STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 08-AP-1296-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JANET A. CONNER,

Defendant-Appellant-Petitioner.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

ON APPEAL FROM A FINAL ORDER
OF THE CIRCUIT COURT FOR RICHLAND COUNTY,
THE HONORABLE MICHAEL J. ROSBOROUGH, PRESIDING

Respectfully submitted,

JANET A. CONNER,
Defendant-Appellant-Petitioner

MAYS LAW OFFICE, LLC
Attorneys for the
Defendant-Appellant-Petitioner
6405 Century Avenue, Suite 103
Middleton, Wisconsin 53562
(608) 257-0440

BY: STEPHEN E. MAYS
State Bar No. 1025716

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited and Other Authorities

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

FIRST ISSUE

Was the Petitioner's due process right to a fair trial and notice of the charges violated where the Information charged her with stalking due to a course of conduct occurring "on or about November 30, 2005" and where the trial court permitted the state to rely upon "other acts evidence" spanning five (5) years, including numerous acts occurring before the petitioner's prior conviction for a crime against the complainant, to establish acts constituting the "course of conduct" element of the offense?

The Court of Appeals answered: No

SECOND ISSUE

Whether the trial court committed prejudicial error in the admission of other acts evidence?

The Court of Appeals answered: No.

THIRD ISSUE

Was the closing argument by the state was improper and prejudicial?

The Court of Appeals: Did not answer.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Petitioner requests both oral argument before this Court and publication of this Court's opinion. Petitioner believes that this case, having been granted review by this Court, presents a real and significant question of both federal and state constitutional law.

More particularly, this appeal raises the issue of a criminal defendant's constitutional due process right to notice of the offense charged in a case where the Information charged an offense allegedly occurring in November 2005, yet the trial court permitted the State admit into evidence, argue at closing, and the jury to consider, separate other *uncharged* acts occurring over the course of the preceding five (5) years to meet an element of the charged offense – Stalking. Not only will this Court's published opinion help develop, clarify and harmonize the law and the questions presented, but it will have statewide impact involving the statutory interpretation of Wis. Stat. § 940.32(2m)(b), a statute the court of appeals found to be ambiguous.

This appeal also raises the very novel issue of the propriety of clarifying legislative intent by virtue of sources completely unrelated to the legislative history and the extent to which the appellate courts may rely upon extraneous sources outside the legislative history to interpret an ambiguous statute.

The appeal also discusses the differing legal analysis required for a due process notice challenge to an Information versus that required upon a challenge that the charging document does not allege an offense under the law.

Finally, this appeal addresses the decision of the court of appeals, which is in conflict with controlling opinions of the United States and Wisconsin Supreme Courts. The test applied by the court of appeals to determine whether the Information was sufficient for due process notice to the Petitioner is in conflict with controlling opinions of both the Wisconsin and United States Supreme Courts. Holesome v. State, 40 Wis. 2d 95, 102, 161 N.W.2d 283, 287 (1968); Russell v. United States, 369 U.S. 749, 763-64, 82 Sup. Ct. 1038, 8 L. Ed.2d 240 (1962); State v. Cheers, 102 Wis. 2d 367, 403-04,306 N.W.2d 676 (1981); Martin v. State, 57 Wis. 2d 499, 506, 204 N.W.2d 499 (1973).

Petitioner also believes that the opportunity for dialogue with the Court which oral argument presents allows the fullest possible exposition of these issues, issues which this Court believed to be significant enough to accept review of the unpublished decision of the court of appeals.

STATEMENT OF THE CASE AND FACTS

This is an appeal from a conviction of one count of stalking with a prior conviction for a crime committed against the same victim within seven (7) years on June 16, 2007, and the trial court's denial of a motion for new trial filed May 5, 2008, in the circuit court for Richland County, Michael J. Rosborough, Judge[1]. The trial court ruled that evidence initially admitted as other acts evidence, including numerous acts occurring before the applicable prior conviction, were properly admitted to establish an element of the offense, a "course of conduct" as defined in Wis. Stat. §§ 940.32(1)(a) and (2).

The petitioner was charged, in a complaint filed December 7, 2005, with two counts of Stalking with a Previous Conviction Within Seven (7) Years in violation of Wis. Stat. § 940.32(2m)(b) (a class H felony) and one count of Criminal Damage to Property in violation of Wis. Stat. § 943.01(1) (as a misdemeanor); all three counts additionally charged the defendant as a repeat offender pursuant to Wis. Stat. § 939.62(1). R. 1. The stalking charges in the complaint were based upon allegations that the petitioner knowingly engaged in a course of conduct which caused the reasonable suffering of emotional distress under the circumstances on or about November 30, 2005, directed at James F. Gainor in Count 1, and Rhonda S.

[1] After filing a Motion for Substitution of Judge, the Hon. Michael J. Rosborough was assigned as trial judge.

Gainor in Count 2, and that the petitioner had been previously convicted of a crime within seven (7) years where the victim of prior crime is the same victim as the charged offense. The criminal damage to property charge was based upon the allegation that the petitioner intentionally damaged a vehicle belonging to James and Rhonda Gainor without the owner's consent on or about November 30, 2005. The petitioner was subsequently acquitted of counts 2, stalking Rhonda Gainor, and 3, criminal damage to property.

A motion to dismiss the criminal complaint was timely filed on April 27, 2006 prior to the preliminary hearing. R. 14. The petitioner's motion to dismiss the criminal complaint, with respect to the felony counts of stalking with a prior conviction within 7 years, argued, in part, that the complaint was insufficient as it alleged only one act rather than a "course of conduct," as defined in Wis. Stat. § 940.32(1)(a), occurring on November 30, 2005. The Honorable Edward Leineweber, presiding over the preliminary hearing on May 4, 2006, refused to rule on the motion to dismiss the criminal complaint prior to the preliminary hearing over defense counsel's objection. R. 109 p. 5. The Honorable Michael J. Rosborough subsequently denied the motion by Order filed May 3, 2007 on the grounds that: (1) the probable cause determination at the preliminary hearing rendered the motion moot; and (2) the complaint set forth sufficient facts to establish probable cause. R. 51.

The state filed a Motion to Introduce Evidence of other Crimes, Wrongs or Acts, Pursuant to § 904.04(2) on November 3, 2006, seeking the admission of the petitioner's prior convictions and the underlying allegations constituting the basis for the petitioner's prior convictions in circuit case number 01 CM 236, wherein the petitioner was convicted of three counts of Violating a Harassment Restraining Order, convictions entered June 30, 2003, and two counts of Unlawful Use of Telephone, convictions entered August 7, 2003. R. 48. The state's motion addressed the issue of possible prejudice stemming from admission of the other acts evidence and the use of a limiting instruction to dispel such prejudice, stating that the state would request such an instruction be given to the jury. R. 48.

