COURT OF APPEALS
DECISION
DATED AND FILED

June 26, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2147-CR **Cir. Ct. No. 2011CF1004**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHEL P. MOLLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: SARAH B. O'BRIEN and JOHN W. MARKSON, Judges. *Affirmed*.

Before Lundsten, Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Michel Moller appeals the judgment of conviction entered upon a jury verdict finding him guilty of stalking, in violation of WIS.

STAT. § 940.32(2) (2011-12).[1] Moller also appeals the circuit court's order denying his motion for postconviction relief. Moller argues that: (1) the evidence was insufficient to prove that he was guilty of stalking beyond a reasonable doubt; (2) the jury instruction incorrectly defined the "course of conduct" element of the stalking charge; and (3) the restitution order issued by the circuit court is invalid.

¶2 We conclude that the evidence was sufficient to prove that Moller was guilty of stalking beyond a reasonable doubt. As to the jury instruction, we assume without deciding that the jury instruction incorrectly defined the "course of conduct" element of the stalking charge, but we conclude that any such error was harmless. Regarding restitution, we conclude that Moller stipulated to the restitution order. We therefore affirm the judgment of conviction and the order denying Moller's motion for postconviction relief.

BACKGROUND

¶3 Moller was charged with stalking K.C., who was an Assistant District Attorney (ADA) in the Dane County District Attorney's Office. The stalking charge stemmed from images and blog entries relating to K.C. that Moller posted to various websites.[2]

¶4 Moller's case was tried to a jury in April 2012. The facts that follow are taken from the testimony presented and the exhibits entered into evidence at trial.

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

[2] Moller does not contest that he maintained various websites and posted images and blog entries relating to K.C. on these websites.

¶5 Moller's wife, Lynn Moller, was a daycare provider. She was charged with child abuse for allegedly abusing children who were in her care. In March 2010, a jury found Lynn Moller guilty of multiple counts of child abuse. K.C. served as the prosecutor at Lynn Moller's trial.

¶6 In mid-September 2010, Mark Kerman, a Victim-Witness Specialist in the Dane County District Attorney's Office, learned that images relating to K.C. were appearing on multiple websites. Kerman told K.C. about the websites. K.C. "went to the web sites and began to look at them." According to K.C., "there were multiple sites to look at and multiple media that went into these sites." K.C. testified that the websites contained photographs and blog entries. K.C. explained that the websites "were easy to find. You just typed in my name, you could get to them just through that ...."

¶7 K.C. testified that she looked at the websites for "ten days … in a row." She could not "say specifically what [she] saw on each day," except that she remembered seeing a photograph of her infant daughter on the websites on September 27, 2010. K.C. testified: "There was [a] ten day period and [Kerman] came in and would tell me about something that had been reported, so then I'd try to find what had been reported…. [W]hen I saw a picture one day I would be looking a couple days later at a different picture, [and] that earlier picture would be gone."

¶8 K.C. explained that the earlier posts "seemed to be an attack on me … but it began to develop and grow more specific." K.C. testified: "[T]here seemed to be an ongoing, increasing focus on me and my family and my children. And – and this intense scrutiny went from my professional [life] to my personal [life] to my family ...."

¶9 The website postings that K.C. saw in September 2010 that related directly to her included the following:[3]

- A photograph of K.C.'s home, with K.C.'s name and home address written on it. The file name is "[K.C.] Address.jpg." The image was posted on September 22, 2010.

- An image of a Barbie doll in a courtroom. The Barbie is wearing a low-cut shirt and has a barrette in her hair. The name of K.C.'s husband is written on the barrette, and the name of K.C.'s son is tattooed above the Barbie's left breast. The image was posted on August 27, 2010.

- A "booking photo" of a Barbie doll, who appears to have a black eye, holding a sign containing K.C.'s name, a birth date, and the words "solicitation" and "Dane County Jail." The file name is "[K.C.] Mug2.JPG." The image was posted on August 28, 2010.

- An image of a Barbie doll with her hands down the pants of a shirtless male Barbie doll, with text below the image stating: "Dane County, Wisconsin – Assistant DA [K.C.] working Her, quote, Job?, end quote." The file name is "Hooker DA [K.C.].JPG." The image was posted on September 22, 2010.

