COURT OF APPEALS
DECISION
DATED AND FILED

August 1, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0208-CR **Cir. Ct. No. 99-CM-264**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MELVIN C. WELCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Iowa County: GEORGE S. CURRY, Judge. *Reversed and cause remanded with directions*.

¶1 DYKMAN, J.[1] Melvin C. Welch appeals from a judgment of conviction for violating a harassment injunction. Welch raises five issues:

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). In addition, all references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

(1) whether the harassment injunction is unconstitutionally vague; (2) whether the criminal complaint was sufficient; (3) whether there was sufficient evidence to allow a jury to conclude that he contacted an "event[] that Bike Wisconsin is conducting"; (4) whether the State failed to prove that he knew his actions violated the injunction; and (5) whether Iowa County was the proper venue in which to prosecute Welch.

¶2 Although we conclude that Welch is barred from collaterally attacking the injunction and that the complaint is sufficient, we agree with Welch that venue was improper in Iowa County. Both article I, § 7 of the Wisconsin Constitution and WIS. STAT. § 971.19(1) (1999-2000)[2] guarantee a defendant's right to be tried by a jury where the crime was committed. A violation of this right voids the proceedings. This case was brought in the county where the injunction was issued rather than where Welch violated the injunction. The circuit court therefore erroneously exercised its discretion when it declined to transfer venue to a different county. We vacate Welch's conviction and remand with instructions to transfer this case to the county where the crime was committed. Because the proceedings in Iowa County were void, we do not determine the sufficiency of the evidence.[3]

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[3] Because article I, § 7 and WIS. STAT. § 971.19 guarantee only the right to be *tried* where the crime was committed, we conclude that the pretrial proceedings were not invalidated. Accordingly, we will consider Welch's claim regarding the sufficiency of the complaint.

Background

¶3 Bike Wisconsin obtained an injunction under WIS. STAT. § 813.125 against Welch in Iowa County. The injunction ordered Welch to refrain from:

> Harassing petitioner, Bike Wisconsin, Inc., its directors, officers and employees, by telephone calls, direct contact, indirect contact, letters, postcards, and further shall remain off the premises, have no contact with the residents, nor shall he have contact with the events that Bike Wisconsin is conducting.

The injunction remained in effect until March 15, 2001.

¶4 After the injunction was issued, Welch sent a letter dated July 28, 1999, from his residence in Milwaukee County to the principal of Green Bay East High School, located in Brown County, which the principal received in early August 1999. The letter directed the principal's attention to a number of documents that were attached to the letter. The documents included copies of letters between Welch and a former competitor, Bike Wisconsin, Inc., that detailed an ongoing dispute between Welch and William Hauda, Bike Wisconsin's president. In addition, Welch included letters to him from Hauda's attorney and court records regarding civil actions against Welch brought both by Hauda and the State. The principal contacted Hauda and gave him the letter and attachments.

¶5 The State filed a complaint charging Welch with violating the harassment injunction. The complaint alleged that a bicycle tour organized by Bike Wisconsin had stayed the night at Green Bay East High School on August 2, 1999, and thus was part of an event conducted by Bike Wisconsin. Welch moved to dismiss the complaint on the grounds that the State brought the case in the wrong venue. The circuit court denied the motion. In December 2000, the case was reassigned from Judge Dyke to Judge Curry. Welch again filed a motion to

dismiss the case due to improper venue and the circuit court again denied the motion. After the trial, the jury returned a verdict of guilty for one count of violating a harassment injunction. Welch appeals.

Analysis

A. Vagueness of the Injunction

¶6 Welch argues that the harassment injunction was unconstitutionally vague. Although we agree that the injunction lacked specificity, we cannot consider the injunction's validity. Under ***State v. Bouzek***, 168 Wis. 2d 642, 484 N.W.2d 362 (Ct. App. 1992), and ***Schramek v. Bohren***, 145 Wis. 2d 695, 713, 429 N.W.2d 501 (Ct. App. 1988), a defendant being prosecuted for a violation of a harassment injunction is barred from challenging the underlying injunction.