On November 21, 2007, the trial court granted the state's motion, over the petitioner's objection and argument with respect to prior acts allegedly committed against James and Rhonda Gainor, in case number 01 CM 236, on the basis that such evidence generally goes to the issue of motive, to provide context to the situation that leads to the criminal charges, providing background to the relationships of the parties, and that such evidence is admissible in these kinds of cases. R. 110 p. 5.

The Information was filed May 10, 2006, charging the petitioner, in Count 1, with Stalking With a Previous Conviction Within Seven (7) Years

pursuant to Wis. Stat. § 940.32(2m)(b) as a repeater listing James Gainor as the victim. Count 1 detailed the offense charged, in relevant portion:

> The above-named defendant on or about Wednesday, November 30, 2005, in the City of Richland Center, Richland County, Wisconsin, did intentionally engage in a course of conduct directed at a specific person to wit: James F. Gainor that causes that person to fear and that would cause a reasonable person to fear bodily injury or death to herself and where the actor knows or reasonably should know that the conduct placed the person in reasonable fear of bodily injury or death to himself. The actor has a previous conviction for a crime within 7 years of the present violation and the victim of that crime is also the victim of the present violation.
>
> R. 29.

The Information was not subsequently amended at any time.

The state's first witness at trial, Officer John Annear of the Richland Center Police Department, testified briefly to investigating the petitioner for harassing phone calls to James and Rhonda Gainor in 2001, while the Gainors had a restraining order against her, which led to the petitioner's prior convictions in 2003. R. 112 pp. 99, 142. Officer Annear also testified at length regarding the investigation of criminal damage to the Gainor's vehicle on November 30, 2005.

James Gainor was called as the state's second witness and testified to numerous acts of harassment between 2001 and the petitioner's prior convictions June 30, 2003, acts of harassment between July 2003 and November 2005, and at length regarding the incident on November 30, 2005 when Mr. Gainor claimed to have witnessed the petitioner scratching the paint on (or "keying") his vehicle. James Gainor testified on direct

examination to numerous acts occurring prior to the petitioner's prior conviction for a crime against him on June 30, 2003 including:

1) receiving numerous phone calls from the petitioner on about September 14, 2000 R. 112 pp. 147-48;

2) receiving a lot of phone calls starting October 4, 2000 R. 112 p.148;

3) the petitioner appearing at and entering property owned by James Gainor on October 4, 2000 R.112, 148;

4) the petitioner appearing at the home of James Gainor and confronting him on October 5, 2000 R. 112 pp. 149-50;

5) receiving lots of crank calls at home and work from October to November of 2000 R. 112 pp. 150-151;

6) the petitioner calling and threatening to cause problems at his employer's Christmas party in the first week of December 2000 R. 112 p. 152;

7) discovering his truck tires flattened a few days after the petitioner's call in December 2000 R. 112 p. 152;

8) discovering his truck windshield had been shattered on December 15, 2000 R. 112 p. 152;

9) receiving a call and voicemail message from the petitioner warning him to watch where he parked so that the petitioner wouldn't be tempted to do anything since she was so psychotic on December 25, 2000 R. 112 p. 153;

10) the petitioner confronting him at his place of employment after work and secretly recording their conversation on December 27, 2000 R. 112 pp. 156-57;

11) receiving magazine subscriptions which hadn't been ordered, receiving crank calls at home and work, and having someone call to cancel reservations for a wedding dance at a bowling alley twice in January of 2001 R. 112 p.159;

12) receiving numerous crank calls at home and work between February 2001 and June 2003 R. 112 pp. 161, 164; and

13) discovering paint dumped on his truck, the passenger side of the truck keyed up, spray paint on his truck, his car windshield smashed and discovering the locks on both his car and truck shut with super glue on different, unspecified dates between February 2001 and June 2003 R. 112 pp. 164-65.

James Gainor additionally testified to various acts allegedly carried out by the petitioner from September 2003 to November 2005, prior to the date charged in the Information. James Gainor testified that he:

1) received numerous crank calls in September 2003 R. 112 p. 166;

2) started receiving crank calls again in March 2004 R. 112 p. 167;

3) discovered that both sides of his car had been keyed on January 6th or 7th, 2005 R. 112 p. 169; and

4) received lots of crank calls at work in November 2005, filing a report with police the second week of that month R.112 p.171.

The state also called Jerald Cooper as a witness regarding prior acts by the petitioner. Mr. Cooper testified about his investigation into crank calls to Mr. Gainor from the Richland Hospital in 2001 and how he discovered that it was the petitioner. R. 112 pp. 265-270.

The trial court reviewed jury instructions with the parties after the close of defense's case on the third day of the jury trial, June 14, 2007. The original proposed jury instruction for the charge of stalking James Gainer submitted by the state, filed June 4, 2007, addressed the element of "course of conduct" and listed three (3) acts constituting the course of conduct:

(1) maintaining a visual or physical proximity to the victim; or

(2) approaching or confronting the victim; or

(3) placing an object on property owned by the victim. R. 59 p .4.

The trial court, however, included nine of the ten examples of acts which may be considered in determining a "course of conduct" listed in Wis. Stat. § 940.32(1)(a)1-10, excluding only subsection (1)(a)9 addressing the delivery of an object with the intent that it be delivered to the victim. R. 81 pp. 3-5. The state expressed approval of the trial court's version of the instruction, (R. 112 p. 681), arguing that it was appropriate to include examples of acts admitted as other acts evidence because "course of

conduct" is defined in a manner that invites a backward looking consideration. R. 112 p. 684.

The petitioner objected to the form of the jury instruction on the element of "course of conduct" listing numerous examples of acts not supported by evidence relating to the date charged in the Information, but descriptive of other acts evidence that had been admitted by the trial court. R. 112 p. 683. The petitioner proposed limiting the examples of acts the jury could consider for the course of conduct, to those acts actually supported by the evidence and relating to the incident when the petitioner was alleged to have damaged the Gainor's car. R. 112 pp. 684-85. The petitioner specifically objected, stating that the instruction as drafted by the trial court would substantially increase the likelihood that she would be convicted on the basis of other acts evidence dating back to 2001. R. 112 p. 685.

The trial court rejected the petitioner's proposal stating that the phrase "course of conduct" is defined as a series of two or more acts carried out over time. The trial court noted that it's understanding of the state's theory of the case was that it went back to 2000 and that "a series of things have happened to the Gainors since then that they attribute to your client," and that the stalking had gone on for a period of seven (7) years. R. 112 pp. 685-86. The petitioner argued that while the prior convictions from 2003 constitute an element of the offense as an act within the seven (7) year

period, the trial court's instruction would leave the jury free to convict the petitioner on the basis of uncharged acts against the alleged victim occurring before the applicable prior conviction. R. 112 p. 686. The trial court rejected the petitioner's argument and ruled that the jury may consider all alleged acts in a stalking case and that the state was free to pursue that theory if supported by the evidence to support it. R. 112 p. 687. In the trial court's Order, dated May 3, 2008 (R.102 p.1), denying the petitioner's post-conviction motion for new trial, the court reasserted that:

> other acts evidence relating to the alleged victims of the present case from the year 2000 onward was properly admitted to establish an element of the charged offense, a 'course of conduct' as defined in Wis. Stat. §940.32(1)(a).

