

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 13, 2013

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. 2012AP2694

Cir. Ct. No. 2012CV864

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

KATHRYN M. WENDORF,

PETITIONER-RESPONDENT,

v.

JOSHUA JAMES WENDORF,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Sheboygan County:
TIMOTHY M. VAN AKKEREN, Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Joshua James Wendorf appeals from a circuit court order granting a domestic abuse injunction on Kathryn M. Wendorf's petition. He contends that there was insufficient evidence to support the injunction. He further contends that the circuit court erroneously exercised its discretion by excluding

evidence of Kathryn's alleged extra-marital affair. We reject his arguments and affirm the order.

¶2 Joshua and Kathryn were married in January 2011. In September 2012, Kathryn filed a petition for a domestic abuse injunction. Following a hearing on the petition, the court commissioner granted the injunction.

¶3 Joshua subsequently moved for a de novo hearing before the circuit court. Following the de novo hearing, the court found that there were reasonable grounds to believe that Joshua had engaged in, or based upon prior conduct may engage in, domestic abuse of Kathryn. Accordingly, it granted the injunction. This appeal follows.

¶4 On appeal, Joshua first contends that there was insufficient evidence to support the injunction. To grant an injunction under WIS. STAT. § 813.12 (2011-12),¹ the circuit court must find "reasonable grounds to believe that the respondent has engaged in, or based upon prior conduct of the petitioner and the respondent may engage in, domestic abuse of the petitioner." Section 813.12(4)(a)3. Domestic abuse includes the intentional infliction of physical pain or injury or a threat to engage in such conduct. Section 813.12(1)(am)1. and 6.

¶5 In reviewing the circuit court's determination, we uphold findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). Furthermore, the circuit court is the final arbiter of witness credibility. *See Johnson v. Merta*, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). Whether the facts found are sufficient to meet a party's burden of proof, however, is a matter of law we review

¹ All references to the Wisconsin Statutes are to the 2011-12 version.

de novo. *Spindler v. Spindler*, 207 Wis. 2d 327, 338, 558 N.W.2d 645 (Ct. App. 1996).

¶6 Upon review of the record, we are satisfied that there was sufficient evidence to support the circuit court's injunction. At the de novo hearing, Kathryn testified about a January 28, 2012 incident in which Joshua inflicted physical pain upon her. She recounted how he became upset with her for texting her friend and pinned her to the bed with his elbow across her chest and his arm hitting her collarbone. Kathryn also testified about an April 22, 2012 incident in which Joshua threatened her life. She recounted how he came home in a state of inebriation, berated her, and, as she walked out the door, told her mother, "she's dead."² This testimony, which the circuit court found credible, was enough for Kathryn to meet her burden of proof.

¶7 Joshua next contends that the circuit court erroneously exercised its discretion by excluding evidence of Kathryn's alleged extra-marital affair. A circuit court's determination to admit or exclude evidence is a discretionary decision that will not be upset on appeal absent an erroneous exercise of discretion. *See State v. Jenkins*, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992). We review evidentiary issues to determine if the circuit court applied the correct law to the relevant facts and reached a reasonable conclusion. *See State v. Manuel*, 2005 WI 75, ¶24, 281 Wis. 2d 554, 697 N.W.2d 811.

² Although Joshua downplays the seriousness of the threat, the circuit court was entitled to conclude otherwise based on other evidence that it heard at the hearing. This included: (1) that Joshua has been diagnosed with an emotional disorder and as being bipolar; (2) that he had been admitted to the Aurora Sheboygan Memorial Medical Center Behavioral Health Unit and had left that hospitalization against medical advice; (3) that he had purchased a hand gun; (4) that he had made multiple threats of suicide; and (5) that he had made other statements to Kathryn about her dying or that she is dead or until she dies.

¶8 At the de novo hearing, Joshua sought to introduce testimony that he had found a receipt for a contraceptive after Kathryn had returned from an out-of-state trip. When the circuit court asked why the testimony was relevant, Joshua indicated that it provided context to the alleged conduct.³ The court rejected this explanation, noting, “what may have gone on with her relationships has no bearing on the court’s decision today.” Reviewing this evidentiary decision, we are satisfied that the circuit court applied the correct law to the relevant facts and reached a reasonable conclusion.

¶9 For the reasons stated, we affirm the order of the circuit court.

By the Court.—Order affirmed.

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

³ Joshua now contends that his proffered testimony was admissible as “other acts” evidence. Because he did not make this argument in the circuit court, we do not consider it now. *See Shadley v. Lloyds of London*, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 776 N.W.2d 838 (we generally do not consider arguments raised for the first time on appeal).

