

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 25, 2003

Cornelia G. Clark
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 No. 02-1940-CR
STATE OF WISCONSIN**

Cir. Ct. Nos. 01CM3968 & 01CM7364

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL A. SIMMONS,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Milwaukee County:
MICHAEL B. BRENNAN, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

¶1 CURLEY, J.¹ Michael A. Simmons appeals from two judgments of conviction entered after the trial court convicted him of one count of violating a domestic abuse injunction in case number 01CM3968, and two additional counts

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2001-02).

of violating a domestic abuse injunction, in case number 01CM7364, all contrary to WIS. STAT. § 813.12(8) (2001-02).² Simmons contends: (1) the trial court erred in concluding that his presence on a public street in the vicinity of his ex-wife's home constituted a failure "to avoid the petitioner's residence," as that term is used in § 813.12(3)(a) and (4)(a); and, consequently, (2) there was insufficient evidence to establish beyond a reasonable doubt that his actions constituted a knowing violation of a temporary restraining order or injunction, as required by § 813.12(8)(a).³

¶2 Because this court concludes that Simmons' actions did not knowingly violate the injunction's requirement "to avoid the petitioner's residence," this court reverses the judgment of conviction entered on count one in case number 01CM3968 and count one in case number 01CM7364.⁴ However, because count two in case number 01CM7364 involving intentional physical contact with the petitioner's residence has not been appealed, the judgment of conviction on that count stands. Accordingly, the trial court is affirmed in part, reversed in part, and the matter is remanded to the trial court to vacate the defendant's judgments of conviction on the two counts on appeal and enter orders of acquittal consistent with this opinion.

² All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted. The cases were consolidated for trial by order of the trial court dated October 19, 2001.

³ Simmons only appeals one count of violating a domestic abuse injunction in case number 01CM3968, and one count of violating a domestic abuse injunction in case number 01CM7364.

⁴ Accordingly, we need not address the sufficiency of the evidence issue. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (stating that the court of appeals may decline to address other issues raised, if the resolution of one point disposes of the appeal).

I. BACKGROUND.

¶3 On April 17, 2000, Jacqueline Campbell obtained a domestic abuse injunction against Simmons that expired on April 17, 2002. Simmons and Campbell had been married for nearly fifteen years and had two children together. Simmons and Campbell were separated on May 31, 1998, and subsequently divorced. The injunction ordered, among other things, that Simmons “avoid the petitioner’s residence ... or any premises temporarily occupied by the petitioner.”

¶4 On April 26, 2001, at approximately 3:30 p.m., Simmons parked his automobile outside of Campbell’s home. Simmons later testified that he parked on the opposite side of the street about two houses down from Campbell’s residence. When he saw his daughter, he got out of his vehicle and gave her a hug in the street. He then pulled away. Later that same day, at approximately 5:30 p.m., Simmons again parked down the block from Campbell’s residence on the opposite side of the street. He sat in his parked car for ten to fifteen minutes and then drove away.⁵

¶5 On June 7, 2001, Simmons again parked his car on the street near Campbell’s residence. Simmons later testified that he parked within approximately thirty-five feet of her home. While Simmons testified that he remained there for five to ten minutes, Campbell, who observed him from a window of her home, testified that he remained parked in the street for

⁵ These actions constitute the sole count of violating a domestic abuse injunction in the case number 01CM3968.

approximately thirty minutes. After he saw his son and gave him a hug, Simmons drove away.⁶

¶6 Finally, on June 30, 2001, according to Campbell, Simmons parked his automobile on the street in front of her home, exited the vehicle, walked up to the home, knocked on the front door, returned to the vehicle, retrieved a bucket from the vehicle, sat down in the street on the bucket and drank a beer.⁷ As a result of this incident, the police were called. When police officers arrived, they observed Simmons drinking a beer in front of the residence and arrested him for violating a domestic abuse injunction.

¶7 On September 12, 2001, Simmons filed a motion to dismiss the two counts that did not involve physical contact with any part of Campbell's residence. On October 9, 2001, the trial court held a hearing and denied Simmons' motion to dismiss. A bench trial was conducted on November 30, 2001, and February 1, 2002. Simmons was found guilty of all three counts in a decision dated March 8, 2002.

II. ANALYSIS.

¶8 The standard of review in a bench trial is whether the court's findings of fact are clearly erroneous. WIS. STAT. § 805.17(2); *Ozaukee County v. Flessas*, 140 Wis. 2d 122, 130-31, 409 N.W.2d 408 (Ct. App. 1987).

⁶ These actions constitute the first count of violating a domestic abuse injunction in case number 01CM7364.

⁷ These actions constitute the second count of violating a domestic abuse injunction in case number 01CM7364.

¶9 In a charge of violating a domestic abuse injunction as set forth in WIS. STAT. § 813.12(8), three elements must be proved in order to find a person guilty. The State must prove beyond a reasonable doubt that: an injunction was issued against the person; the person committed an act in violation of the terms of the injunction; and the person knew that the injunction had been issued and that his or her acts violated its terms. *See* WIS JI—CRIMINAL 2040.