The state proceeded with closing argument on the theory supported by the trial court's ruling on jury instructions. The state argued, referring to the petitioner's prior June 30, 2003 convictions for violation of a restraining order occurring in 2001:

> The nature of that was making the telephone calls to the hospital and, of course, that fits one of the subjects that the judge just read to you concerning the course of conduct that you may considering deciding whether or not she is guilty of the stalking charges. One of those is contacting the victim by telephone and causing the person's telephone to ring repeatedly, etcetera.
>
> I think there's also evidence in the case that she audio-taped the activities of the victim. Remember, there's the conversation on December 27 of 2000 where she was audiotaping Mr. Gainor without him knowing about it.

R. 112 p. 712.

The state also offered examples of acts constituting a "course of conduct" from October 4 and 5 of 2000, where the petitioner was alleged to have

entered Mr. Gainor's home and subsequently confronted him at his home the next day with her sister as well as the receipt of unordered magazine subscriptions which Mr. Gainor had testified to as occurring in January of 2001. R. 112 pp. 712-13.

The state, in final closing arguments, went further in defining a "course of conduct" by advising the jury, "the stalking charges require two or more acts and just the convictions from the hospital with the telephone calls, well there you got three for that matter because three convictions." R. 112 p. 748. This argument was in reference to the testimony regarding crank calls, the subsequent investigation which led to the petitioner's arrest for violating a restraining order in 2001 and the judgment of conviction entered into evidence to establish prior convictions for crimes committed against the same complaining witnesses. R. 70, Ex. 25.

The trial court subsequently denied the petitioner's motion for judgment notwithstanding the verdict, filed September 25, 2007, R. 91 pp. 3-6), which argued that the admission of other acts evidence to establish an element of the offense violated the petitioner's due process rights to notice of the charge and a fair trial. The state responded by arguing that the trial court had previously ruled that the "course of conduct" element of the offense was properly established by acts alleged to have occurred between the years 2000 to 2003 as direct proof in the present case R.104 pp.1-2) and that the petitioner's due process right to notice was not infringed as the

criminal complaint incorporated a motion to introduce other acts evidence pursuant to Wis. Stat. § 904.04(2) filed April 9, 2003. R.1, pp. 13-19. The state also argued that the petitioner was given notice that evidence of other acts occurring prior to the date charged in the Information because earlier acts had been testified to at the preliminary hearing and were subject to a motion hearing on the state's motion to admit other acts evidence pursuant to Wis. Stat. § 904.04(2) filed November 3, 2006. R. 104 p. 3). The state failed to address how the petitioner was given notice that other acts evidence stemming from occurrences from June 2003 through early November 2005 would also be used to establish the charged "course of conduct" in the present case. The trial court denied the petitioner's motion because it was "satisfied that its evidentiary rulings were correct and the court is satisfied that there was sufficient evidence to support the jury's verdict." R. 113 p. 4.

The trial court subsequently denied the petitioner's motion for new trial which argued that other acts evidence was improperly admitted to establish motive and identity, that the other acts alleged to have occurred prior to June 30, 2003 were improperly admitted to establish a "course of conduct" occurring within seven years *after* the prior June 30, 2003, and improper argument by the state during closing argument. The state argued that it supported the trial court's ruling at the close of the trial that other acts evidence prior to the petitioner's prior conviction could establish the

"course of conduct" element in the present case and that closing arguments to the jury pursuing that theory were not improper based upon the court's ruling. R. 115 pp. 8-9. The trial court denied the motion. R. 115 p. 9.

The Wisconsin Court of Appeals for District IV, in a decision ***not*** *recommended for publication* in the official reports, affirmed the trial court's rulings. Slip Op. Applying the test set forth in Wilson v. State, 59 Wis. 2d 269, 276, 208 N.W.2d 134 (1973), the court held that the petitioner received sufficient notice of the charged offense because the Information alleged the elements of the charged crime. Slip. Op, pp. 15-16. The court further held that the petitioner's right to a fair trial was not violated by the use of alleged acts occurring prior to the operative prior conviction to establish the "course of conduct" element of the offense. Slip. Op, p. 10. The court reasoned that although the language of Wis. Stat. §940.32(2m)(b) is vague, the legislative intent is sufficiently clarified such that the rule of lenity does not apply on the basis of Nat'l Inst. of Justice, U.S. Dep't of Justice, Project to Develop a Model Anti-Stalking Code for States (1993). The court, therefore, determined that the statute only requires that the final act in a course of conduct occur after the requisite prior conviction, based upon the legislative intent to provide a gradient of aggravated stalking offenses gleaned from the federal publication. Slip. Op, p. 10.

ARGUMENT

I. THE PETITIONER'S CONSTITUTIONAL DUE PROCESS RIGHT TO NOTICE OF THE CHARGED OFFENSE WAS VIOLATED WHEN THE TRIAL COURT PERMITTED THE STATE TO ADMIT "OTHER ACTS" EVIDENCE TO ESTABLISH A "COURSE OF CONDUCT" NOT CHARGED BY THE STATE AND WHERE SUCH ACTS ALLEGEDLY OCCURRED BEFORE THE DATE OF THE CHARGED STALKING VIOLATION AND BEFORE THE DATE OF THE PETITIONER'S PRIOR CONVICTION.

The Sixth Amendment to the United States Constitution and Article 1, §7 of the Wisconsin Constitution guarantee an accused the right to be informed of the nature and cause of a criminal accusation. In essence, "procedural due process requires that a defendant have notice of a specific charge and a chance to be heard in trial of the issues raised by that charge." State v. Cheers, 102 Wis. 2d 367, 403-406, 306 N.W.2d 676 (1981). The Information must not only allege that the statutory elements of the charged offense have been committed; it must provide information that, "sufficiently apprises the defendant of what he must be prepared to meet, and secondly, in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." Russell v. United States, 369 U.S. 749, 763-64, 82 Sup. Ct. 1038, 8 L. Ed.2d 240 (1962) (internal quotations and citations omitted). The constitutional due process right to notice of a charged offense "requires that the notice provided reasonably convey the information required for parties to prepare their defense and

make their objections." Bachowski v. Salamone, 139 Wis. 2d 397, 412-13, 407 N.W.2d 533 (1987) (holding that due process rights were not violated where the statute at issue "requires a petitioner to state facts and circumstances which describe and support the specific acts or conduct which allegedly constitute" the offense defined by statute and where the form required to file the claim "requires the petitioner to specify 'what happened when, where, who did what to whom.'").