- A still shot of K.C. taken from a live interview that she gave. The background of the image is black and "superimposed [on the image] is a white mask" with a five-pointed star on its forehead. According to K.C., when she saw the image on the websites the "mask would pop up in the background next to [K.C.] and superimposed inside the mask was [K.C.'s] daughter's face."

- A photograph of K.C., her husband, and her daughter. The image was posted on September 19, 2010.

[3] Printed versions of the postings were introduced at trial as Exhibits 7 and 8. Exhibit 7 is a printed version of "a snapshot in time" of one of Moller's internet blogs that was taken on September 29, 2010, by Detective Ronald Dorn of the Dane County Sheriff's Office. Exhibit 8 is a printed version of one of Moller's internet photo galleries that Detective Dorn printed on September 29, 2010. Exhibits 7 and 8 show the blog entries and images that Moller posted, along with the dates on which the entries and images were posted and the file names assigned to the images.

- A photograph of K.C.'s daughter, modified to show "reddening to the eyes and manipulation [to] the face." The file name is "they shake me.JPG." K.C. testified that her daughter's eyes were "made to look red, similar to what you might see in a petechia eye, which in a child abuse case, when a child is [shaken], the blood vessels in their eyes pop, and that's an injury that's typical in child abuse cases."

- The same photograph of K.C.'s daughter, posted directly above an article about a baby who was shaken "so hard that his brain swelled, wiping out his cognitive functioning and severely disabling him."

- The same photograph of K.C.'s daughter, but in an unedited form, with the file name "Abused child.JPG."

¶10 K.C. had a Facebook page in 2010 to which she posted photographs of her family and children.[4] K.C. testified that she had posted to her Facebook page two of the photographs that she later saw on Moller's websites, specifically, the photograph of K.C., her husband, and her daughter, and the photograph of K.C.'s daughter. K.C. explained that she tried to make her Facebook page "as private as [she] could so that you had to be [her] friend to access [her] information," and that the privacy settings on her Facebook account were active in 2010.[5]

[4] The following is a helpful and succinct summary of Facebook:

> Facebook is a social networking service and website …. Users who register for an account at the site obtain a Facebook "page" on which they can create a personal "profile" with photographs … and other personal information. Users can then invite other Facebook users to become their Facebook "friends," people who are then part of the user's own social network.

O'Leary v. State, 109 So. 3d 874, 874 n.1 (Fla. Dist. Ct. App. 2013) (citation omitted).

[5] "Facebook allows users to select privacy settings for their Facebook [pages]. Access can be limited to the user's Facebook friends, to particular groups or individuals, or to just the user." ***Ehling v. Monmouth-Ocean Hosp. Serv. Corp.***, 961 F. Supp. 2d 659, 668 (D. N.J. 2013).

¶11 K.C. testified that she became aware that the contents of her Facebook page could have been shared with Moller when she viewed the Facebook pages of two of her cousins. K.C. viewed the Facebook pages of her cousins Emily and Wesley and saw that Moller appeared in the list of their Facebook friends. K.C. discovered that Moller was Facebook friends with her cousins around the time that she saw the photograph of her daughter on Moller's websites.

¶12 Regarding the photograph of her house that appeared on Moller's websites, K.C. testified that she did not take the photograph and she did not post it to her Facebook page. K.C. explained that she and her husband built the house and did not buy it from a real estate company or listing. K.C. testified that, to her knowledge, there had never been a real estate listing associated with the house. K.C. testified that she believed the photograph of her house was taken in July 2010 or August 2010 based on "the bushes and the shrubs and the trimming."

¶13 Mark Kerman, the Victim-Witness Specialist who first alerted K.C. to the postings, testified that on September 24, 2010, Kerman was "assisting with witnesses" at the preliminary hearing of another "childcare provider [who] was charged with child abuse."[6] K.C. appeared on behalf of the State at the September 24 hearing. Kerman saw Moller "seated in the courtroom." Kerman testified that he was "in and out of the courtroom" throughout the morning, and upon his "separate entries" he saw Moller "still seated in the courtroom."

[6] We refer to this as the "September 24 hearing."

