based in part on two letters he had sent her threatening her with bodily harm. Clark was present for the hearing on the issuance of the injunction and did not contest it. The injunction provided that Clark "be enjoined and restrained from: contacting [Weber] in any way in person, in writing or through a third person." The injunction was effective until August 22, 1997.

In April 1996, Clark wrote Weber a letter, characterized by his counsel as "a letter of apology … a love letter." The State charged Clark with violating the harassment injunction.[3] Prior to trial, Clark moved to dismiss the

[2] Section 947.013, STATS., makes it a crime to strike, shove, kick or subject another person to physical contact, or to attempt or threaten to do those things; or to engage "in a course of conduct or repeatedly commit[] acts which harass or intimidate [another] person and which serve no legitimate purpose." Section 813.125(1), STATS., defines "harassment" in a similar manner for purposes of the injunction statute.

[3] The State also charged Clark with bail jumping, of which the jury found him not guilty.

charge on the grounds that the injunction was invalid because it prohibited Clark from having any contact with Weber instead of just enjoining harassing conduct by Clark. The trial court took the matter under advisement and denied the motion following receipt of the guilty verdict. During the trial, over Clark's objection, the court admitted into evidence the two letters Clark sent to Weber in August 1995 which formed the basis for granting the harassment injunction. Clark argued the letters were irrelevant and prejudicial. The court ruled, however, as follows:

> I think that the jury may consider prior conduct of the defendant which caused the issuance of the injunction in determining whether subsequent conduct of the defendant after the injunction is issued does in fact constitute a violation of the injunction, and therefore, [the August 1995 letters] are admitted and received in evidence.

The jury found Clark guilty of violating the harassment injunction. He was subsequently sentenced, as a repeater under § 939.62, STATS., to a term of nine months incarceration, consecutive to a prison sentence he was then serving. The court stayed the sentence and released Clark on bail pending this appeal of his conviction.

ANALYSIS

The legal validity of a harassment injunction, and whether Clark may collaterally attack its terms in the instant criminal proceedings, are questions of law which we decide de novo. *See* ***State v. Jankowski***, 173 Wis.2d 522, 525, 496 N.W.2d 215, 216 (Ct. App. 1992). A trial court's decision to admit or exclude evidence, however, is "a discretionary determination that will not be upset on appeal if it has "'a reasonable basis'" and was made 'in accordance with accepted legal standards and in accordance with the facts of record.'" ***Lievrouw v. Roth***, 157 Wis.2d 332, 348, 459 N.W.2d 850, 855 (Ct. App. 1990) (citation omitted) (quoted source omitted).

Clark argues here, as he did in the trial court, that the terms of the harassment injunction he was accused of violating were improper because all contact and not just harassing conduct was prohibited. *See* ***Bachowski v. Salamone***, 139 Wis.2d 397, 414, 407 N.W.2d 533, 540 (1987) ("Only the acts or conduct which are proven at trial and form the basis of the judge's finding of harassment or substantially similar conduct should be enjoined."). We do not reach this issue, however. ***Bachowski*** was a direct appeal from an order for injunction entered under § 813.125, STATS. ***Id.*** at 403-04, 407 N.W.2d at 535-36. Clark cannot "collaterally attack the validity of the underlying injunction in a subsequent criminal prosecution for its violation." ***State v. Bouzek***, 168 Wis.2d 642, 643, 484 N.W.2d 362, 363 (Ct. App. 1992). Here, as in ***Bouzek***, Clark does not claim that the injunction was fraudulently obtained, did not seek appellate review of its issuance, and in fact, consented to its entry. ***Id.*** at 645, 484 N.W.2d at 364.