The purpose of the Information is "to inform the defendant of the charges against him." Cheers, at 403. The constitutional sufficiency of the pleadings are determined by two factors: (1) whether the accusation is such that the defendant is able to determine whether it states an offense to which she is able to plead and prepare a defense; and (2) whether conviction or acquittal is a bar to another prosecution for the same offense. Id. at 404, citing State v. George, 69 Wis. 2d 92, 97, 230 N.W.2d 253 (1975). The Information's essential function is to "provide the defendant with sufficient details regarding the nature of the charge and conduct which underlies the accusation to allow her or him to prepare or conduct a defense." State v. Stark, 162 Wis. 2d 537, 544, 470 N.W.2d 317 (Ct. App. 1991). Notice to the accused is the key factor required of the Information, Whitaker v. State, 83 Wis. 2d 368, 373, 265 N.W.2d. 575 (1978), and the "right to be clearly appraised of the criminal charge is constitutional in scope and

cannot be avoided by mere rules of modern pleading…" Martin v. State, 57 Wis. 2d 499, 506, 204 N.W.2d 499 (1973).

A defendant's due process rights are violated when the Information does not contain the time frame for which the defendant is prosecuted for a continuing offense. The Information must inform the accused of "the time frame in which the crime allegedly occurred." State v. Kaufman, 188 Wis. 2d 485, 492, 525 N.W.2d 138 (Ct. App. 1994), quoting Stark, at 544; see also, Stark at 545-46 (holding that while the time need not be precisely alleged when it is not a material element of the charged crime, the State still has a constitutionally required obligation to "inform the defendant, within reasonable limits, of the time when the offense charged was alleged to have been committed;" and, "the state has a duty to disclose information it does have," with regards to the time period of the charged offense); State v. Fawcett, 145 Wis. 2d 244, 253, 426 N.W.2d 91 (Ct. App. 1988) ("A defendant is entitled to be informed of the charges against him, as well as the underlying facts constituting the offense, including the time frame in which the [offense] allegedly occurred..." (citations omitted)). The date of the alleged acts constituting the offense is critical because, "the purpose of the charging document is to inform the accused of the acts he allegedly committed and to enable him to understand the offense so he can prepare his defense." State v. Waste Management of Wisconsin, Inc., 81 Wis. 2d 555, 566, 261 N.W.2d 147 (Wis. 1978).

The state has the power to decide whether to charge an individual with a continuing offense or a series of single offenses where a defendant's alleged actions may be viewed as a continuing offense. Kaufman, at 492, FN. 2, citing State v. Lomargo, 113 Wis. 2d 582, 587, 335 N.W.2d 583 (1983). Where the state elects to charge a defendant with a continuing offense, failure to provide the defendant with the date upon which the charged continuing offense began violates the defendant's due process rights by failing to provide notice that the defendant would have to prepare a defense to that continuing violation. Kaufman, at 492; see also State v. Cornhauser, 74 Wis. 42, 43-44, 41 N.W. 959 (1889) (holding than an information for embezzlement was improperly sustained by evidence of embezzlement occurring prior to the charged date).

The court of appeals, in Kaufman, addressed an Information charging the defendant with one count of welfare fraud occurring between June 21 and September 22, 1991, and another count of welfare fraud occurring between September 21 and December 22, 1990. Welfare fraud is a continuing offense, John v. State, 96 Wis. 2d 183, 194, 291 N.W.2d 502 (1980), and the state in Kaufman elected not to charge the defendant with committing the offense from the date that the continuing violation allegedly began. Evidence presented at trial did not establish that the defendant failed to timely report a change in her living circumstances as charged in count one, but that she had committed welfare fraud from 1988 through

early June of 1991. Id. at 489-90. The state argued that welfare fraud was a continuing offense which began prior to the dates charged in count 1 due to the defendant's failure to report a change in circumstances before June 1991. Id. at 490 (arguing that the continuing offense was proven by a state's witness testifying to the defendant's confession to have been committing welfare fraud from the fall of 1988).

The Kaufman court rejected the state's position, finding that the decision to charge Kaufman with welfare fraud on two separate periods, rather than charging her with a continuing offense with the earlier alleged beginning date of the Fall of 1988 specified in the information, violated her constitutional right to sufficient notice to prepare a defense. Id. at 492. The defendant had not been provided adequate notice that she would have to prepare a defense to a continuing violation: "Regardless of when Kaufman's failure to report allegedly occurred, this critical date was not stated in the information and cannot now be considered without violating Kaufman's rights of due process." Id., citing, George, 69 at 96-97.

The present case is similar to the circumstances addressed in Kaufman. Evidence was presented at trial that the petitioner scratched the paint on the Gainor's vehicle on November 30, 2005, (R. 112, pp. 171-185, 235-238, 282-284), however, the jury acquitted the petitioner of count three (3) of the Information charging criminal damage to the Gainor's vehicle on November 30, 2005. A substantial portion of the State's case consisted of

what was initially admitted as other acts evidence by the trial court, (R. 110, p. 5) addressing uncharged acts spanning a period of more than five (5) years from the date charged in the Information.[2] Rather than charging the petitioner with an offense starting in 2000, the petitioner was charged with the separate occasion of stalking on or about November 30, 2005.

Similar to the facts in Kaufman, the state did not seek to amend the Information prior to the trial or even jury deliberations pursuant to Wis. Stat. § 971.29(2).[3] Rather, it appears that the State never intended to establish the course of conduct element of the offense by acts allegedly committed prior to the operative prior conviction until the trial court advised the state that it viewed the course of conduct as consisting of all alleged acts over the five (5) year period at the jury instruction conference.

The petitioner received notice sufficient to prepare a defense to allegations of stalking and criminal damage to property on November 30, 2005, but learned at the close of proof at trial that the state would seek to establish an element of the offense with all acts alleged to have occurred

[2] The state presented several witnesses for the purpose of establishing other acts evidence. See the entire testimony of John Annear relating to harassing calls in 2001 (R.112 p. 99-101, 140); testimony of James Gainor relating to events from September 2000 to early November 2005 (R.112 p. 147-70) (These are the 23 of 45 pages of direct testimony by James Gainor that primarily addressed other acts evidence); testimony of Rhonda Gainor (R.112 p. 220-29); entire testimony of Jerry Cooper relating to phone calls investigated in 2001 (R.112 p. 265-70); and the testimony of Amanda Johnson relating to phone calls prior to 2003 (R.112 p. 276-79).

[3] 971.29(2) – At the trial, the court may allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant. After verdict the pleading shall be deemed amended to conform to the proof if no objection to the relevance of the evidence was timely raised upon the trial.

over a five (5) year period. Extending the scope of the alleged continuing offense to five (5) years from a specific charged date dramatically increased the number of allegations the petitioner needed to defend against. Not only were the number of alleged acts and the time frame dramatically increased, but this was done so only after the defense had rested its case.

