COURT OF APPEALS
DECISION
DATED AND FILED

September 6, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP532-FT **Cir. Ct. No. 2005FO847**

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

WASHINGTON COUNTY,

PLAINTIFF-RESPONDENT,

V.

CARL J. WAGNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: ANNETTE K. ZIEGLER, Judge. *Reversed.*

¶1 ANDERSON, J.[1] While "one picture is worth ten thousand words," it still does not constitute "a pattern of conduct composed of a series of acts." We

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

reverse Carl J. Wagner's conviction for violating Washington County's harassment ordinance because taking a single photograph of a neighbor boy is not a "pattern of conduct composed of a series of acts."

¶2 Although the judgment of conviction was entered after a bench trial, this appeal does not raise the usual claim of sufficiency of the evidence. The essential facts relevant to the appellate issues are undisputed, and Wagner challenges the legal standards applied by the trial court. Whether the trial court applied the proper legal standard based on the governing statute presents a question of law, which this court reviews de novo. ***Chernetski v. American Family Mut. Ins. Co.***, 183 Wis. 2d 68, 72, 515 N.W.2d 283 (Ct. App. 1994).

¶3 A Washington County sheriff's deputy issued Wagner a uniform citation alleging that on July 25, 2005, he engaged in harassing conduct in violation of WASHINGTON COUNTY, WIS., CODE § 14.947.013 (1998). After a not guilty plea was entered on his behalf, the case proceeded to a bench trial.

¶4 WASHINGTON COUNTY, WIS., CODE § 14.947.013 (1998) adopts WIS. STAT. § 947.013. The pertinent portions of the statute provide:

> **947.013 Harassment. (1)** In this section:
>
> (a) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.
>
> ….
>
> **(1m)** Whoever, with intent to harass or intimidate another person, does any of the following is subject to a Class B forfeiture:
>
> ….
>
> (b) Engages in a course of conduct or repeatedly commits acts which harass or intimidate the person and which serve no legitimate purpose.

¶5 There are only two elements that must be proven. First, the defendant engaged in a course of conduct which harassed the victim and which served no legitimate purpose. WISCONSIN STAT. § 947.013(1)(a) defines a "course of conduct" as "a series of acts over a period of time, however short, evidencing a continuity of purpose." Second, the defendant engaged in the conduct with intent to harass or intimidate the victim. "With intent to harass" means that the defendant acted with the mental purpose to harass the victim or was aware that his conduct was practically certain to harass the victim. *See* WIS JI—CRIMINAL 1912. The County must prove these elements by clear and convincing evidence. ***Reinke v. Personnel Bd.***, 53 Wis. 2d 123, 137, 191 N.W.2d 833 (1971).

¶6 Keeping in mind our standard of review and the elements needed to prove harassment, we turn to the sparse testimony. The only witnesses were the alleged victim, Myles Metzger, and his mother, Patricia Metzger, so their testimony is uncontroverted.[2]

¶7 Thirteen-year-old Myles testified that he was in the driveway of the family residence, loosening up for a baseball game by swinging a baseball bat, when Wagner, who lived two houses away, drove by on the public street and snapped a photo of Myles. He said that it made him uncomfortable knowing that Wagner had taken a photo of him. Myles said that he yelled at Wagner, "What's your problem?"

[2] Wagner did not attend the trial.

¶8 Patricia related that Myles came into the house upset that Wagner was taking pictures of him. She recounted that Myles was flushed and angry, "saying I don't know why he's doing this to me …." She testified:

> This is the first time that Carl [Wagner] has taken photos separately of him…. This was the—an isolated incident where he crossed the line. I wasn't even in the photo. There was not an adult. His—his anger is addressed towards me but now he's taking it out on the kids.

¶9 Patricia provided additional testimony that fleshed out the "back-story"[3] with a narrative of a long-running neighborhood feud that had its genesis in Metzger's purchase of land from Wagner's father. She described Wagner taking photos of her on ten different occasions. She reported that she had called the sheriff's department to report six incidents involving Wagner, while she documented thirty times Wagner called the sheriff's department to complain about his neighbors. She admitted filing petitions for injunctions against Wagner and his father and that both were dismissed. Finally, she acknowledged that she was a

[3] In narratology, a back-story (also back story or backstory) is defined as:

> [T]he history behind the situation extant at the start of the main story. This literary device is often employed to lend the main story depth or verisimilitude. A back-story may include the history of characters, objects, countries, or other elements of the main story. Back-stories are usually revealed, sketchily or in full, chronologically or otherwise, as the main narrative unfolds. However, a story creator may also create portions of a back-story or even an entire back-story that is solely for his or her own use in writing the main story and is never revealed in the main story. In role-playing games, a character's back-story is usually called his or her background.

