COURT OF APPEALS
DECISION
DATED AND RELEASED

June 22, 1995

No. 94-3249-CR-NM

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES W. MCMILLEN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

GARTZKE, P.J.[1] A jury found James W. McMillen guilty of violating a domestic-abuse injunction. *See* § 813.12(8), STATS. He was acquitted of solicitation of murder, causing bodily harm to another, intentional damage to physical property, and criminal trespass. The trial court imposed a fine and costs totaling $1300.00.

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

The state public defender appointed Michael J. Devanie to represent McMillen on appeal. Attorney Devanie has filed a no-merit report pursuant to RULE 809.32, STATS., and ***Anders v. California,*** 386 U.S. 738 (1967). McMillen received a copy of the no-merit report and was advised of his right to file a response. He has not responded.

The no-merit report addresses whether there was sufficient evidence to prove that McMillen violated the domestic-abuse injunction. An appellate court will affirm a conviction if, viewing the evidence in the light most favorable to the conviction, it concludes that a jury, acting reasonably, could find guilt beyond a reasonable doubt based on the evidence. ***State v. Barksdale***, 160 Wis.2d 284, 289-90, 466 N.W.2d 198, 200 (Ct. App. 1991). A charge of violating a domestic-abuse injunction requires the existence of an injunction, an act that violates the injunction, and the defendant's knowledge of the first two elements. WIS J I—CRIMINAL 2040.

McMillen acknowledged he knew that his ex-wife had obtained a domestic-abuse injunction against him. The injunction was in effect at the time of the incident and it ordered McMillen to avoid his ex-wife's "residence and/or any premises temporarily occupied" by her. The only issue is whether he knew he was acting in violation of the injunction.

McMillen's mother testified that in late February 1993, he visited her in Milwaukee and told her he was moving to Florida. She testified that they agreed she would sell the farm on which he had been living in Viroqua. On March 9, 1993, McMillen's ex-wife, mother, and daughter drove to the farm to prepare the property for sale. Two days later, McMillen and five friends drove to the farm. There is no dispute that when McMillen left Milwaukee, he did not know his ex-wife was at the farm.

McMillen and his friends arrived around 2:00 a.m. and noticed a car in the driveway. In response to the investigating officer's question about seeing his ex-wife's car, McMillen said, "So I see a car[;] she has two vehicles." One of McMillen's friends testified that as they drove up to the house, McMillen made some comment about the "bitch's" car being there. McMillen testified that the car was snow covered, that it was similar to his ex-wife's, that he did not know why it would be there, that he did not realize she was in the house, and

that she had two cars and he thought maybe she just parked one there. He testified that he said he hoped "the bitch ain't here."

"Knowing" requires only that an actor believe the fact exists. Section 939.23(2), STATS. From the testimony, a jury could reasonably conclude that McMillen recognized the car and that he knew his ex-wife was likely to be in the farmhouse. Consequently, the jury's verdict was supported by the evidence.

Another possible issue is whether the trial court should have suppressed McMillen's statement. The police officer who responded to the call about a shooting at the farm questioned McMillen, who was shot in the leg, before medical personnel arrived. The trial court concluded that the statement was voluntary and that McMillen was not in custody at the time.

To the extent a trial court's decision on a suppression motion involves findings of evidentiary or historical facts, those findings will not be overturned unless they are clearly erroneous. ***State v. Krier,*** 165 Wis.2d 673, 676, 478 N.W.2d 63, 65 (Ct. App. 1991). Application of constitutional and statutory principles to the facts found by a trial court, however, presents a matter for independent review by an appellate court. ***Id.***

The trial court's finding that McMillen was not in custody is supported by the evidence. The investigating officer testified that at the time of the questioning, he considered McMillen the victim. The officer testified that after surveying the house for weapons, he spoke with McMillen to determine what had occurred. A challenge to the trial court's decision on the suppression motion lacks arguable merit.

This court's independent review of the record did not disclose any additional potential issues for appeal. Therefore, any further proceedings on McMillen's behalf would be frivolous and without arguable merit within the meaning of ***Anders*** and RULE 809.32(1), STATS. Accordingly, the judgment of conviction is affirmed, and Attorney Devanie is relieved of any further representation of McMillen on this appeal.

By the Court.—Judgment affirmed.