The court of appeals, in its opinion, attempts to distinguish Kaufman from the petitioner's situation, stating that the charge of welfare fraud as in Kaufmann does not have the element of the "course of conduct" element required for the offense of Stalking. However, the offense of welfare fraud, like stalking, is generally a continuing offense. See John, at 194 and Slip. Op, pp. 14-15. Kaufman likewise was charged with a continuing offense and the court addressed the issue of whether her due process right to notice of the charged offense is violated by prosecution of a continuing offense which extended roughly two and a half (2 ½) years prior to the dates charged in the Information. Kaufman, at 491-92.

Kaufman's conviction was not vacated because the state failed to notify her of a continuing offense. Rather, it was vacated due to the state's failure to notify her of what *time period* she would have to defendant against. Id. at 493 (emphasis supplied), ("the information did not indicate the date from which the continuing violation began running nor did the parties agree to the date …[t]herefore, the State is bound by the time period specified in the information.") The only real distinction in the Kaufman

decision for purposes of the legal analysis is that the uncharged time period in the present case is greater than five (5) years rather than two and a half (2 ½) years.

The trial court's ruling, permitting admission of acts over the five (5) year period – from October 2000 to early November 2005 – for the purpose of establishing an element of the charged offense, had the practical effect of improperly amending count one (1) of the Information to allege a course of conduct occurring within a five (5) year period. While a court may permit amendment of an Information at trial where such amendment is not prejudicial to the defendant, see Wis. Stat. § 971.29(2), where the amendment at the close of trial changes the alleged offense or results from different transactions, such amendment is prejudicial as it denies the defendant notice of the offense sufficient to prepare a defense. State v. Neudorff, 170 Wis. 2d 608, 618-621, 489 N.W.2d 689 (Ct. App. 1992) (amending charge on the morning of trial to a conspiracy which overlapped original charge only slightly in time with the originally charged dates was a prejudicial violation of the defendant's right to notice of the charged offense); State v. Tawanna H., 223 Wis. 2d 527, 577-78 and 580-81, 590 N.W.2d 276 (Ct. App. 1998) (amendment of charge to conform to proof at close of trial was prejudicial error).

In the present case, the state sought admission of the prior acts relied upon at trial to establish identity in the case of a prior conviction for

damaging an unrelated party's vehicle in 2003, and for the "purposes of proving motive, intent, plan, and *res geste*." R. 48 p.12. The state further dispelled any suggestion that such acts would be used to establish the charged offense in noting at the close of the "argument" portion of the motion that any prejudicial effect could be dispelled by an instruction and that the "State will request that such an instruction be given to the jury." R. 48 p.12. The state's motion did reference one specific instance in which such prior criminal convictions would establish an element of the offense, noting that the prior convictions in case number 01 CM 236 would establish that the petitioner had been convicted of a prior crime against the alleged victims as required for a conviction under Wis. Stat. §940.32(2m)(b). R. 48, p.12.

Simply put, a defendant is entitled to clear notice of the offense charged and the time frame of the charged offense in the charging instrument, the Information, and that was not provided in this case. The petitioner was prejudiced by the trial court's ruling at the close of trial as it allowed the jury to convict the petitioner of count one (1) of the Information on the basis of transactions separate from those alleged in the Information.

B. WILSON V. STATE DOES NOT PROVIDE THE PROPER LEGAL ANALYSIS TO ADDRESS A DUE PROCESS NOTICE VIOLATION CLAIM.

The court of appeals mistakenly applied the jurisdictional sufficiency test set forth in Wilson v. State, 59 Wis. 2d 269, 208 N.W.2d 134 (1973), to address the petitioner's due process notice violation claim. Slip. Op, pp. 15-16. The test adopted by this Court to address the issue of a constitutional due process right to notice was set forth in Holesome v. State, 40 Wis. 2d 95, 161 N.W.2d 283 (1968):

> In order to determine the sufficiency of the charge, two factors are considered. They are, whether the accusation is such that the defendant determine whether it states an offense to which he is able to plead and prepare a defense and whether conviction or acquittal is a bar to another prosecution for the same offense.

Id. at 102

The United States Supreme Court further explained the basis for this analysis and makes it clear that the Wilson test utilized by the court of appeals is not sufficient to satisfy the constitutional due process right to notice of the charged offense:

> It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species, -- it must descend to particulars.'" United States v. Cruikshank, 92 U.S. 542, 558. An indictment not framed to apprise the defendant "with reasonable certainty, of the nature of the accusation against him . . . is defective, although it may follow the language of the statute." United States v. Simmons, 96 U.S. 360, 362. "In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute

> the offence intended to be punished; . . . " United States v. Carll, 105 U.S. 611, 612. "Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." United States v. Hess, 124 U.S. 483, 487. See also Pettibone v. United States, 148 U.S. 197, 202-204; Blitz v. United States, 153 U.S. 308, 315; Keck v. United States, 172 U.S. 434, 437; Morissette v. United States, 342 U.S. 246, 270, n. 30. Cf. United States v. Petrillo, 332 U.S. 1, 10-11. That these basic principles of fundamental fairness retain their full vitality under modern concepts of pleading, and specifically under Rule 7 (c) of the Federal Rules of Criminal Procedure, is illustrated by many recent federal decisions.

Russell v. United States, 369 U.S. 749, 765-766, 82 Sup. Ct. 1038, 8 L. Ed.2d 240 (1962) (footnotes omitted).

This Court, in Wilson, did not address a due process issue related to notice, but rather, a challenge to the information being jurisdictionally defective and void for failing to charge an offense, pursuant to Champlain v. State, 53 Wis. 2d 751, 754, 193 N.W.2d 868 (1972). See: Wilson v. State, at 274-75. This Court, in Wilson, held that the Information did sufficiently charge an offense, attempted aggravated robbery, by virtue of alleging all elements of the charged offense. Id. at 275-76. The present appeal, however, objects to the Information as being constitutionally insufficient to provide notice of a continuing offense of aggravated stalking spanning more than (5) years. The court of appeals analysis would only be appropriate had the petitioner challenged the Information for not charging the offense of aggravated stalking.

II. THE PLAIN AND UNAMBIGUOUS LANGUAGE OF WIS. STAT. 940.32(2m)(b) REQUIRES THAT A COURSE OF CONDUCT CONSISTING OF TWO OR MORE ACTS OCCUR "WITHIN 7 YEARS AFTER THE PRIOR CONVICTION" FOR A CRIME AGAINST THE SAME VICTIM.