¶14 William Hendrickson, a detective with the Dane County Sheriff's Office, testified that he spoke with Moller on the day that a search warrant was executed at Moller's home. Hendrickson testified that Moller stated that he "was familiar with ADA [K.C.] as a result of her being the prosecutor on a case involving Mr. Moller's wife," and that "[h]e [Moller] didn't agree with the prosecution" of his wife, Lynn Moller, who he felt was "unfairly targeted."

¶15 Hendrickson asked Moller "if he maintained a number of web sites or blog sites … and whether he would comment on ADA [K.C.] on those," and Moller told Hendrickson "that he had in the past." Regarding the modified photograph of K.C.'s daughter that appeared on the websites, Hendrickson testified that Moller told him "he might have doctored them up a bit."

¶16 Hendrickson testified that a GPS unit was placed on Moller's vehicle as part of the investigation. Hendrickson explained that the GPS unit was retrieved from Moller's vehicle and "from [the] investigation of the GPS, [Hendrickson] learned that Mr. Moller had been by or near [K.C.'s] residence."

¶17 Hendrickson also testified as follows:

> [Prosecutor] Now, the defendant [Moller] also told you, however, that he posted the images of [K.C.] … because of his anger and – towards her, is that fair to say?
>
> [Hendrickson] That's fair to say, yes.
>
> ….
>
> [Prosecutor] Additionally, when speaking about ADA [K.C.] in response to what had happened to his wife's … case, what he told you is that in regards to ADA [K.C.] that he needed to get the word out and, in fact, that [K.C.] needed to be watched, is that the correct phrasing?
>
> [Hendrickson] Yes.

¶18 The jury found Moller guilty of stalking, in violation of WIS. STAT. § 940.32(2). The circuit court issued a judgment of conviction reflecting the jury's verdict.

¶19 At a sentencing hearing in May 2012, the circuit court withheld sentence and placed Moller on probation for three years. The court ordered Moller to pay restitution in the amount of $1,997.64, to compensate K.C. for "[i]nstallation of [a] home security system."

¶20 Moller filed a postconviction motion requesting that the circuit court vacate the restitution order and hold a "restitution hearing." Moller argued that the court "should vacate its order for restitution because Moller was not provided adequate opportunity to contest or stipulate to the restitution claim, in violation of [WIS. STAT. §] 973.20(13)(c)." After a hearing on the motion, at which Moller testified, the court denied Moller's request that the court vacate the restitution order. Moller appeals the judgment of conviction and the circuit court's denial of his motion for postconviction relief. Additional facts will be referenced below as necessary.

DISCUSSION

¶21 Moller raises three main arguments: (1) the evidence was insufficient to prove that he was guilty of stalking beyond a reasonable doubt; (2) the jury instruction incorrectly defined the "course of conduct" element of the stalking offense; and (3) the restitution order issued by the circuit court is invalid. We address each argument in turn.

Sufficiency of the Evidence

¶22 We first address Moller's argument that the evidence was insufficient because, if we conclude that the evidence was insufficient to support a conviction, we are precluded from remanding for a new trial under the double jeopardy clauses of the United States and Wisconsin Constitutions. ***State v. Banks***, 2010 WI App 107, ¶43, 328 Wis. 2d 766, 790 N.W.2d 526. In reviewing the sufficiency of the evidence to support a conviction, we may not substitute our judgment for that of the jury "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Additionally, we consider the reasonable inferences the jury could draw from the evidence presented. *See* ***State v. Toliver***, 104 Wis. 2d 289, 293, 311 N.W.2d 591 (1981). Whether the evidence is sufficient to support a conviction beyond a reasonable doubt is a question of law, which we review de novo. ***State v. Booker***, 2006 WI 79, ¶12, 292 Wis. 2d 43, 717 N.W.2d 676.

¶23 As stated, Moller was convicted of stalking in violation of WIS. STAT. § 940.32(2). The elements of stalking, as they apply here, are as follows: (1) Moller intentionally engaged in a course of conduct directed at K.C.; (2) Moller's course of conduct would have caused a reasonable person "under the circumstances that existed at the time of the course of conduct" to suffer serious emotional distress; (3) Moller's acts caused K.C. to suffer serious emotional distress; and (4) Moller knew or should have known that at least one of the acts constituting the course of conduct would cause K.C. to suffer serious emotional distress. *See* WIS. STAT. § 940.32(2) and WIS JI—CRIMINAL 1284.

