

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 28, 2014

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 Nos. 2014AP1055-CR
2014AP1056-CR**

**Cir. Ct. Nos. 2012CM005514
2012CM005994**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MILLARD RENO BANDY, SR.,

DEFENDANT-APPELLANT.

APPEALS from judgments and orders of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

¶1 BRENNAN, J.¹ Millard Reno Bandy, Sr., appeals from two judgments of conviction entered after he pled guilty to three counts of violating a

¹ These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

domestic abuse temporary restraining order contrary to WIS. STAT. §§ 813.12(3) and 968.075(1)(a). As relevant here, the circuit court placed Bandy on three years probation. Bandy seeks commutation of his probation to two years on the grounds that his convictions were not acts of “domestic abuse” as defined in § 968.075(1)(a), and therefore, his maximum probation exposure was only two years. He argues that pursuant to WIS. STAT. § 973.09(2m) the third year is void and his term of probation is valid only to the extent of the two year maximum. We reject his argument and affirm the three year probation maximum because we conclude that Bandy’s convictions were for acts of domestic abuse within the meaning of § 968.075(1)(a)1. and 4.

BACKGROUND

¶2 On October 9, 2012, L.S. filed a Petition for Temporary Restraining Order, requesting that the circuit court issue an order requiring Bandy to, among other things, “refrain from committing acts of domestic abuse against” her. In her petition, L.S. stated that she was “in imminent danger of physical harm” from Bandy, who was her live-in boyfriend at the time. She alleged that Bandy had: beaten her, knocked out her teeth, made her jump off the top porch, sold and smoked drugs in her house with others while she slept, punched her with his fist, kicked her down the stairs, and caused her to go to the hospital because of his beating.

¶3 Based on L.S.’s petition, a Milwaukee County Court Commissioner signed a Domestic Abuse Temporary Restraining Order (the “TRO”), prohibiting Bandy from committing acts of domestic abuse against L.S. and from having any contact with L.S. or her residence. The TRO further ordered that the police “shall remove respondent from [L.S.’s home],” and set a hearing date for October 22,

2012. The Milwaukee County Sheriff served the TRO on Bandy on October 9, 2012, at 1510 hours.

¶4 The next day, October 10, 2012, as L.S. arrived at her home with her daughter, she saw Bandy come out of a rear bedroom, then exit out her back door. L.S. reported Bandy's conduct to the police, and Bandy was charged in Milwaukee County Circuit Court with Violation of a Domestic Abuse Temporary Restraining Order, contrary to WIS. STAT. §§ 813.12(3), 813.12(8)(a), and 968.075(1)(a). The criminal complaint explicitly noted that Bandy was being charged with an act of domestic abuse pursuant to § 968.075(1)(a). As part of the October 14, 2012 bail order in that case, Bandy was ordered to have no contact with L.S. of any kind, including: phone, computer, or personal contact. Bandy signed the no-contact order, acknowledging receipt on October 14, 2012.

¶5 Subsequently, Smith again petitioned for a Domestic Abuse Temporary Restraining Order and another Domestic Abuse Temporary Restraining Order was issued on November 5, 2012, again prohibiting Bandy from having any contact with her. Bandy was served with that TRO on November 6, 2012.

¶6 Between November 10 and 12, 2012, L.S. received text messages on her phone from Bandy, who is identified as "Reno" on her phone, stating as follows:

- On November 10, 2012, at 8:59 p.m., the text read: "[L.S.] I'll give what's n my pocket just 2 b with u and never make another mistake as long as I'm with you";
- On November 11, 2012, at 3:14 a.m., the text read: "Please give me a chance 2 make it do what is good 4 both us. You being my focuse point n life New Management";

- On November 11, 2012, at 10:29 p.m., the text read: “Where u @.and how long b 4 u get here New Management”;
- On November 11, 2012, at 10:36 p.m., the text read: “Why don’t u get ova your madness & face reality I aint going no where”; and
- On November 12, 2012, at 12:19 a.m., the text read: “Come home then & prove it bad ass New Management.”