The petitioner's due process right to a fair trial was violated by the trial court's ruling that the "course of conduct" element could be established by alleged acts occurring before the required prior conviction in a prosecution under Wis. Stat. § 940.32(2m)(b) as well as producing a jury instruction which presented the aggravated element of the offense as a sentencing enhancement factor, rather than an element of the charged offense. R. 81, pp. 3-6. Many of the examples of acts which may constitute a course of conduct, placed in the jury instruction *sua sponte* by the trial court, were only established by evidence of acts which occurred up to five (5) years prior to the date of the charged offense and prior to the petitioner's prior conviction for a crime against Mr. Gainor. R. 112. pp. 685-87). At the close of the defense's case, the trial court permitted the state to proceed with a theory of prosecution that the relevant acts constituting a course of conduct included all alleged acts from 2000 to 2005. The state adopted the recently authorized theory of prosecution and misstated the law by arguing to the jury that the "course of conduct" element of the offense had been established by numerous acts occurring prior to the appellant's conviction for a crime against the victim, entered

June 30, 2003, and had even been established by those convictions relating to harassing phone calls in 2001. R. 112, p. 748.

Wis. Stat. § 940.32(2m)(b) increases the penalty of an I felony Stalking charge under Wis. Stat. § 940.32(2) to an H felony where, "[t]he actor has a previous conviction for a crime, the victim of that crime is the victim of the present violation of sub. (2), and the present violation occurs within 7 years after the prior conviction." One element of the offense of stalking under subsection (2) is engaging in "a course of conduct," defined as "a series of 2 or more acts carried out over time, however short or long, that show a continuity of purpose…." Wis. Stat. § 940.32(1)(a).

This Court has explained that statutory interpretation relies upon the plain language of a statute "because it is assumed that the legislature's intent is expressed in the words it used." State v. Haanstad, 2006 WI 16, ¶19, 288 Wis. 2d 573, 709 N.W.2d 447 (citation omitted). Thus, interpretation begins with the language of the statute and giving it its common, ordinary, and accepted meaning, except that technical or specially defined words are given their technical or special definitions. State ex rel. Kalal v. Circuit Court for Dane County, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110.

Statutory language is interpreted in the context in which it is used, not in isolation but as part of a whole, in relation to the language of surrounding or closely related statutes, and we interpret it reasonably to

avoid absurd or unreasonable results. Id. at 46. The scope, context, and purpose of the statute are also considered insofar as they are ascertainable from the text and structure of the statute itself. Id. at 48. If this process of analysis yields a plain meaning, then there is no ambiguity and the plain meaning must be applied. Id. at 46.

However, if the statutory language is capable of being understood by reasonably well-informed persons in two or more senses, it is ambiguous and we may employ sources extrinsic to the statutory text. Id. at 47, 50. These extrinsic sources are typically items of legislative history. Id. at 50. Courts must interpret a statute in the manner favoring the defendant where the court is unable to clarify intent of the legislature by resort to legislative history. State v. Cole, 2003 WI 59, ¶67, 262 Wis. 2d 167, 663 N.W.2d 700.

A. THE PLAIN, UNAMBIGUOUS, LANGUAGE OF WIS. STAT. § 940.32(2m)(b) REQUIRES PROOF OF A SERIES OF TWO OR MORE ACTS INTENDED TO PLACE A PERSON IN DISTRESS COMMITTED AFTER THE PRIOR CONVICTION FOR A CRIME AGAINST THE SAME VICTIM.

The petitioner was charged with a violation of Wis. Stat. §940.32(2m)(b) in Count 1 of the information. R. 29. That subsection of the statute is as follows:

> (2m) Whoever violates sub. (2) is guilty of a Class H felony if any of the following applies:
> (b) The actor has a previous conviction for a crime, the victim of that crime is *the victim of the present violation of sub. (2),* and ***the present violation occurs*** *within 7 years* ***after the prior conviction***.

(emphasis supplied). A violation of subsection (2) requires a course of conduct consisting of a series of two or more acts. Wis. Stat. §§ 940.32(1)(a) and (2). It is clear from the context of sub. (2m)(b), that the "present violation" which must occur within 7 years after the prior conviction is a present violation of sub. (2) which encapsulates a "course of a conduct" consisting of two or more acts. Thus, a prosecution under (2m)(b) must establish two or more acts constituting a "course of conduct" which occur after the requisite prior conviction.

This plain meaning of the statute is further supported by closely related statutes. The very similar Harassment statute Wis. Stat. § 947.013 also provides a gradient of penalties for harassing conduct entailing a "course of conduct" and proscribes certain time periods for aggravated harassment offenses. Pursuant to Wis. Stat. 947.013(1t), the offense of harassment is elevated to a Class I felony where an accused commits the offense of harassment and has been previously convicted of harassment "involving the same victim and the present violation occurs ***within*** 7 years of the prior conviction."[4] (Emphasis supplied). While the aggravated stalking statute, Wis. Stat. 940.32(2m)(b), requires that the stalking offense occur within 7 years *after* the prior conviction, the aggravated harassment provision under Wis. Stat. 947.013(1t) only requires that the harassment

[4] The language of subsection (1t) is substantially identical to the subsection as it existed in 1992, prior to the enactment of 1993 Wis. Act 96 which created the Stalking statute and prior to the publication of Project to Develop a Model Anti-Stalking Code for States.

occur within 7 years of the prior conviction. As it is assumed that "the legislature's intent is expressed in the words it used", Haanstad, at ¶19, it is clear that the legislative intent in drafting Wis. Stat. § 940.32(2m)(b) was different than in Wis. Stat. § 947.013(1t). As the legislature is presumed to be aware of the language of other statutes, particularly closely related statutes, the difference in statutory language indicates that Wis. Stat. 940.32(2m)(b) was not intended to address a course of conduct which only partially occurs within 7 years of a prior offense, but only a course of conduct (two or more acts) occurring after the prior conviction.

The text of Wis. Stat. 940.32(2e)(a) also supports the petitioner's reading of sub. (2m)(b): "After having been convicted of a sexual assault … or a domestic abuse offense, the actor engages in any of the acts listed in sub. (1)(a) 1. to 10., if the act is directed at the victim of the sexual assault or the domestic abuse offense." Sub. (2e)(a) demonstrates that the legislature can clearly express it's intent to require that only one act constituting a "course of conduct" is necessary to constitute an aggravated offense after a prior conviction. That the legislature did not use similar, clear language in sub. (2m)(b) demonstrates that the legislature did, indeed, intend the aggravated offense require proof of at least two acts occurring after the requisite prior conviction.

B. LEGISLATIVE INTENT BEHIND THE ENACTMENT OF WIS. STAT. 940.32(2m)(b) CANNOT BE CLARIFIED BY EXTRANEOUS SOURCES WITH NO RELATION TO LEGISLATIVE HISTORY.

The court of appeals, relying upon dicta from State v. Warbelton, 2009 WI 6, ¶35-36, 315 Wis. 2d 253, 759 N.W.2d 557, improperly relied upon a U. S. Department of Justice (hereinafter "DOJ") publication to surmise the legislature's intent upon finding the language of Wis. Stat. § 940.32(2m)(b) to be ambiguous.

