COURT OF APPEALS
DECISION
DATED AND FILED

September 29, 2015

Diane M. Fremgen
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. 2015AP77 **Cir. Ct. No. 2013CV11183**

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

ALAN L. KELTNER,

PETITIONER-RESPONDENT,

V.

DANIEL JOSEPH MILLER,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Daniel Joseph Miller appeals from an order granting Alan L. Keltner a harassment injunction against Miller. Miller challenges the sufficiency of the evidence and the circuit court's findings of fact, as well as its conclusion that "Miller's conduct constituted harassment that could be properly

enjoined under [WIS. STAT.] § 813.125" (2013-14).[1] Miller also argues that the injunction "effectively prevents [Miller] from exercising his First Amendment rights," "constitutes an impermissible prior restraint on speech," and is "excessively broad." We reject Miller's arguments and affirm the order.

BACKGROUND

¶2 In December 2013, Keltner, who is proceeding *pro se*, petitioned for a harassment injunction against Miller pursuant to WIS. STAT. § 813.125. Keltner is a volunteer at Affiliated Medical Services, a clinic that provides women's health services, including abortions. Keltner escorts women to the door as they approach the clinic. Miller, who opposes abortion, provides sidewalk counseling to those entering the clinic. Keltner's petition alleged that Miller had harassed Keltner by: sending out an email to supporters that called Keltner "one of the vilest, sadistic and most disgusting individuals I have yet to encounter [at the clinic]"; distributing Keltner's home address to Miller's supporters; appearing at Keltner's home on two occasions; videotaping and photographing Keltner; pushing Keltner on two separate occasions; telling the 170-pound Keltner "I hope you lose 150 pounds;" and other actions.

¶3 A court commissioner heard testimony from Keltner and Miller and granted the harassment injunction for a period of four years. Miller requested a *de novo* hearing before the circuit court. The circuit court heard testimony over two days and ultimately granted the injunction. The circuit court's order provided that the terms of the injunction issued in December 2013 would remain in effect.

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

Specifically, Miller was ordered to: (1) "[c]ease or avoid harassment" of Keltner; (2) avoid Keltner's residence "or any premises temporarily occupied by [Keltner], including any place at which [Keltner] volunteers when he is volunteering";[2] and (3) "[a]void contact that harasses or intimidates [Keltner]," including "contact at [Keltner's] home, work, school, public places, in person, by phone, in writing, by electronic communication or device, or in any other manner." This appeal follows.

LEGAL STANDARDS

¶4 Under WIS. STAT. § 813.125(4), a circuit court or circuit court commissioner may grant an injunction ordering a person to cease or avoid the harassment of another if it finds "reasonable grounds to believe that the respondent has engaged in harassment with intent to harass or intimidate the petitioner." *See* § 813.125(4)(a)3. "Such a finding presents a mixed question of fact and law. This court will uphold the factual findings of the circuit court unless they are clearly erroneous … [but] whether reasonable grounds exist to grant the injunction is a question of law that we review *de novo*." ***Board of Regents-UW System v. Decker***, 2014 WI 68, ¶20, 355 Wis. 2d 800, 850 N.W.2d 112 (citations omitted; italics added).

¶5 The term "harassment" is defined in WIS. STAT. § 813.125(1):

> In this section, "harassment" means any of the following:
>
> **(a)** Striking, shoving, kicking or otherwise subjecting another person to physical contact; engaging in an act that would constitute abuse under s. 48.02 (1), sexual assault

[2] The order restated this term slightly differently a second time, indicating that Miller must "avoid[] any place where [Keltner] volunteers when he is actively volunteering there."

> under s. 940.225, or stalking under s. 940.32; or attempting or threatening to do the same.
>
> **(b)** Engaging in a course of conduct or repeatedly committing acts which harass or intimidate another person and which serve no legitimate purpose.

¶6 On appeal, we review a circuit court's decision to grant a harassment injunction, as well as the scope of the injunction, for an erroneous exercise of discretion. ***Welytok v. Ziolkowski***, 2008 WI App 67, ¶¶23-24, 312 Wis. 2d 435, 752 N.W.2d 359. "We may not overturn a discretionary determination that is demonstrably made and based upon the facts of record and the appropriate and applicable law. Also, because the exercise of discretion is so essential to the [circuit] court's functioning, we generally look for reasons to sustain discretionary rulings." ***Id.***, ¶24 (citation omitted).