¶24 "Course of conduct" is defined as:

> [A] series of 2 or more acts carried out over time, however short or long, that show a continuity of purpose, including any of the following:
>
> 1. Maintaining a visual or physical proximity to the victim.
>
> 2. Approaching or confronting the victim.
>
> 3. Appearing at the victim's workplace or contacting the victim's employer or coworkers.
>
> 4. Appearing at the victim's home or contacting the victim's neighbors.
>
> 5. Entering property owned, leased, or occupied by the victim.
>
> 6. Contacting the victim by telephone or causing the victim's telephone or any other person's telephone to ring repeatedly or continuously, regardless of whether a conversation ensues.
>
> 6m. Photographing, videotaping, audiotaping, or, through any other electronic means, monitoring or recording the activities of the victim. This subdivision applies regardless of where the act occurs.
>
> 7. Sending material by any means to the victim or, for the purpose of obtaining information about, disseminating information about, or communicating with the victim, to a member of the victim's family or household or an employer, coworker, or friend of the victim.
>
> 8. Placing an object on or delivering an object to property owned, leased, or occupied by the victim.
>
> 9. Delivering an object to a member of the victim's family or household or an employer, coworker, or friend of the victim or placing an object on, or delivering an object to, property owned, leased, or occupied by such a person with the intent that the object be delivered to the victim.
>
> 10. Causing a person to engage in any of the acts described in subds. 1. to 9.

See WIS. STAT. § 940.32(1)(a)1.-10. and WIS JI—CRIMINAL 1284. To "[s]uffer serious emotional distress" means to feel "terrified, intimidated, threatened, harassed, or tormented." *See* WIS. STAT. § 940.32(1)(d) and WIS JI—CRIMINAL 1284.

¶25 As to the first element, the State presented evidence of at least three separate acts collectively satisfying a "course of conduct" directed at K.C. First, the State presented evidence from which the jury could have found that Moller appeared at K.C.'s workplace, under WIS. STAT. § 940.32(1)(a)3. Kerman testified that: he was assisting with witnesses for the September 24 hearing; he saw Moller seated in the back of the courtroom (in the Dane County Courthouse) where the hearing was taking place; and K.C. was the prosecutor at the September 24 hearing. Moller argues that his presence at the September 24 hearing "cannot form a basis for the 'course of conduct'" because: (1) the courtroom was not K.C.'s workplace; and (2) "the evidence clearly established that Moller's presence at the … hearing was not directed at [K.C.]," but that Moller was present at the hearing because "he had begun to closely follow child abuse prosecutions after his wife's conviction." The problem with Moller's argument is that it does not view the evidence in the light most favorable to the State and the conviction. When viewed in that light, the evidence set forth above was clearly sufficient for the jury to have found that the courtroom was part of K.C.'s workplace and that Moller was there to communicate to K.C. that Moller was keeping an eye on K.C.

¶26 Second, the State presented evidence from which the jury could have found that Moller sent material to a member of K.C.'s family for the purpose of obtaining information about or disseminating information about K.C., under WIS. STAT. § 940.32(1)(a)7. K.C. testified that, in September 2010, she learned that Moller was Facebook friends with two of her cousins. K.C. also testified that she

saw two photographs that she had posted to her Facebook page on Moller's websites. From this testimony, the jury could have inferred that: (1) Moller sent material, specifically, a Facebook friend request to K.C.'s cousins; (2) by becoming Facebook friends with K.C.'s cousins, Moller gained access to K.C.'s Facebook page; (3) Moller obtained pictures of K.C. and her family from K.C.'s Facebook page; and (4) Moller disseminated the pictures of K.C. and her family by posting the pictures on his websites.