¶10 Here, the parties stipulated to the fact that the domestic abuse order was in place at the time of the alleged incidents, that Simmons was present in court when it was issued, and that he was personally served with a copy of the injunction. Thus, the only remaining disputed element was whether Simmons knew that his acts violated its terms. The injunction served upon Simmons contained the following language:

IT IS ORDERED THAT THE RESPONDENT REFRAIN FROM COMMITTING ACTS OF DOMESTIC ABUSE AGAINST THE PETITIONER ... and

....

The respondent *avoid the petitioner's residence* and/or the residence temporarily occupied by the petitioner now and in the future.

....

The respondent avoid contacting or causing any person other than a party's attorney to contact the petitioner unless the petitioner consents in writing. Contact includes contact at work, school, public places, by phone or in writing, except to phone the children on their phone line at petitioner's residence.

(Emphasis added.)

¶11 Simmons contends that the wording of the injunction did not put him on notice that his acts violated the injunction. Simmons points out that in two of

the charges, the State did not allege that he had contact with Campbell or her residence, while the third charge alleged that he walked up and knocked on the door. Simmons argues, with respect to two of the charges, that he did avoid the residence of Campbell because he parked on the other side of the street or several houses down the block and never approached or entered Campbell's property. Further, he testified that he was parked there in the hopes of seeing his two children that he shares with Campbell. He explained that although originally he was allowed phone contact with the children through a separate phone line, the line he was to call to contact the children was no longer in working order. He denied knocking on Campbell's door with respect to his arrest on June 30, 2001.

¶12 Campbell, in contrast, testified that Simmons parked immediately in front of her house in each instance, although on the other side of the street. She also alleged that Simmons knocked on the door of her home on the night of the second incident.

¶13 The trial court determined that the testimony of Simmons and the victim was identical in most respects. The major dispute between the testimony of Campbell and Simmons concerned whether he walked onto her property and knocked on her door. This dispute was resolved by the trial court in the State's favor and is not on appeal.

¶14 With regard to the other two charges, the issue centers on whether the prohibition to "avoid[] the residence" encompassed the public street in front of Campbell's home. The trial court held that it did. This court disagrees.

¶15 No case law defines or discusses exactly what "avoiding the residence" means. Nor does the statute give any guidance as to where the line is drawn in order to obey the "avoid the residence" mandate. Could Simmons park

in the next block and avoid conviction? Would driving past Campbell's home without stopping have prevented his arrest? How far away from Campbell's house should he have been to be free of an accusation that he failed to "avoid her residence"? A statute is void for vagueness if it does not provide "fair notice" of prohibited conduct and also provide an objective standard for enforcement of violations. *State v. Smith*, 215 Wis. 2d 84, 91, 572 N.W.2d 496 (Ct. App. 1997). Here, the wording of the injunction invites speculation. But this court declines to address this issue because the question as to whether Simmons had knowledge that he violated the injunction can be answered without it.

¶16 In this case, Simmons submits that the answer is a simple one. He argues that, because in an earlier complaint charging him with violating the identical domestic abuse injunction, the State took the position that Simmons had to avoid entering the curtilage of Campbell's home in order not to run afoul of the injunction, he had no knowledge that parking on the street violated the injunction. Thus, Simmons posits that since he did not enter the curtilage of Campbell's property when he parked his car on the street, he was not knowingly in violation of the injunction. This court agrees.

¶17 A jury trial was held in the earlier complaint by Campbell that Simmons violated the domestic abuse injunction. During the trial, it was established that Simmons stepped onto Campbell's property, but only because he tripped. There, the State argued that "residence" was defined as Campbell's home and the surrounding curtilage. The State submitted that Simmons had violated the injunction because he had actually been on her property. The trial court directed a verdict in Simmons' favor and accepted testimony that there was *de minimus* contact and that the contact was accidental.

¶18 While the trial court here correctly observed that the dispute in the earlier case did not center around the definition of “avoiding,” nevertheless, by implication, the State adopted Simmons’ argument that in parking his car on the street he did not violate the injunction. This is so because if, as is suggested, the “avoid the residence” directive forbade Simmons from being on the street where Campbell lived, the State could have easily argued in the earlier case that Simmons’ stepping over the property line was irrelevant because simply by being present at the property he was guilty of “avoiding the residence.” Thus, in the earlier case, the State took the position that a violation could not occur until Simmons stepped onto Campbell’s property. Therefore, because of the earlier stance taken by the State, Simmons lacked the knowledge that his most recent actions violated the domestic abuse injunction. Inasmuch as Simmons was acquitted on the earlier charge and led to believe that only an actual entry onto Campbell’s property violated the injunction, the second part of the third element for a conviction under WIS. STAT. § 813.12(8), i.e., knowledge, was absent. As a result, it was reasonable for Simmons to believe parking his car on Campbell’s street was not prohibited. Thus, the trial court erroneously exercised its discretion when it concluded that all the elements of the crime had been proved.

¶19 Consequently, this court reverses two of Simmons’ three convictions and remands this matter to the trial court to vacate that part of the judgment in case number 01CM7364 and the judgment in case number 01CM3968 concerning these two counts. Inasmuch as the order would result in defendant’s immediate release, this court remands to the trial court with directions to release the defendant on

bond with conditions the trial court believes are appropriate until such time as the appellate process has been concluded per WIS. STAT. RULE 809.26.⁸

By the Court.—Judgments affirmed in part; reversed in part and cause remanded with directions.

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

⁸ The record will not be remanded pending remittitur unless a party seeks the record.