¶7 L.S. reported these texts to the police, and Bandy was charged in a second criminal complaint with three counts of Violation of a Domestic Abuse Temporary Restraining Order, contrary to WIS. STAT. §§ 813.12(3), 813.12(8)(a), 939.62(1)(a), and 968.075(1)(a). The criminal complaint explicitly noted each charge was an act of domestic abuse.

¶8 Bandy plead guilty, on March 6, 2013, to the original charge of Violating a Domestic Abuse Temporary Restraining Order, stemming from the October 10, 2012 incident, and to two counts of Violating a Domestic Abuse Temporary Restraining Order for the November 10-12, 2012 text messages. The third count in the text-message case was dismissed and read in. In its plea colloquy with Bandy, the circuit court asked if there were any facts in the complaints that Bandy disagreed with and Bandy answered, “No.”

¶9 At sentencing, the State advised the circuit court of Bandy’s prior record; he had seventeen prior convictions, including several prior referrals for domestic abuse and one prior charge of domestic abuse battery that was later dismissed. The court sentenced Bandy to nine months at the House of Correction,

consecutive, stayed that sentence and placed him on three years' probation with conditions.²

¶10 Bandy filed a postconviction motion on October 21, 2013. As relevant here, Bandy sought a reduction in his three year probationary term to two years, arguing that the circuit court erred in determining that his convictions were for conduct that was “domestic abuse” within the meaning of WIS. STAT. § 968.075(1)(a) and that the maximum was only two years. The circuit court denied his motion, and this appeal follows.

STANDARD OF REVIEW

¶11 Whether Bandy's convictions were for “domestic abuse” within the meaning of WIS. STAT. § 968.075(1)(a) presents a mixed question of fact and law. We review the circuit court's factual findings under a “clearly erroneous” standard of review. *See State v. Smith*, 207 Wis. 2d 258, 266, 558 N.W.2d 379 (1997). If, as is the case here, there are no disputed factual findings, we review the legal question independently of the circuit court. *See State v. Wills*, 193 Wis. 2d 273, 277, 533 N.W.2d 165 (1995).

DISCUSSION

¶12 Bandy seeks a one year commutation of his probation on the grounds that the one year probation extension statute, *see* WIS. STAT. § 973.09(2)(a)1.b., does not apply to him because none of his three convictions were for “domestic abuse” as it is defined in WIS. STAT. § 968.075(1)(a). Because we conclude that

² The only part of Bandy's sentence that is material to this appeal is the length of probation. As such, we do not detail the other conditions set forth in his sentence.

the circuit court correctly determined that Bandy's convictions were for acts of "domestic abuse" under § 968.075(1)(a), we affirm.

¶13 Ordinarily, a defendant convicted of one count of Violating a Domestic Abuse Temporary Restraining Order, an unclassified misdemeanor, *see* WIS. STAT. § 813.12(8)(a), faces a maximum of one year probation, *see* WIS. STAT. § 973.09(2)(a)1r. However, a defendant convicted of an unclassified misdemeanor that is an act of domestic abuse, as defined by WIS. STAT. § 968.075(1)(a), faces an additional year of probation, for a total potential maximum of two years. WIS. STAT. § 973.09(2)(a)1.b. Furthermore, if a defendant "is convicted of not less than 2 nor more than 4 misdemeanors at the same time," the defendant's maximum original period of probation may be increased by an additional year. WIS. STAT. § 973.09(2)(a)2. As applied to Bandy, Bandy's maximum probation exposure here is properly increased to three years on each count, provided that each count was an act of *domestic abuse* as it is defined in § 968.075(1)(a). If not acts of domestic abuse, then Bandy is entitled to commutation to two years probation maximum on each count. *See* § 973.09(2m). Accordingly, we review the record to determine if his acts constitute "domestic abuse" as defined in § 968.075(1)(a).

¶14 Here, our review is limited to a legal question because the facts in the record are undisputed; Bandy does not dispute any of the facts in either of the criminal complaints. In fact, at the plea hearing, in response to the circuit court's question, Bandy told the court that there were no facts in the complaints that he disagreed with. Neither does he challenge the facts in the complaints on appeal. Additionally, Bandy does not dispute the accuracy of his criminal history as presented at sentencing. And finally, Bandy does not challenge any part of L.S.'s

domestic abuse allegations against him in her October 9, 2012 petition for the TRO.