¶27 Third, the State presented evidence from which the jury could have inferred that Moller appeared at K.C.'s home, under WIS. STAT. § 940.32(1)(a)4. K.C. testified that she saw a picture of her home on Moller's websites in September 2010. K.C. explained that she never posted the picture of her home to her Facebook page, and to the best of her knowledge the home had never appeared in an online real estate listing. The jury also heard testimony that a GPS unit was placed on Moller's vehicle during the course of the investigation, which indicated that Moller's vehicle had been "by or near" K.C.'s home. From this evidence, the jury could have inferred that Moller had appeared at K.C.'s home.

¶28 When viewed in the light most favorable to the State and to the conviction, the evidence supports the jury's finding that Moller intentionally engaged in a course of conduct directed at K.C.

¶29 As to the second element, the jury could have found that a reasonable person who discovered that Moller contacted members of her family, used those contacts to access her Facebook page, lifted intimate family photographs off that page and doctored them, and then disseminated the doctored family photographs to the public, would suffer serious emotional distress. For a reasonable person working as a prosecutor, the feeling of serious emotional

distress would likely be compounded by the availability of such private information to others involved in the criminal cases she prosecuted. In addition, for a reasonable person, the feeling of serious emotional distress would also likely be compounded by learning that the person responsible for posting the images later appeared at her workplace. Accordingly, there was sufficient evidence as to the second element.

¶30 As to the third element, K.C. testified: "[T]he fact that there were lengths gone to take a picture of my house and put this address on this site and make my child[] look injured in this photo, it terrified me." K.C. further explained: "[H]e [Moller] made it clear … he knew where I lived and he knew my children and he was finding everything out he could about my family. He contacted my cousins in Florida. It was disturbing and affected me." The jury could have found from this testimony that Moller's acts caused K.C. to suffer serious emotional distress, and therefore there was sufficient evidence as to the third element.

¶31 As to the fourth element, that Moller knew or should have known that at least one of the acts constituting the course of conduct would cause K.C. to suffer serious emotional distress, Moller argues that he "could not have reasonably anticipated the effect his internet posts would have on [K.C.]. He had no way of knowing that [K.C.] was viewing his websites, nor should he have expected that she would ever become aware of them." Moller also contends that he "could not have known that his presence at the September 24 hearing would have any effect on [K.C.]." Moller's argument fails to recognize that as to this element, the jury needed only to find that Moller *should have known* that *at least one* of the acts constituting the course of conduct would cause K.C. to suffer serious emotional distress. We need not and do not explain the multiple ways that the jury could

have reached this finding based on the evidence presented at trial, but instead present one possible finding supported by the evidence: the jury could have found that Moller *should have known* that Moller's act of sending information (a Facebook friend request) to K.C.'s cousins, and then disseminating private photographs of K.C. and her family on the internet for anyone to view and where K.C. would be likely to learn of them, coupled with his appearance at K.C.'s workplace, would cause K.C. to suffer serious emotional distress. Based on this alone, there was sufficient evidence as to the fourth element.

¶32 Accordingly, the evidence presented was sufficient for a jury to find beyond a reasonable doubt that all four elements of stalking had been proved.

Jury Instruction

¶33 We next address Moller's argument that his conviction should be reversed because the jury was given a defective instruction. Moller explains that the circuit court "modified the standard jury instruction for Stalking" to state "that the 'course of conduct' could be supported by evidence of the acts listed in the statute, as well as any acts 'that are of a similar character' to those listed." With regard to the course of conduct element of the stalking offense, the circuit court instructed the jury that:

> "Course of conduct" means a series of two or more acts carried out over time, however short or long, that show a continuity of purpose. Acts that you may find constitute a course of conduct include:
>
> a. Maintaining a visual or physical proximity to the victim.
>
> b. Approaching or confronting the victim.
>
> c. Appearing at the victim's workplace or contacting the victim's employer or coworkers.

> d. Appearing at the victim's home or contacting the victim's neighbors.
>
> e. Entering property owned, leased, or occupied by the victim.
>
> f. Contacting the victim by telephone or causing the victim's telephone or any other person's telephone to ring repeatedly or continuously, regardless of whether a conversation ensues.
>
> g. Photographing, videotaping, audiotaping, or, through any other electronic means, monitoring or recording the activities of the victim. This subdivision applies regardless of where the act occurs.
>
> h. Sending material by any means to the victim or, for the purpose of obtaining information about, disseminating information about, or communicating with the victim, to a member of the victim's family or household or an employer, coworker, or friend of the victim.
>
> i. Placing an object on or delivering an object to property owned, leased, or occupied by the victim.
>
> j. Delivering an object to a member of the victim's family or household or an employer, coworker, or friend of the victim or placing an object on, or delivering an object to, property owned, leased, or occupied by such a person with the intent that the object be delivered to the victim.
>
> k. Causing a person to engage in any of the acts described in subds. (a) to (j).
>
> l. *Acts that are of a similar character to (a) – (k).*

(Emphasis added.)