Clark cites ***State v. Jankowski***, 173 Wis.2d 522, 496 N.W.2d 215 (Ct. App. 1992), decided after ***Bouzek***, as having modified, or at least confused, the ***Bouzek*** holding. We disagree. In ***Jankowski***, we acknowledged the rule laid out in ***Bouzek***, but pointed out that Jankowski's challenge did not go to the terms of the underlying injunction but to the court's authority to order it. ***Id.*** at 526-27, 496 N.W.2d at 217. Our holding was simply that "[w]hen a court acts in excess of its jurisdiction, its orders or judgments are void and may be challenged at any time." ***Id.*** at 528, 496 N.W.2d at 217. Here, as in ***Bouzek***, but contrary to the collateral attack permitted in ***Jankowski***, Clark seeks to attack what the enjoining court ordered, not that court's authority to enter an order. This he cannot do. ***Bouzek***, 168 Wis.2d at 643, 484 N.W.2d at 363.

In order to properly review the trial court's ruling permitting the State to introduce the August 1995 letters into evidence, we must consider the context in which the ruling was made. In support of his motion to dismiss the criminal charge, Clark had asserted that the enjoining court could only prohibit future harassment, not all contact between Clark and Weber. Thus, he argued, the injunction could not reach a *non*-threatening letter, such as the April 1996 letter for which Clark was charged. The court had taken that motion under advisement before trial. When Clark objected to the State's introduction of the August 1995 letters, the trial court reminded Clark's counsel of her position that a criminal prosecution could only lie where the post-injunction conduct was similar to the harassing conduct upon which the injunction was granted. Counsel attempted to distinguish the elements the State must prove from her prior argument attacking the legal basis for the charge, but the court concluded that the jury should be permitted to consider Clark's prior conduct "in determining whether subsequent conduct of the defendant after the injunction is issued does in fact constitute a violation of the injunction."

Thus, the trial court determined that the earlier letters were relevant to a material issue in the prosecution, and we cannot conclude that this determination represents an erroneous exercise of discretion. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Section 904.01, STATS. The third element of the offense with which Clark was charged requires the State to prove that Clark "knew that his acts violated [the] terms [of the injunction]." *See* WIS J I—CRIMINAL 2040.

During her opening statement to the jury, Clark's counsel told the jurors Clark would not contest the fact that an injunction had been entered and that he knew it, but that:

> [The prosecutor] suggested that the evidence is going to show that Mr. Clark was perfectly aware of what the limitations on his actions in relationship to Ms. Weber were. That's going to be something that's going to be in dispute.
>
> ….
>
> He knew that he could not write threatening letters to Ms. Weber. He had learned that the hard way. He had written her some very inappropriate letters that contained some threats. He knew that that was prohibited at any time under any circumstances.
>
> But the letter that he wrote to her eight months after the injunction was entered was not a threatening letter.
>
> ….
>
> Mr. Clark will tell you that he really did not think he was doing anything wrong when he wrote that letter.

Thus, Clark's knowledge of what constituted prohibited conduct under the injunction and whether he knew that his April 1996 letter was a violation was very much in dispute. The contents of the 1995 letters compared to the content of the April 1996 letter would tend to make Clark's knowledge of a violation in writing the 1996 letter either more or less probable, depending on whether the jury viewed the letters as similar or dissimilar. The trial court did not err in concluding that the earlier letters were relevant to the matter being tried.

While the trial court did not explicitly comment upon the prejudicial nature of the August 1995 letters and whether that might outweigh their probative value, *see* § 904.03, STATS., it is clear from the record that any prejudice to Clark from the introduction of the letters was slight. At the point the letters were admitted, Weber had already testified that, prior to the issuance of the injunction,

Clark had previously called her at work and threatened to have someone beat her up, had made other threats, and had written her threatening letters which concerned her enough that she contacted the police. Clark does not claim on this appeal that the receipt of that testimony was erroneous or prejudicial. As noted above, Clark's counsel herself had told the jury in her opening remarks that Clark had written Weber "some very inappropriate letters that contained some threats." We cannot conclude, therefore, that the admission of the letters themselves was unfairly prejudicial to Clark when repeated references to the letters and his past threatening behavior had already been communicated to the jury. The trial court did not erroneously exercise its discretion in admitting the letters.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)(4), STATS.