DISCUSSION

¶7 In this case, the circuit court found that Miller intentionally harassed Keltner in several ways, including: (1) shoving Keltner on September 20, 2013, "causing [Keltner] to lose his balance"; (2) bumping or shoving Keltner on November 15, 2013; (3) stating to Keltner that Keltner "should lose 150 pounds," which the circuit court said was "meant to intimidate or retaliate"; (4) going to Keltner's home and later advising Keltner that he had done so in order "to intimidate him," which the circuit court said was "a part of harassment and for no legitimate purpose"; (5) making a comment to Keltner about dandelions at his home, which the circuit court found was evidence that Miller was "at some point watching Mr. Keltner weed his lawn"; (6) going to Keltner's home a second time, which the circuit court found was "part of a pattern of conduct that exhibits harassment under the statutes"; and (7) posting Keltner's photograph on Miller's Facebook page after the court commissioner had issued the injunction, which the

circuit court said was "more evidence of his harassment and intimidation of Mr. Keltner." The circuit court concluded:

> I do find there are reasonable grounds [for the injunction]. I find that there is clear and convincing evidence to this by the greater weight of the credible evidence. In fact, [it is] this court's finding beyond a reasonable doubt that the shoving did occur and Mr. Miller did shove Mr. Keltner on two occasions.
>
> I also find that stalking as it's defined has occurred as well by Mr. Miller against Mr. Keltner…. There have been a series of acts, two or more, where this was carried out over a relatively short period of time where Mr. Miller engaged in this conduct and by his own admission with the testimony he has given.

¶8 Miller challenges the circuit court's findings on several bases. First, he asserts that the circuit court's "finding that Mr. Miller harassed Mr. Keltner by physically striking or shoving him was clearly erroneous." (Bolding and some capitalization omitted.) Miller argues that Keltner "failed to meet his burden of proof that one of these alleged incidents even occurred and the record of the second incident established that the contact was caused by the aggressive nature of Mr. Keltner, not motivated by any intent to harass Mr. Keltner on the part of Mr. Miller."

¶9 We are not persuaded. Keltner and Miller both testified about the incidents of physical contact and the circuit court explicitly found Keltner's testimony to be more credible. The circuit court also heard testimony from a witness to the second incident, which the circuit court explicitly found "to be credible." That witness said that he saw Miller "bump [Keltner] a little bit, which startled [the witness], because [Miller is] a pretty good sized man, and [the witness

and Keltner] are both pretty small."[3] The circuit court even said that it was "finding beyond a reasonable doubt" that Miller shoved Keltner on two occasions, and it further found that the second shoving incident was part of "a pattern of conduct that exists here." These findings, which are based on testimony and the circuit court's credibility determinations, are not clearly erroneous.

¶10 Miller's second factual challenge is to the circuit court's findings that Miller "harassed Mr. Keltner by stalking and intimidating him." (Bolding and some capitalization omitted.) Although Miller explicitly acknowledges that the circuit court "found that Mr. Miller's testimony regarding these events was not 'credible,'" he nonetheless challenges the circuit court's findings, asserting that those findings "were not supported by the testimony and evidence at the hearing." For instance, Miller points out that Keltner testified Miller told him "so you like to pick dandelions in your yard." Based on that testimony, the circuit court found: "This is not a comment that one normally would make and it's not a comment where Mr. Miller said he just noticed he didn't have any dandelions … and I find it totally unbelievable that he was not at some point watching Mr. Keltner weed his lawn." Miller argues: "The court's findings here are inconsistent with the record and clearly erroneous. In fact, the record establishes that the actual statement made by Mr. Miller to Mr. Keltner was to the effect that he saw that Mr. Keltner's yard 'had no dandelions' – exactly what the court said was not said."

¶11 We have carefully reviewed Miller's challenges to the circuit court's findings, and we are not convinced that the circuit court's findings are clearly

[3] The record indicates that Keltner is five foot, eight inches tall and weighs one hundred and seventy pounds, while Miller is six foot, seven inches tall and weighs two hundred and eighty pounds.

erroneous. Taking the dandelion testimony as an example, the precise words stated were not crucial to the circuit court's finding. Rather, after hearing about the incident from Miller, Keltner, and a witness, the circuit court found that Miller's intent in commenting on the dandelions (or lack thereof) in Keltner's yard was to harass and intimidate Keltner. Miller's own testimony supports that finding. Under questioning from his counsel, he testified as follows:

> [Counsel:] Mr. Keltner also testified about an occasion … where you had indicated to him … that he had dandelions in his yard, more dandelions in his yard; do you recall that testimony?
>
> [Miller:] I do.
>
> [Counsel:] Did you make a comment to him like that?
>
> [Miller:] I did.
>
> [Counsel:] And why did you make that comment?
>
> [Miller:] It was a way to let him know that I knew where he lived.

Based on this testimony, as well as the other testimony offered by Keltner and the witness, the circuit court's findings are not clearly erroneous. *See* ***id.***, ¶27 ("Where … more than one reasonable inference can be drawn from the credible evidence, we accept the reasonable inference drawn by the circuit court sitting as fact finder.").

