COURT OF APPEALS
DECISION
DATED AND FILED

February 1, 2018

Diane M. Fremgen
Acting 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. 2017AP473 Cir. Ct. No. 2017CV115

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

PETITIONER,

PETITIONER-RESPONDENT,

V.

MICHAEL T. WILLAN,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: CLAYTON PATRICK KAWSKI, Judge. *Affirmed.*

Before Blanchard, Kloppenburg and Fitzpatrick, JJ.

Per curiam opinions 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).

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¶1 PER CURIAM. Michael Willan, pro se, appeals a domestic abuse injunction entered in favor of petitioner Mary.[1] Willan argues that the circuit court made procedural and factual errors when it granted the injunction. We reject Willan's arguments and affirm.

BACKGROUND

¶2 Willan and Mary were formerly in a live-in relationship. After an incident in which Willan threw a phone and punched a hole in a door, Mary filed a petition for a temporary restraining order. Mary alleged that she was in danger of imminent physical harm from Willan. Mary further alleged that Willan had engaged in a two-year pattern of verbal abuse, which included yelling at Mary and blaming his bad moods and excessive drinking on the fact that Mary would not have more sex with him. Mary alleged that on at least one occasion, Willan's yelling about sex was so loud that a neighbor complained to the landlord.

¶3 The circuit court granted a temporary restraining order and scheduled a hearing on Mary's request for an injunction. Willan did not personally appear at the hearing but he was represented by an attorney. Mary testified about Willan's abuse and was cross-examined by Willan's attorney. Among other things, Mary testified that Willan became angry and yelled at her when she did not want to have sex with him, and that she usually responded by giving in because she was afraid of what Willan might do if she did not have sex with him. Mary further testified that she was afraid that Willan would hurt her in the future. At the conclusion of the hearing, the circuit court granted the

[1] Mary is a pseudonym to protect the identity of the victim.

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injunction. Willan filed a pro se motion for reconsideration, which the circuit court denied. Willan now appeals.

DISCUSSION

¶4 The circuit court is authorized to issue an injunction if it "finds reasonable grounds to believe that the respondent has engaged in, or based upon prior conduct ... may engage in, domestic abuse of the petitioner." WIS. STAT. § 813.12(4)(a)3. (2015-16).[2] Domestic abuse includes third degree sexual assault in violation of WIS. STAT. § 940.225(3)[3] or "[a] threat to engage in [such] conduct." WIS. STAT. § 813.12(1)(am)3. and 6. The decision to grant or deny an injunction is within the circuit court's discretion. *See* ***Sunnyside Feed Co., Inc. v. City of Portage***, 222 Wis. 2d 461, 471, 588 N.W.2d 278 (Ct. App. 1998). We will reverse the injunction if we determine that the circuit court erroneously exercised its discretion. ***Id.***

¶5 We begin with Willan's procedural arguments. Willan contends that the circuit court erred by considering "new verbal allegations of domestic abuse" that were not included in the original petition. To support this argument, Willan

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[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[3] WISCONSIN STAT. § 940.225(3) states in relevant part that "Whoever has sexual intercourse with a person without the consent of that person is guilty of a Class G felony." This statute further provides

> "Consent", as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact.

WIS. STAT. § 940.225(4).

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relies on ***Bachowski v. Salamone***, 139 Wis. 2d 397, 413, 407 N.W.2d 533 (1987) (vacating an injunction because of the disparity between the testimony at the hearing and the allegations in the petition). In ***Bachowski***, there was a clear disconnect between the allegations and the evidence. The petition alleged that the respondent had filed false charges and damaged property, but no testimony was offered to support these allegations. ***Id.*** at 413. Instead, the court granted an injunction based on testimony about the respondent's yelling. ***Id.*** ***Bachowski*** is readily distinguishable from the present case, because all of Mary's testimony supported the allegations in her petition. Specifically, Mary alleged that over a two-year period, Willan had engaged in a pattern of verbal abuse that centered on wanting to have more sex with her. Mary further alleged that Willan's abuse had recently escalated into more aggressive conduct. At the hearing, Mary testified about specific examples of instances in which she felt threatened by Willan's abusive approach to sex.