¶34 Moller argues that the acts constituting a course of conduct "are limited to those that fall within the categories enumerated in subdivisions 1.-10. of … [§] 940.32(1)(a)," and the jury instruction given by the circuit court was incorrect because it expanded the acts constituting a course of conduct to "[a]cts that are of a similar character to" those enumerated in WIS. STAT. § 940.32(1)(a)1.-10. Moller bases his argument on the text of WIS JI—CRIMINAL

1284, the standard jury instruction for stalking, and on a comment from the Jury Instructions Committee, concluding that though ambiguous the statute limits the acts constituting the course of conduct to the types listed. Moller argues that the course of conduct jury instruction given by the circuit court was incorrect in light of this comment. The State contends that the course of conduct jury instruction given by the court was correct because "the legislature's use of the term 'including'" in § 940.32(1)(a) "demonstrates its unambiguous intent that the list of ten 'acts' constituting the 'course of conduct' … not be exclusive."

¶35 We choose not to resolve these competing arguments and instead assume, without deciding, that the part of the jury instruction defining the course of conduct element was incorrect. However, even assuming without deciding that this part of the jury instruction was incorrect, we conclude that the error was harmless based on our review of the record.

¶36 The Wisconsin Supreme Court has made clear that the harmless error rule generally applies to erroneous jury instructions. *See* ***State v. Gordon***, 2003 WI 69, ¶¶38-40, 262 Wis. 2d 380, 663 N.W.2d 765 (expressly rejecting the contention that the harmless error analysis should not apply to an erroneous jury instruction); ***State v. Harvey***, 2002 WI 93, ¶¶35, 38, 254 Wis. 2d 442, 647 N.W.2d 189 (adopting the federal harmless error rule employed in ***Neder v. United States***, 527 U.S. 1 (1999), and applying it to an erroneous jury instruction). Moreover, the United States Supreme Court in ***Neder*** explained: "We have often applied harmless-error analysis to cases involving improper instructions on a single element of the offense," including cases where the jury instruction misstated an element. ***Neder***, 527 U.S. at 9-10 (citing ***Pope v. Illinois***, 481 U.S. 497 (1987)).

¶37 In Moller's case, we assume without deciding that the jury instruction misstated the course of conduct element of the offense. Accordingly, under ***Neder***, application of the harmless error rule is appropriate in this case.

¶38 Where a jury instruction misstates an element of the offense, "we must determine whether, under the totality of the circumstances, the erroneous instruction constituted harmless error." ***State v. Beamon***, 2013 WI 47, ¶¶3, 27, 347 Wis. 2d 559, 830 N.W.2d 681. When we review a conviction based on a jury instruction that was erroneous, we must determine whether it is "'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***Id.***, ¶27 (quoting ***Harvey***, 254 Wis. 2d 442, ¶49).

¶39 We conclude that it is clear beyond a reasonable doubt that a rational jury would have found Moller guilty absent the error in the jury instruction. As our discussion of the sufficiency of the evidence makes clear, the evidence was overwhelming that Moller engaged in at least three acts that fell within the statutorily defined set of acts constituting a course of conduct, namely, that Moller: (1) appeared at K.C.'s workplace, contrary to WIS. STAT. § 940.32(1)(a)3.; (2) sent material to a member of K.C.'s family for the purpose of obtaining information about or disseminating information about K.C., contrary to § 940.32(1)(a)7.; and (3) appeared at K.C.'s home, contrary to § 940.32(1)(a)4. Because of the strong evidence that Moller engaged in acts specifically set out by § 940.32(1)(a)1.-10., no rational jury would have resorted to reliance on the "similar character" category that the circuit court added to the jury instruction to find that Moller engaged in a course of conduct directed at K.C. More to the point, there is no doubt the jury would have convicted Moller in the absence of the challenged instructional language. Accordingly, it is clear beyond a reasonable doubt that a rational jury would have found Moller guilty of stalking absent the

erroneous jury instruction, and we therefore conclude that the erroneous jury instruction constituted harmless error.