¶12 In addition to challenging the circuit court's factual findings, Miller argues: "The law does not support the issuance of an injunction based on two extremely minor incidents of physical contact resulting in no injury of any kind and other benign conduct that was engaged in for a legitimate purpose and which was in no way motivated by a desire to harass." Miller has not provided legal support for this argument, and we decline to research the argument for him. *See*

State v. Pettit, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered."). Further, this argument is premised on the assumption that the circuit court's findings are clearly erroneous, which is an assertion we have rejected. The circuit court found that Miller intentionally shoved Keltner on two occasions and engaged in other behavior designed to harass Keltner. Having found "reasonable grounds to believe that the respondent has engaged in harassment with intent to harass or intimidate the petitioner," *see* WIS. STAT. § 813.125(4)(a)3., it was within the circuit court's discretion to issue the injunction, *see* § 813.125(4)(a). We are not persuaded that the circuit court erroneously exercised its discretion.

¶13 Next, Miller presents two constitutional arguments. He argues: (1) "The injunction functions as an unconstitutional prior restraint on expression"; and (2) "The record clearly shows that Mr. Keltner's motive in seeking and enforcing the injunction was not to legitimately prevent harassment of his person, but to censor speech with which he disagreed. This renders the injunction itself unconstitutional." (Some capitalization and bolding omitted.)

¶14 As to the first issue, we agree with Keltner that this issue was not raised in the circuit court and, therefore, we decline to consider it. *See* ***State v. Schulpius***, 2006 WI 1, ¶26, 287 Wis. 2d 44, 707 N.W.2d 495 (appellate courts generally do not review an issue raised for the first time on appeal). While the transcript of the hearing before the circuit court contains several references to free speech (including those offered by Keltner in his testimony), Miller did not argue or provide legal support for an argument that the injunction is an unconstitutional prior restraint on his freedom of expression. Miller's counsel was allowed to offer lengthy argument on a motion to dismiss at the end of Keltner's testimony, but the

closest he came to suggesting there was a constitutional issue at stake came when he said: "[T]his is important work that these people are doing, and under the law if there's a legitimate purpose served by the contact then … an injunction can't be granted." Miller suggests that he was denied the right to present arguments to the circuit court because the court did not invite closing argument, but there is no indication that Miller asked to again make a record or offer a closing argument. Even after the circuit court ruled, Miller did not seek clarification of the ruling or offer an objection on constitutional grounds. Instead, Miller's counsel simply asked about the ultimate disposition of two exhibits that were used during the hearing. No post-hearing motions or briefs were filed. By not raising this constitutional issue at the circuit court, Miller forfeited this issue. *See* ***id.***

¶15 In his reply brief, Miller argues that even if he forfeited this constitutional argument, "the substantial interests of justice would still require this Court to rule in favor of Mr. Miller on this appeal." We are not persuaded. Not only did Miller fail to raise this issue in the circuit court, it is not adequately briefed on appeal. *See* ***Pettit***, 171 Wis. 2d at 646-47. Miller appears to challenge the scope of the injunction, which prohibits contact with Keltner anywhere he is volunteering, but Miller does not offer any analysis of case law concerning harassment injunctions and their scope, and how constitutional principles may affect the legality of harassment injunctions. We decline to develop an argument for him. *See* ***id.***

¶16 The second constitutional challenge Miller raises relates to his opinion about Keltner's motives. He argues that "Keltner's motive in seeking and enforcing the injunction was not to legitimately prevent harassment of his person,

but to censor speech with which he disagreed."[4] (Some capitalization and bolding omitted.) Miller offers no legal authority for the proposition that the petitioner's motives in seeking an injunction are relevant to whether it should be granted and can render an injunction unconstitutional. This argument is inadequately briefed and will not be considered. *See* ***id.***

¶17 For the foregoing reasons, we reject Miller's challenges to the order granting a harassment injunction. The final issue we address is Keltner's motion asking us to find that Miller's appeal is frivolous. We are not convinced that such a finding is warranted. First, while appellants generally face an uphill battle when they challenge findings of fact or a circuit court's exercise of discretion, we are not prepared to find that Miller's assertions of circuit court error were "without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." *See* WIS. STAT. RULE 809.25(3)(c)1. We also note that because Keltner is acting *pro se* on appeal, he would not be entitled to reasonable attorney fees even if this court were to find the appeal frivolous. As the prevailing party, Keltner is entitled to costs as outlined in RULE 809.25(1).

[4] Miller asserts that Keltner has intentionally shown up at the clinic and another clinic in order to force Miller to leave the area. In response, Keltner contends that "Miller's own records show that he did not go to the clinic for only 8 hours over a 5.5 month (165 day) period due to Mr. Keltner's presence." Keltner further asserted that the restraining order simply prevents Miller from being in Keltner's presence, not from speaking. We decline to attempt to reconcile the parties' factual assertions or develop a legal argument for Miller on this issue. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (stating that this court will not address issues on appeal that are inadequately briefed).

By the Court.—Order affirmed.

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