¶15 Thus, the sole issue on appeal is whether the undisputed record shows that Bandy's acts constituted "domestic abuse" as defined in WIS. STAT. § 968.075(1)(a).

I. Bandy's October 10, 2012 acts constitute domestic abuse under WIS. STAT. § 968.075(1)(a).

¶16 Bandy argues that because he did not physically harm or threaten L.S. when he entered her home on October 10, 2012, in violation of the TRO, his acts fail to meet the statutory definition of domestic abuse in WIS. STAT. § 968.075(1)(a). He argues that mere violation of a domestic abuse no-contact TRO cannot be domestic abuse under the statute. Additionally, he argues that because the complaint fails to allege that L.S. feared imminent physical pain or injury on October 10 it is not reasonable to infer that she did. Bandy argues that because when L.S. saw him he left out the back door, rather than come towards her, any fear L.S. may have had was unreasonable.

¶17 The State counters that Bandy's acts on October 10, must be viewed in context with his history of violence against L.S. and his blatant disregard of the TRO obtained just the day before. When placed in that context, the State contends that the totality of the circumstances demonstrate a reasonable fear of imminent physical harm within the meaning of WIS. STAT. § 968.075(1)(a). We agree with the State.

¶18 WISCONSIN STAT. § 968.075(1)(a) defines "Domestic abuse," as pertinent here, as follows:

(1) DEFINITIONS. In this section:

- (a) “Domestic abuse” means any of the following engaged in by an adult person against ... an adult with whom the person resides or formerly resided
1. Intentional infliction of physical pain, physical injury or illness.
 2. Intentional impairment of physical condition.
 3. A violation of s. 940.225(1), (2) or (3).
 4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3.

¶19 Bandy’s analysis of the statute is too limited. Certainly the statute requires a physical act. But it does not require that the physical act be a threat or an injury. The act, whatever it is, must be one that: (1) *may cause* another person; (2) to *reasonably fear*; (3) imminent physical pain or injury. In other words, we look at more than Bandy’s actions on October 10, 2012. We look to the *effect* of those actions on L.S. in light of all the circumstances, including Bandy’s immediate past acts of domestic violence against L.S., his flagrant disregard of the TRO and his criminal history. Under the totality of those circumstances, we must ask whether Bandy’s acts on October 10 were such that they may have caused L.S. to reasonably fear imminent physical pain or injury.

¶20 In context, Bandy’s physical act of being present in L.S.’s home is not benign, even though he left the home when she found him there. We note that Bandy does not dispute that he was properly served with the TRO on October 9, and does not claim any legitimate excuse for being in L.S.’s home, nor could he.

¶21 L.S. had just been to court the day before because, as she stated in her petition, she feared imminent physical harm from Bandy. She detailed his domestic abuse of her, claiming Bandy beat her, knocked out her teeth, made her

jump off the top porch, punched her with his fist, kicked her down the stairs and caused her to go to the hospital because of his beatings.

¶22 Seeing Bandy in her home the very next day, L.S. may have reasonably feared imminent physical harm from Bandy. His quick violation of the no-contact order may well have reasonably caused her to fear that she was not safe in her home and that imminent physical abuse was coming. Although Bandy left the home without hurting L.S. that time, his flagrant violation may reasonably have caused L.S. to fear that he had no respect for the TRO and that she was in the same or worse peril than she was the day previous.

¶23 Additionally, Bandy's extensive criminal history—including seventeen convictions for retail theft, resisting and obstructing an officer, battery, escape, disorderly conduct and receiving stolen property, his previous domestic abuse battery charge in 2010, later dismissed, and his three domestic abuse referrals in 2005 and 2006—demonstrate the reasonableness of L.S.'s fear in context with the abuse she had suffered from him

¶24 The facts here are similar to those in *State v. Edwards*, 2013 WI App 51, 347 Wis. 2d 526, 830 N.W.2d 109. Edwards was convicted of substantial battery and disorderly conduct. *Id.*, ¶1. The complaint in *Edwards* stated that the victim reported that Edwards “grabbed her and pushed her onto a hot stove, threw her on the floor and began to strangle her.” *Id.*, ¶4. As to the disorderly conduct, the complaint alleged that after the victim got away, Edwards called her six times, told her to come home and threatened to kill himself if she failed to do so. *Id.* She called police and they found Edwards in bed with a large kitchen knife and cell phone. *Id.*

