

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 25, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-0348-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT C. BRAUN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: BONNIE L. GORDON, Judge. *Affirmed.*

WEDEMEYER, P.J.¹ Robert C. Braun appeals from a judgment entered after a jury convicted him of contempt of court, contrary to § 785.01(1)(b), STATS., for violating a permanent injunction. He claims the trial court erred in instructing the jury. Because the trial court did not err, this court affirms.

¹ This appeal is decided by one judge pursuant to § 752.31(2), STATS.

I. BACKGROUND

On December 10, 1992, a Milwaukee trial court issued a permanent injunction order prohibiting certain individuals, and anyone acting in concert with those individuals, from engaging in certain activities at medical clinics that provide abortions. Braun was one of the original named defendants to the injunction action. He admitted he was served with a summons and complaint in that matter. The December injunction's caption listed the defendants as "Missionaries to the Preborn, an unincorporated association, et al." On April 15, 1993, a Milwaukee trial court amended the caption of the December injunction to specifically list by name the defendants to that action.

On October 28, 1994, Braun was charged with one count of punitive contempt of court in violation of § 785.04, STATS., for allegedly blocking, impeding and obstructing ingress to and egress from one of the medical facilities listed in the injunction. Braun does not deny that his conduct was in violation of the injunction. His defense is that he did not believe he was legally bound by the injunction because the December injunction did not specifically name him and because the April injunction was illegally modified.

The trial court gave the following pertinent jury instruction:

On December 12th, 1992, Judge Jeffrey A. Wagner issued a permanent injunction order in State of Wisconsin and City of Milwaukee, plaintiffs, versus Missionaries to the Preborn, an unincorporated association, et al, defendants, Case No. 92-CV-8195. On April 15th, 1993, Judge Patrick T. Sheedy amended the caption in the above-entitled order in accordance with state statutes.

The jury convicted. Braun now appeals.

II. DISCUSSION

The jury instruction referenced above is the subject of this appeal. Braun claims that giving this instruction was erroneous because the instruction improperly directed a verdict as to one element of the charge and tainted another element of the charge. This court is not persuaded.

Whether a trial court's instructions to the jury improperly direct a verdict presents a question of law subject to independent review. *See State v. Kuntz*, 160 Wis.2d 722, 736, 467 N.W.2d 531, 536 (1991).

The elements of contempt under § 785.01(1)(b), STATS., require that: (1) a court order the defendant to refrain from certain conduct; (2) the defendant have the ability to comply with that order; and (3) the defendant intentionally disobey that court order. Braun complains that the jury instruction directed a verdict as to the first element and tainted the third element. This court disagrees.

The jury instruction given did not remove the element of whether Braun was ordered by a court to not do something from the jury's consideration. The jury was not told to disregard any element on the basis that the element was not in dispute or that it had already been proved or determined by the court. The record demonstrates that the jury was instructed that the State must prove every element of the offense charged beyond a reasonable doubt and charged the jury with the standard instruction for punitive contempt, *see* WIS J I-CRIMINAL 2031, combined with the standard instruction for intent. *See* WIS J I-CRIMINAL 923.1.

The challenged instruction in no way suggests to the jury that the amendment of the injunction caption meant that Braun had been subject to it or

had knowledge of it. It did not instruct that jury that if Braun's name was in the caption, that he was presumed to have knowledge of the injunction. This determination was left to the jury. Similarly, the jury instruction did not taint the jury's determination of the third element. This instruction merely charged the jury on an issue of law, that is, that the caption of the injunction had been properly amended.² It did not take away from the jury the issue of whether Braun had been ordered by the court not to do something, whether Braun was a party to the injunction, or whether Braun intentionally disobeyed the order. The instruction was not erroneous.

By the Court.—Judgment affirmed.

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

² This court further concludes that Braun's attack challenging the validity of the court order that he was accused of violating during this contempt proceeding was improper. *See State v. Orehun*, 84 Wis.2d 487, 267 N.W.2d 318 (1978). Nevertheless, this court agrees with the trial court's determination that the amendment of the caption of the permanent injunction was proper. *See Hengel v. Hengel*, 120 Wis.2d 522, 524-25, 355 N.W.2d 846, 847 (Ct. App. 1984) (holding that after service of a notice of appeal, a trial court may retain jurisdiction over certain insubstantial and trivial matters in a case). The amendment of the caption, here, falls into this category because it did not affect the subject matter on appeal. The amended caption merely enumerated the named defendants who were a party to the action, but had previously been referred to as "et al" on the caption. The substance of the injunction remained the same.