¶6 Willan further argues that he was denied due process because the circuit court allowed Mary to testify about a "new claim." Because Mary's testimony was consistent with her petition, we reject Willan's argument that he did not have sufficient notice to enable a defense.

¶7 Willan also contends that the circuit court erred by allowing Mary's attorney to make a record of the questions she would have asked Willan, if he had appeared at the hearing. The circuit court rejected Willan's attorney's argument because it did not draw any adverse inferences from Mary's attorney's questions. We can therefore dispose of this argument because the error, if any, was harmless. *See* ***Martindale v. Ripp***, 2001 WI 113, ¶¶31-32, 246 Wis. 2d 67, 629 N.W.2d 698 (discussing the longstanding rule that appellate courts will not reverse for errors that do not affect a party's substantial rights).

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¶8 We now turn to Willan's challenges to the factual basis for the injunction. We review the circuit court's factual findings under the clearly erroneous standard, giving due regard to the circuit court's determination of witness credibility. *See* ***Wittig v. Hoffart***, 2005 WI App 198, ¶19, 287 Wis. 2d 353, 704 N.W.2d 415. Willan argues in conclusory fashion that no evidence of physical harm or imminent danger was presented at the hearing. Willan is incorrect. Mary's testimony, as described above, is more than sufficient to support a finding of physical harm and imminent danger.

¶9 Willan also contends that the circuit court erred by finding that Willan threatened to sexually assault Mary, and suggests that the court was required to make a specific finding that Willan had sexually assaulted Mary. We question why Willan would insist on a specific finding as to whether he sexually assaulted Mary, particularly given the unfavorable testimony on this issue. At any rate, Willan's argument is unsupported by any legal authority and makes little sense in light of the text of the domestic abuse statute, which allows a court to issue an injunction based on threats to engage in sexual assault. *See* WIS. STAT. § 813.12(1)(am)6.

¶10 Willan further contends that the circuit court erred by failing to make a specific finding that his statements to Mary were "true threats." *See* ***Wittig***, 287 Wis. 2d 353, ¶16 (applying constitutional limitations on the punishment of speech in the injunction context). Willan argues that "[o]ne person's idea of verbal abuse, is another person's idea of getting their point across." But the determination of whether speech is a true threat is an objective one: would a reasonable person foresee that Willan's statements to Mary would reasonably be interpreted "as a serious expression of a purpose to inflict harm, as distinguished from hyperbole,

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jest, innocuous talk, expressions of political views, or other similarly protected speech"? *Id.* (quoted source omitted).

¶11 While the record is sufficient to establish that Willan made true threats, it is unnecessary for us to reach this constitutional question. This is because the circuit court also concluded that Willan's conduct of throwing objects and punching a door hard enough to make a four-inch hole were threatening acts that independently supported a domestic abuse injunction. We see no argument from Willan to challenge this determination, so we need not decide whether Willan's threatening words, standing alone, would justify the injunction. *See* ***Cholvin v. Wisconsin Dep't of Health and Family Servs.***, 2008 WI App 127, ¶34, 313 Wis. 2d 749, 758 N.W.2d 118 (if a decision on one point disposes of the appeal, we typically will not decide other issues raised).

¶12 Finally, Willan's brief frequently refers to a police report that he believes undermines Mary's testimony. Willan first brought this report to the circuit court's attention in a motion for reconsideration, and so we understand Willan to be challenging the court's denial of that motion. The court concluded that the report was hearsay and not newly discovered evidence that would justify reconsideration. The court further noted that the report did not negate Mary's credible testimony at the hearing. We review a circuit court decision to deny a motion for reconsideration for erroneous exercise of discretion. *See* ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶6, 275 Wis. 2d 397, 685 N.W.2d 853. We see no reason to second guess the circuit court's exercise of discretion here.

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CONCLUSION

¶13 Because we reject Willan's claims of error, we affirm the circuit court's order granting Mary a domestic abuse injunction.

By the Court.—Order affirmed.

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

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Michael T. Willan

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

No. 2017AP473 Petitioner v. Willan L.C.#2017CV115

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of respondent-appellant-petitioner, Michael T. Willan, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Sheila T. Reiff
Clerk of Supreme Court

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Additional material from this filing is available in the Clerk's Office.