Wikipedia, The Free Encyclopedia, *Backstory*, http://en.wikipedia.org/wiki/Backstory (last visited Aug. 24, 2006).

defendant in a pending federal lawsuit Wagner had filed against her, her husband, Washington County and several deputies.[4]

¶10 At the close of testimony, the prosecutor summed up the County's case: "[T]he defendant did engage in conduct that served no useful purpose other than to harass particularly the child in the Metzger family, who testified, Myles." While the prosecutor acknowledged the long-running feud, she remained focused on the County's theory of the case:

> Clearly, Myles was upset by the actions of the Defendant. Clearly, there is a continuing course of conduct alleged here; although, the County acknowledges that we are here specifically to litigate the events of July 25th of 2005, but the bottom line, Judge, is that there is no evidence on this record, other than what you've heard, that this conduct was engaged in for any legitimate purpose whatsoever.

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[4] Many might consider that the back-story developed by Patricia's testimony to be classic "other acts" evidence, because it is evidence of conduct that happened at another time and place. *See* ***State v. Johnson***, 184 Wis. 2d 324, 349, 516 N.W.2d 463 (Ct. App. 1994) (Anderson, P.J., concurring). In this case, it is part of the panorama of the evidence necessary to put the incident into context and is admissible for that limited purpose. *See* ***id.*** at 349-50. However, if it had been offered "to show a similarity between that other act and the act complained of, then it is properly termed 'other acts evidence'" and is inadmissible pursuant to WIS. STAT. § 904.04(2). ***State v. Bauer***, 2000 WI App 206, ¶7 n.2, 238 Wis. 2d 687, 617 N.W.2d 902.

Defense counsel did not object to the County's solicitation of evidence of Wagner's different acts; in fact, he actively solicited such evidence himself. Where there is no objection, we ordinarily do not address an evidentiary issue. We do so in this case only to reaffirm that while the evidence was admissible, it still cannot be considered in determining whether Wagner committed the ordinance violation he was charged with. This evidence still carries the "evil" that is carried by "other acts" evidence.

Under well-established law, the prosecution is prohibited from using "other acts" evidence for the sole purpose of establishing a defendant's unsavory character and raise the inference that the defendant has a propensity for criminal behavior. ***Johnson***, 184 Wis. 2d at 352. The reason for this prohibition is "other acts" evidence could be so inflammatory that a jury would find a defendant guilty solely because he committed prior acts of misconduct. ***Id.*** at 353.

Consequently, we will not consider Patricia's back-story in our evaluation of the evidence and the circuit court's application of the law to the evidence.

> It did cause the victim child to be upset and clearly his mother as well ….

¶11 Defense counsel argued that the snapping of a single photo could not be considered a course of conduct meant to harass or intimidate. He pointed out that Myles never testified that the taking of the photo harassed or intimidated him. He questioned the Metzgers' credibility given the long-running feud.

¶12 In finding Wagner guilty the circuit court said, "Whether he takes a picture or not, he is clearly doing something that is, I think, highly unusual and a repeated course of conduct that clearly bothered this youth on this particular day." The circuit court found that Wagner's action fit within the definition of "harass":

> It means to worry or impede by repeated acts, to vex, trouble, annoy continually or chronically, to plague, bedevil or badger. It means to annoy persistently, to intimidate, to make timid or fearful. That's precisely what happened to this youth on this day and it seems that this is a course of conduct that has been continuing.

¶13 We agree with the circuit court that Wagner's actions fall within the definition of harass. This is the same definition of harass relied upon by the supreme court in rejecting constitutional challenges to WIS. STAT. § 813.125,[5] the "harassment injunction" statute, in a case arising out of a neighborhood feud, ***Bachowski v. Salamone***, 139 Wis. 2d 397, 407, 407 N.W.2d 533 (1987).

¶14 Nevertheless we reverse the judgment of conviction because we hold that the circuit court erred in finding that this was a course of conduct. In ***Id. Bachowski***, 139 Wis. 2d at 407-08, the supreme court noted that the definition of

[5] WISCONSIN STAT. § 813.125 outlines the procedures that are to be followed to obtain injunctive relief against a person who has allegedly violated WIS. STAT. § 947.013. ***Bachowski v. Salamone***, 139 Wis. 2d 397, 400, 407 N.W.2d 533 (1987).

harass "is narrowed by the statute's requirement that the acts which harass … must be accomplished by repeated acts or a course of conduct." The supreme court made clear "that single isolated acts do not constitute 'harassment' under the statute." ***Id***. at 408. In a companion case, ***State v. Sarlund***, 139 Wis. 2d 386, 393, 407 N.W.2d 544 (1987), the court explained that WIS. STAT. § 947.013 proscribes "repetitive, deliberate intrusion into the privacy of another."

¶15 Wagner's snapping a single photograph of Myles on July 25, 2005, does not come within the behavior proscribed by WIS. STAT. § 947.013(1m)(b). It is neither a course of conduct—"a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose"—nor is it repetitively intruding into Myles' privacy. While the circuit court correctly characterized Wagner's snapping a single photo as "highly unusual," an ill-mannered, immature, immoderate or impolite act, which annoys another, is not enough to establish a violation of the criminal harassment statute. ***Bachowski***, 139 Wis. 2d at 407-08 (citations omitted).

By the Court.—Judgment reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.