The Warbelton decision did not rely upon the DOJ publication to interpret Wis. Stat. §940.32(2m)(a). Rather, this Court utilized the plain language of the subsection as well as examining the structure of the statute as a whole and it's relation to other, similar statutes. Id. at ¶22-34. This Court then noted that the evident intent of the legislature to create aggravated offenses with additional elements was further confirmed by the history of other stalking statutes naturally as evidenced by the Project to Develop a Model Anti-Stalking Code for the States. Warbelton, at ¶35 (noting in FN. 17 that "there is no direct reference to the model statute recorded in the legislative history").

The lower court's reliance upon a DOJ publication is flawed not only because there is no indication that the legislature relied upon the publication, but because the text of sub. (2m)(b) is not even suggested as an aggravated offense by the model code. See Project to Develop a Model

Anti-Stalking Code for States, p.49-50 (proposing aggravated offenses for those previously convicted of a felony or stalking offense against the same victim within a certain number of years). Additionally, Wisconsin statutes contained the model for the stalking offense long before the DOJ publication. See Id. at 15 (citing Wis. Stat. § 947.013 as Wisconsin's stalking statute).

CONCLUSION

The petitioner's Constitutional Due Process Rights to be informed of the nature and cause of the charged offense and her right to a fair trial pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, §7 of the Wisconsin Constitution were violated. Count 1 of the Information charging her with Stalking with a Previous Conviction For a Crime Against the Same Victim Within 7 Years under Wis. Stat. § 940.32(2m)(b) occurring "on or about Wednesday, November 30, 2005" was insufficient to provide the petitioner with notice that she would be required to defend against numerous allegations of acts constituting the offense of Stalking spanning a period greater than five (5) years. The petitioner was also denied a fair trial based upon a misinterpretation of Wis. Stat. § 940.32(2m)(b) by the trial court which permitted the state to argue to the jury and for the jury to consider alleged acts occurring prior to the operative prior conviction alone as sufficient to constitute the required "course of conduct." The state at trial even went so far as to argue that the uncharged actions underlying the petitioner's prior convictions, standing alone, were sufficient to establish the "course of conduct" element of the offense.[5] R. 112, p. 748.

[5] Closing argument by the State: "I just want to point out that the stalking charges require two or more acts and just the convictions from the hospital with the telephone calls, well there you got three for that matter because three convictions." A proposition which most likely violates a defendant's constitutional protection from double jeopardy and ex-post facto laws.

The court of appeals' analysis of the Due Process notice issue raised by the petitioner is in conflict with controlling precedent in the opinions of both the United States and Wisconsin Supreme Courts. The lower court improperly applied the analysis appropriate to determine a court's jurisdictional authority to hear a claim challenging the sufficiency of the Information based upon failure to charge an offense under the law. The petitioner did not allege that the Information failed to sufficiently provide notice of what statutory offense was charged; rather, she challenged the sufficiency of the Information in Count 1 to provide notice of the nature and cause of the charged offense – i.e., what alleged acts or course of conduct she would be required to defend against at trial. The Information did not provide the petitioner with notice of the nature and cause of the Stalking charge sufficient to put her on notice that elements of the offense could be established by conduct alleged to have occurred at various and unspecified times over a five (5) year period.

The court of appeals additionally improperly found Wis. Stat. § 940.32(2m)(b) ambiguous and that the legislature's intent was clarified by virtue of an extraneous publication by a unit of a federal agency not referred to in the legislative history. The lower court failed to utilize traditionally fundamental methods of statutory interpretation in reaching the determination of ambiguity. The lower court further erred by relying upon a completely extraneous source with no connection to the Wisconsin

legislature's enacting of the statute. Finally, the lower court's reasoning for reliance upon the extraneous source is flawed.

The decision of the court of appeals must be overruled and in doing so, this Court should send a clear message to lower courts that statutory interpretation must be based upon the language of a statute, the statutes context, similar statutes, and finally, legislative history if required. Allowing the appellate courts to disregard statutory context, legislative history and merely rely upon extraneous sources from without the state simply invites unbridled judicial activism. For the reasons stated above, the conviction of the petitioner must be reversed and this action remanded to the trial court with directions to grant the petitioner's Motion for New Trial.

Dated at Middleton, Wisconsin, May 12, 2010.

Respectfully submitted,

JANET A. CONNER,
Defendant-Appellant-Petitioner

MAYS LAW OFFICE, LLC
Attorneys for the
Defendant-Appellant-Petitioner
6405 Century Avenue, Suite 103
Middleton, Wisconsin 53562
(608) 257-0440

BY: _____
STEPHEN E. MAYS
State Bar No. 1025716

CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 100 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and 60 characters per line. I further certify that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief. The length of the brief is 7,995 words.

Dated, May 12, 2010.

Signed,

_____

STEPHEN E. MAYS
State Bar No. 1025716

APPENDIX

TABLE OF CONTENTS OF APPENDIX

CERTIFICATION OF APPENDIX

I hereby certify that filed as part of this brief is an appendix that complies with Wis Stat. § 809.19 (2) (a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

Dated, May 12, 2010.

Signed,

_____

STEPHEN E. MAYS
State Bar No. 1025716

APPENDIX

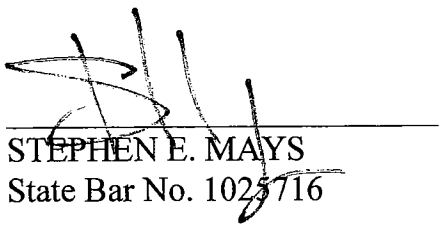
TABLE OF CONTENTS OF APPENDIX

CERTIFICATION OF APPENDIX

I hereby certify that filed as part of this brief is an appendix that complies with Wis Stat. § 809.19 (2) (a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

Dated, May 12, 2010.

Signed,



STEPHEN E. MAYS
State Bar No. 1025716

COURT OF APPEALS
DECISION
DATED AND FILED

August 27, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1296-CR **Cir. Ct. No. 2005CF119**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JANET A. CONNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Richland County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Bridge, JJ.

¶1 BRIDGE, J. Janet A. Conner appeals from the judgment of conviction entered against her and the order denying her motion for postconviction relief. Following a jury trial, Conner was convicted of one count of stalking with a previous conviction within seven years of a prior conviction in violation of WIS.

STAT. § 940.32(2m)(b) (2007-08).[1] She contends that: (1) the circuit court improperly interpreted § 940.32(2m)(b) when it admitted evidence of her "course of conduct," which included acts that preceded her prior conviction for violating a harassment injunction obtained by the victim in the present matter; (2) the circuit court improperly admitted other acts evidence relating to the acts underlying her conviction for violating the injunction, as well as to acts underlying her conviction for criminal damage to the property of a victim other than the victim in the present matter; and (3) the criminal information did not provide her with adequate notice of the charged stalking offense. We disagree with each contention and affirm.