¶7 Welch contends that ***Bouzek*** applies only when the defendant pleaded guilty to violating the injunction and that his case can be distinguished because he was convicted by a jury. Although it is true ***Bouzek*** involved a guilty plea, we disagree that this was a relevant fact in the decision. Rather, the court stated broadly: "We hold in this case that a person convicted of violating a harassment injunction contrary to sec. 813.125, Stats., may not collaterally attack the validity of the underlying injunction in a subsequent criminal prosecution for its violation." ***Bouzek***, 168 Wis. 2d at 643 (footnote omitted). Further, neither ***Bouzek*** nor ***Schramek*** made any exception for constitutional challenges, but rather permitted collateral attacks only when fraud was used to obtain the injunction. We are bound by published opinions of the court of appeals. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Therefore, any argument that ***Bouzek*** or ***Schramek*** were wrongly decided should be addressed to

the supreme court. Because Welch does not argue that the injunction was fraudulently obtained, we cannot consider the validity of the injunction.

B. Sufficiency of the Complaint

¶8 The complaint alleges that Welch violated the injunction issued under WIS. STAT. § 813.125. It states that while Bike Wisconsin was staying overnight at Green Bay East High School during a bike tour, the principal received a letter from Welch discussing Hauda and Bike Wisconsin. Welch challenges the sufficiency of the complaint, arguing that it does not allege the specific date that the principal received Welch's letter. Because the injunction only prohibits Welch from having contact with "events that Bike Wisconsin *is* conducting," Welch argues that the complaint is insufficient unless it alleged that the Bike Wisconsin tour was staying at the high school the same day that the letter arrived.

¶9 We determine the sufficiency of a criminal complaint de novo. ***State v. Adams***, 152 Wis. 2d 68 74, 447 N.W.2d 90 (Ct. App. 1989). WISCONSIN STAT. § 968.01(2) defines a complaint as a written statement of essential facts constituting the offense charged. It needs only to contain the facts necessary to lead a reasonable person to conclude that a crime was probably committed and the defendant is probably culpable. ***State v. Blalock***, 150 Wis. 2d 688, 694, 442 N.W.2d 514, 516 (Ct. App. 1989). If a reasonable inference can be made from the complaint to establish probable cause, the complaint is sufficient. ***State v. Manthey***, 169 Wis. 2d 673, 688-89, 487 N.W.2d 44, 51 (Ct. App. 1992).

¶10 We disagree that the complaint was insufficient because we disagree that the State needed to allege the date the principal received the letter in the complaint. A reasonable interpretation of "events" would include the bike tour as a whole and not just the tour's overnight stay at the high school. It could be

reasonably inferred from the complaint that Bike Wisconsin's tour was ongoing when the principal received Welch's letter. It could also be reasonably inferred that Welch sent the letter to the principal for the purpose of giving him information regarding Bike Wisconsin and Hauda. Therefore, it would be reasonable to conclude that Welch had violated the harassment injunction and thus violated WIS. STAT. § 813.125 when he sent a letter to a school at which Bike Wisconsin was going to be stopping and the letter concerned Bike Wisconsin.

¶11 Moreover, even if the "event" was only the overnight stay, we disagree that the phrase "is conducting" limits the prohibited contact to include only the exact day that Bike Wisconsin stayed at the high school. The purpose of the injunction is to stop Welch from harassing Bike Wisconsin and those involved with Bike Wisconsin. The phrase "is conducting" should not be interpreted in a nonsensical manner that would defeat the injunction's purpose. Whether the "event" has actually occurred, is about to occur or is still in the planning stages, the injunction has been violated when Welch contacts those involved with the events, at least when he does so for the purpose of conveying information regarding Bike Wisconsin. In sum, because the complaint contained the facts necessary to allow a reasonable person to conclude that Welch violated the harassment injunction, we conclude the complaint was sufficient.

C. Proper Venue

¶12 The final argument Welch makes is that Iowa County was not the proper venue and therefore the conviction should be vacated. The determination of proper venue is a question of law, which we review de novo. ***Irby v. Young***, 139 Wis. 2d 279, 281, 407 N.W. 2d 314 (Ct. App. 1987).

¶13 Under article I, § 7 of the Wisconsin Constitution defendants are guaranteed the right to "a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law." Similarly, WIS. STAT. § 971.19(1) provides: "Criminal actions shall be tried in the county where the crime was committed, except as otherwise provided."

¶14 Welch contends that because he sent the letter from Milwaukee County and it was received in Brown County, venue was improper in Iowa County. The State disagrees, relying on WIS. STAT. § 971.19(2). That subsection provides: "Where 2 or more acts are requisite to the commission of any offense, the trial may be in any county in which any of such acts occurred." The State explains that to obtain a conviction for violating WIS. STAT. § 813.125, one of the elements it had to prove was that a harassment injunction had been issued previously against Welch. *See* WIS JI—CRIMINAL 2040. Because the injunction against Welch was issued in Iowa County, venue was proper there.