¶25 Edwards challenged the circuit court’s imposition of an additional year of probation based on its conclusion that his disorderly conduct conviction was for an act of domestic abuse under WIS. STAT. § 968.075(1)(a). *Edwards*, 347 Wis. 2d 526, ¶1. Edwards argued that his threat to harm *himself*, not the *victim*, did not fall under § 968.075(1)(a). *Edwards*, 347 Wis. 2d 526, ¶¶1-2.

¶26 In rejecting Edwards’ challenge, we found that the totality of the circumstances of the disorderly conduct, including the proximity between his physical abuse and his threat, the multiple phone calls, the threat itself and presence of the large kitchen knife in his bed, all constituted domestic abuse under WIS. STAT. § 968.075(1)(a). *Edwards*, 347 Wis. 2d 526, ¶12. We held that Edwards’ threat to kill himself “would give rise to fear of imminent harm [to the victim] and is not reasonably construed as presenting a threat to Edwards alone given his pleas/threats to his girlfriend to return home.” *Id.*

¶27 Similarly here, having so recently gone to court to prevent Bandy’s contact because of his past abuse and L.S.’s fear of more physical injury from Bandy, it was reasonable for L.S. to fear imminent physical pain or injury from the fact that Bandy immediately disregarded the TRO. Bandy attempts to distinguish *Edwards* by arguing that even assuming all of L.S.’s allegations in her petition for the TRO were true, they were more attenuated than Edwards’ domestic abuse, which was the same day as his disorderly conduct. However, we conclude that a one-day lapse since her report of abuse by Bandy is not significantly more attenuated than Edwards’ abuse.

¶28 The test is the reasonableness of L.S.’s fear of more violence and, given the context, that fear was still fresh given her history of abuse at his hands and that she had only received the TRO the day before. Accordingly, we conclude

that Bandy's October 10 acts constitute domestic abuse under WIS. STAT. § 968.075.

II. *Bandy's November 10-12, 2012 text messages were acts of domestic abuse within the meaning of WIS. STAT. § 968.075.*

¶29 Bandy argues that there was nothing in his text messages that would cause a reasonable person to fear physical harm and there was certainly nothing to suggest any physical harm was imminent. The undisputed text messages said:

- “[L.S.] I’ll give what’s n my pocket just 2 b with u and never make another mistake as long as I’m with you”;
 - “Please give me a chance 2 make it do what is good 4 both us. You being my focuse point n life New Management”;
 - “Where u @.and how long b 4 u get here New Management”;
 - “Why don’t u get ova your madness & face reality I aint going no where”;
- and
- “Come home then & prove it bad ass New Management.”

¶30 Once again the State argues, and we agree, that the text messages must be viewed in context with Bandy's other actions to determine if the texts may cause L.S. to reasonably fear imminent physical harm. At the time he sent the texts, Bandy was the subject of two separate court orders forbidding him to contact L.S. in any fashion: the October 14, 2012 no-contact order and a Domestic Abuse Temporary Restraining Order issued against him on November 5, 2012, which included a no-contact order. He signed for the first order and was served with the second order.

¶31 Despite these court orders, Bandy sent L.S. a series of texts, and while he did not explicitly say he would harm her, Bandy’s texts were cajoling (“Please give me a chance 2 make it do what is good 4 both us”), defiant (“Come home then & prove it”) and menacing (“Why don’t u get ova your madness & face reality I aint going no where”). The texts demonstrated a disregard for the court’s orders and indicated that he was not going to leave L.S. alone. Given Bandy’s history of violence against L.S., the texts reasonably may have caused her to fear more imminent physical harm. As such, the circuit court did not err in concluding that the text-related convictions were acts of domestic abuse within the meaning of WIS. STAT. § 968.075. Accordingly, we affirm Bandy’s three year probationary term.

By the Court.—Judgments and orders affirmed.

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

