COURT OF APPEALS
DECISION
DATED AND FILED

April 24, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2289 **Cir. Ct. No. 2012CV2547**

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

BRENDA S. NOLEN,

PETITIONER-RESPONDENT,

V.

JEFF BARNHARDT,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed*.

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Jeff Barnhardt appeals an injunction order granted in favor of Brenda Nolen, and the denial of a motion for reconsideration. Barnhardt argues the circuit court erred by granting the injunction, and by denying his request for a new trial based on newly discovered evidence. He also contends

that the court erred by not allowing additional evidence at the reconsideration hearing. We reject Barnhardt's arguments and affirm.

¶2 On July 2, 2012, the circuit court held a hearing on Nolen's injunction petition. The injunction petition followed a rather complicated break-up of a former dating relationship. Nolen alleged Barnhardt "has been texting, calling & emailing relentlessly," but the main focus of her request for an injunction was an incident occurring at her home on June 23. While outside her home, Barnhardt texted Nolen, "I'm here. Please come out and talk to me. I love you." Nolen testified:

> I mean basically I'm here because of – what led me here was what happened that weekend. It was very scary. He was peeping in all of my windows and banging on the doors and relentlessly trying to get me to come out to speak to him. It scared me to death. That's why I called the police, and they observed the same behavior. He was in the back of my house in the patio door trying to look through.

¶3 Nolen also testified to a prior confrontation at a gas station:

> I was getting gas and he was driving down the road, spun around, and came to the gas station and cornered me into the pump demanding me to talk to him, and he was in my face and it was a very scary moment then. And I probably should have done something at that point but I just really thought that he would stop, and it continued and led to what happened that weekend at my house.

¶4 At the conclusion of the hearing, the court granted the petition and issued a harassment injunction. Barnhardt filed a motion for reconsideration, claiming that the circuit court misconstrued the evidence. He also argued that newly discovered evidence refuted Nolen's testimony.

¶5 On September 12, 2002, the circuit court held a hearing on Barnhardt's motion for reconsideration. Barnhardt sought to introduce a 911 call

relating to the incident at Nolen's home, and a videotape and police report relating to the confrontation at the gas station, in an effort to discredit Nolen's trial testimony. He also sought to introduce an additional phone record purporting to show that Nolen called Barnhardt after she applied for a harassment injunction.

¶6 The court noted the videotape lacked audio and found it "really has very little value because the contact [at the gas station] really had multiple aspects to it." However, the court acknowledged one aspect to the encounter was verbal, and that it "didn't allow Mr. Barnhardt to testify on surrebuttal [at trial] as to his version of the gas station event." Therefore, the court allowed Barnhardt to testify at the reconsideration hearing as to "his version of the gas station event," but did not allow the introduction of the videotape into evidence. In addition, the court concluded that the proffered evidence purporting to discredit Nolen was not relevant to the reconsideration hearing because "[t]he opportunity to challenge credibility was at the trial." The court further concluded that the police report was not probative because "it is being offered to show that a witness who didn't testify at trial lied."

¶7 Following Barnhardt's testimony at the reconsideration hearing, the circuit court found that his "version of those events is simply lacking in credibility." The court reiterated its previous finding of stalking, and found as an additional basis for an injunction that Barnhardt engaged in a course of conduct that served no legitimate purpose but to harass. The court denied the motion for reconsideration. Barnhardt now appeals.

¶8 Under WIS. STAT. § 813.125(4)(a)3. (2011-12),[1] a court may grant an injunction ordering a person to cease or avoid the harassment of another if it finds "reasonable grounds to believe" that the person has "engaged in harassment with intent to harass or intimidate the petitioner." Relevant to this appeal, § 813.125(1) defines harassment as any of the following:

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

Sec. 813.125(1)(a) and (b).

¶9 Here, the evidence supports the circuit court's findings. The court emphasized "at least two episodes" that were sufficient to support its conclusion that Barnhardt violated the harassment statute, including "a confrontation of the victim" at the gas station and the appearance at Nolen's home. The court also noted the contacts by telephone "or causing the victim to receive repeated phone calls, whether or not a conversation ensues."

¶10 A key aspect of the court's findings was the court's determination that Barnhardt's version of events was simply lacking in credibility. Witness credibility is within the sole province of the fact-finder. *See* ***Johnson v. Merta***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). We see no reason to disturb the court's credibility determinations.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶11 Barnhardt argues that the evidence he sought to introduce was discovered after trial, and that he was not negligent in seeking the evidence. Barnhardt argues that he had only six days' notice of the injunction hearing, and claims he first learned of the allegations concerning the gas station incident at trial.

¶12 Yet, Barnhardt did not indicate at trial that he had an inadequate opportunity to prepare. We acknowledge that the court must hold a hearing on the issuance of an injunction within fourteen days after the issuance of a temporary restraining order unless the date is extended to allow for service or unless the parties consent to the extension. *See* WIS. STAT. § 813.125(3)(c). However, the statute does not preclude a necessary, good faith continuance of a timely commenced hearing. Barnhardt did not request a continuance of the trial to gather more evidence. In any event, the record reflects that Barnhardt's attempts to introduce evidence at the reconsideration hearing were fairly confused, and counsel failed to adequately explain why the court should have allowed additional evidence at the hearing.

¶13 Accordingly, we reject Barnhardt's argument that the circuit court improperly denied him the opportunity to present evidence at the reconsideration hearing, "thereby failing to take into account all the facts and circumstances before making credibility determinations …." We concur with the circuit court's implicit conclusion that Barnhardt was merely attempting to re-try the prior evidentiary hearing on a motion for reconsideration.

¶14 Finally, we remind Barnhardt's counsel of the need to recognize the bounds of zealous advocacy. We note the following by way of example. Barnhardt premises his insistence that Nolen's petition "was a lie" on the following statement in the petition: "Since a period of time since basically March

the respondent has been *harassing me* in a threatening manner that's making me fearful for my safety and my kids safety." (Emphasis added.)

¶15 Counsel characterizes Nolen's statement as if she had alleged that Barnhardt threatened Nolen's children. Barnhardt then contrasts this characterization with Nolen's testimony at trial that Barnhardt "hasn't threatened my children" and argues from this that Nolen was caught in "a lie." However, Barnhardt's reading of the petition is unjustifiable, as the petition does not allege that he threatened Nolen's children.

¶16 In another example, Barnhardt's brief accuses the circuit court of, at one point "abruptly interrupting and blurting out" a statement. The record reveals that counsel's characterization is not warranted. A cardinal rule of effective appellate advocacy is to avoid unfair or unnecessary disparagement of lower courts.[2]

By the Court.—Order affirmed.

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

[2] Barnhardt also requests that this court strike Nolen's statement of facts for lack of record citations. We have not relied upon Nolen's statement of facts. Rather, we have independently reviewed the record on appeal. Accordingly, we decline to address Barnhardt's request to strike.