Restitution Order

¶40 Lastly, we address Moller's argument that the restitution order issued by the circuit court is invalid. Moller contends that "the restitution order is invalid because Moller did not stipulate to the State's claim for restitution," and because the circuit court did not "conduct a hearing on the matter," in violation of WIS. STAT. § 973.20(13)(c). Subsection 973.20(13)(c) provides in pertinent part:

> The court, before imposing sentence or ordering probation, shall inquire of the district attorney regarding the amount of restitution, if any, that the victim claims. The court shall give the defendant the opportunity to stipulate to the restitution claimed by the victim and to present evidence and arguments on the factors specified in par. (a). *If the defendant stipulates to the restitution* claimed by the victim or if any restitution dispute can be fairly heard at the sentencing proceeding, *the court shall determine the amount of restitution before imposing sentence or ordering probation*.[7]

(Emphasis added.) Citing § 973.20(13)(c), the State argues that Moller's trial attorney stipulated to the request for restitution, and that this "obviated the need for a hearing." We agree.

¶41 At the sentencing hearing, the prosecutor informed the circuit court that K.C. had requested restitution of $1,997.64 for "[i]nstallation of [a] home

[7] WISCONSIN STAT. § 973.20(13)(a) sets forth the factors that the circuit court is to consider in determining whether to order restitution and, if so, in what amount, including: (1) the amount of loss suffered by any victim as a result of a crime considered at sentencing; (2) the financial resources of the defendant; (3) the present and future earning ability of the defendant; (4) the needs and earning ability of the defendant's dependents; and (5) any other factors the court deems appropriate.

security system." Moller's trial attorney responded to the restitution request as follows:

> Regarding the restitution request, … [w]hen I just leaned over and showed it to Mr. Moller, his main concern was his ability to pay, … not necessarily the fairness of should she have that …. I think he would agree, *Look, I [Moller] was convicted, if [K.C.'s] afraid and she thinks she needs to have this to feel safe, okay, that seems fair enough*…. As I said, I showed it to him he said, *Gee, I don't have a job.... We've had two* – his wife's case and now this case where they've hired attorneys and they just don't have any money. So that would be something he'd ask Your Honor to take into consideration regarding restitution is his lack of an ability to pay restitution.

Moller made a statement to the court at the sentencing hearing and did not personally object to the restitution request while addressing the court. The court ordered Moller to pay restitution, stating: "I will order restitution in the amount claimed…. [I]t wasn't a huge amount, $1,997.64. I think that it's likely that Mr. Moller will be able to pay that during the period of probation once he puts this behind him and can find an understanding employer." Moller did not object to the court's order for restitution.

¶42 We conclude that Moller stipulated to the restitution award, for two reasons. First, we construe Moller's trial attorney's statement that Moller "would agree, *Look, I [Moller] was convicted, if [K.C.'s] afraid and she thinks she needs to have this [the home security system] to feel safe, okay, that seems fair enough*," as an affirmative stipulation to the restitution request. Second, even if it were not, Moller failed to object to the restitution request. Rather, Moller's counsel at most asked the circuit court to take into account Moller's limited ability to pay. The court did so and determined that Moller could pay the relatively modest amount of restitution by the end of the three-year term of probation. A defendant's failure to object to restitution claimed at sentencing is a constructive stipulation. *See* ***State***

v. Hopkins, 196 Wis. 2d 36, 43-44, 538 N.W.2d 543 (Ct. App. 1995). We will not reverse a stipulated restitution award. *See, **id.***

¶43 In sum, we conclude that: the evidence was sufficient to prove that Moller was guilty of stalking beyond a reasonable doubt; any error that resulted from the jury instruction defining the course of conduct element, which we assume without deciding was incorrect, was harmless; and Moller stipulated to the restitution award. We therefore affirm.

By the Court.—Judgment and order affirmed.

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