¶15 We do not see the logic of the State's argument. WISCONSIN STAT. § 971.19 does not refer to *elements*, it refers to *acts*. Although in most cases, an element of a particular crime *is* an act, "act" and "element" are not synonymous terms. *See, e.g.,* ***Blenski v. State***, 73 Wis. 2d 685, 691, 245 N.W.2d 906 (1976). The only reasonable interpretation of "act" under § 971.19(2) is that it is an act *of the defendant* (or at least, in the case of conspiracies or parties to the crime, acts of co-conspirators or co-parties). Otherwise, § 971.19(2) would be in danger of violating article I, § 7.

¶16 To prove the first element of WIS. STAT. § 813.125 the State had to show only that the *circuit court* had issued an injunction in Iowa County. It did

not have to prove that Welch's previous acts in Iowa County constituted harassment or that Welch "acted" in Iowa County at all. Rather, Welch's actions in Iowa County were irrelevant in this case as any reconsideration of the validity of the underlying harassment injunction would be an impermissible collateral attack. Therefore, although Welch's actions in Iowa may have ultimately led to the charges under § 813.125, Welch did not engage in acts in Iowa County that were "*requisite* to the commission of [the] offense."

¶17 To accept the State's argument that Welch "committed" the crime of violating a harassment injunction in Iowa County would expand the concept of venue beyond what is constitutionally permissible. It would, for example, permit any case involving a repeater allegation to be tried in the county where the previous conviction was obtained because it was an element that the State was required to prove in order to obtain a sentence enhancement. We therefore reject the State's interpretation of WIS. STAT. § 971.19(2) and conclude that Welch did not commit the crime of violating a harassment injunction in Iowa County. Venue was therefore not proper there. The circuit court erroneously exercised its discretion when it permitted the trial to proceed in Iowa County over Welch's objection. *See* ***State v. Davis***, 2001 WI 136, ¶28, 248 Wis. 2d 986, 637 N.W.2d 62 ("An erroneous exercise of discretion results when the exercise of discretion is based on an error of law.").

¶18 The only remaining issue is the proper remedy. Although the supreme court has stated that venue in a criminal case is not a question of personal or subject matter jurisdiction, *see* ***State v. Bangert***, 131 Wis. 2d 246, 293, 389 N.W.2d 12, it has nevertheless declared "void" proceedings held in an improper venue over the objection of the defendant. *See* ***State v. Mendoza***, 80 Wis. 2d 122, 144-45, 258 N.W.2d 260 (1977); *see also* ***Wheeler v. State***, 24 Wis. 52, 54 (1869).

This suggests that improper venue is not subject to a harmless error test. *See also* ***Arizona v. Fulminante***, 499 U.S. 279, 310 (holding that "structural defects," which are those errors that affect "the framework within which the trial proceeds," are not subject to a harmless error analysis); ***Coleman v. Kemp***, 778 F.2d 1487, 1541 n.24 (11th Cir. 1985) (concluding that erroneous refusal to grant motion for change of venue was not subject to harmless error analysis). Even it were, the State would have the burden to show that the error has harmless. *See* WIS. STAT. § 805.18. As the State has not attempted to make such an argument, we cannot conclude that there was harmless error.

¶19 Nonetheless, we disagree with Welch that the proper remedy is dismissal. Both ***Mendoza*** and ***Wheeler*** remanded the case for a new trial in the county where the crime was committed. We therefore conclude that transfer, not dismissal, is the appropriate remedy. We remand to the circuit court to determine the proper venue and transfer the case to that county.[4]

[4] Because the parties have not briefed the issue, we do not determine in which county or counties proper venue lies. However, we view ***State ex rel. Arthur v. Proctor***, 255 Wis. 355, 38 N.W.2d 505 (1949), and ***State v. Kelly***, 148 Wis. 2d 774, 436 N.W.2d 883 (Ct. App. 1989), as instructive. *See* ***Arthur***, 255 Wis. at 357 (holding that venue was proper in county where tax return was filed rather than county from where it was mailed in prosecution for making a false income tax return); ***Kelly***, 148 Wis. 2d at 778 ("As a general rule, when a person in one state begins a crime that is completed in another state, the crime is deemed to have been committed in the latter state.").

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.