BACKGROUND

¶2 Janet Conner was charged on December 7, 2005, with two counts of stalking with a previous conviction within seven years, in violation of WIS. STAT. § 940.32(2m)(b),[2] and one count of causing criminal damage to property, in

---

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] WISCONSIN STAT. § 940.32(2) and (2m)(b) provide:

> **(2)** Whoever meets all of the following criteria is guilty of a Class I felony:
>
> (a) The actor intentionally engages in a course of conduct directed at a specific person that would cause a reasonable person under the same circumstances to suffer serious emotional distress or to fear bodily injury to or the death of himself or herself or a member of his or her family or household.
>
> (b) The actor knows or should know that at least one of the acts that constitute the course of conduct will cause the specific person to suffer serious emotional distress or place the specific person in reasonable fear of bodily injury to or the death of himself or herself or a member of his or her family or household.

(continued)

violation of WIS. STAT. § 943.01(1).[3] Counts one and two were charged as repeaters under WIS. STAT. § 939.62(1)(b) and count three was charged as a repeater under sub. (1)(a) of the statute.[4] All three counts arose from an incident

---

(c) The actor's acts cause the specific person to suffer serious emotional distress or induce fear in the specific person of bodily injury to or the death of himself or herself or a member of his or her family or household.

....

(2m) Whoever violates sub. (2) is guilty of a Class H felony if any of the following applies:

....

(b) The actor has a previous conviction for a crime, the victim of that crime is the victim of the present violation of sub. (2), and the present violation occurs within 7 years after the prior conviction.

[3] WISCONSIN STAT. § 943.01(1) provides:

(1) Whoever intentionally causes damage to any physical property of another without the person's consent is guilty of a Class A misdemeanor.

[4] WISCONSIN STAT. § 939.62(1)(a) and (b) provide in relevant part:

939.62. Increased penalty for habitual criminality. (1) If the actor is a repeater, as that term is defined in sub. (2), and the present conviction is for any crime for which imprisonment may be imposed, ... the maximum term of imprisonment prescribed by law for that crime may be increased as follows:

(a) A maximum term of imprisonment of one year or less may be increased to not more than 2 years.

(b) A maximum term of imprisonment of more than one year but not more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than 4 years if the prior conviction was for a felony.

on November 30, 2005 which involved Conner's "keying" (scratching with a key or similar object) a vehicle owned by James and Rhonda Gainor.[5]

¶3 With respect to counts one and two, the criminal information alleged that on or about November 30, 2005, Conner intentionally engaged in a course of conduct directed at James (count 1) and Rhonda (count 2) that would cause "a reasonable person to fear bodily injury or death" and that Conner did in fact cause James and Rhonda to fear bodily injury or death. With respect to the "previous conviction within seven years" component of the two stalking charges under WIS. STAT. § 940.32(2m)(b), the information alleged that in June 2003, Conner was previously convicted of three counts of violating a harassment restraining order and that the victims in that matter were the Gainors. In count three, the information alleged that on or about the same date, Conner caused physical damage to a vehicle owned by the Gainors without the Gainors' consent.

¶4 Prior to trial, the State filed a motion pursuant to WIS. STAT. § 904.04(2) to introduce evidence of, and the facts underlying, four prior convictions involving Conner.[6] Of these, only one related to the Gainors—the June 2003 conviction for violating the Gainors' restraining order. Over Conner's objection, the court admitted evidence related to this conviction. The court ruled

[5] Because James and Rhonda Gainor share the same last name, for ease of understanding we refer to them by their first names except when referring to them collectively.

[6] The four convictions were: Iowa County case no. 1996CM166 (two counts of unlawful use of telephone); Iowa County case no. 1997CM208 (one count of harassment, one count of unlawful use of telephone, and one count of resisting or obstructing an officer); Richland County case no. 2001CM236 (two counts of unlawful use of telephone, and three counts of violating a harassment restraining order); and Iowa County case no. 2003CM328 (one count of criminal damage to property). Case no. 2001CM236 involved crimes against James and Rhonda Gainor, and the remaining cases involved crimes against other individuals.

that the evidence went to the issue of motive, provided context to the situation leading to the criminal charges, provided background to the relationships of the parties, was relevant, and was not unduly prejudicial.

¶5 The court also admitted evidence of, and the facts underlying, Conner's prior conviction for criminal damage to property stemming from an incident in which she used a key to scratch a vehicle belonging to Joy Stolz. The court noted that this crime was very similar to count three, which charged Conner with causing criminal damage to property by using a key to scratch the Gainors' vehicle. The court ruled that this evidence was admissible to show *modus operandi*, and ruled further that the evidence was relevant and not unduly prejudicial.

¶6 At trial, James testified that he and Conner had been involved in a brief relationship that ended in May 2000, and that shortly thereafter he began seeing Rhonda, whom he married in 2001. He testified that in September 2000, Conner began a pattern of harassing behavior involving him as well as Rhonda, and that this activity continued for several years thereafter. The Gainors, as well as other witnesses, testified to the following events, which we have summarized for ease of understanding:

- James received numerous phone calls from Conner on about September 14, 2000.
- Conner entered James's home on October 4, 2000 and used his phone to call James, who was at Rhonda's home.

- Conner and her sister appeared at James's home on October 5, 2000, and stated that she wanted to talk to Rhonda, who was inside, because she had "bad things" to say about James.

- James received many "crank phone calls" at his home, Rhonda's home and his place of work during October and November 2000.

- Conner called James during the first week of December 2000 and stated that she was going to cause problems with Rhonda when the couple attended James's work Christmas party.

- When James left work a few days after his work Christmas party in December 2000, he discovered that the tires on his vehicle had been flattened.

- On December 15, 2000, James discovered upon leaving work that the windshield on his vehicle had been shattered.

- On December 25, 2000, James received a voicemail message from Conner warning him to watch where he parked so that Conner "wouldn't be tempted to do something to it since she's so psychotic."

- Conner confronted James at his place of employment on December 27, 2000 and secretly recorded their conversation.

- During January 2001, the Gainors received magazine subscriptions they had not ordered, received "crank phone calls" at work, and had someone call twice to cancel their reservation at the facility hosting their wedding reception.

- A harassment injunction was issued on February 16, 2001 and was effective until February 16, 2003.

- The Gainors received numerous "crank phone calls" at home and at work between February 2001 and June 2003.

- On various dates between February 2001 and June 2003, paint was dumped on the hood of James's vehicle; the passenger side of the vehicle was keyed; spray paint was painted down the passenger side of and across the windshield of James's vehicle; the windshield of James's vehicle was shattered; and Superglue was squirted into the door locks of two of James's vehicles.

- Conner was convicted in June 2003 of violating the harassment injunction, was sentenced to 90 days in jail, and was released in September 2003.

- The Gainors again began receiving numerous "crank calls" in September 2003.

- Conner was in jail on an unrelated matter between October 2003 and February 2004 and the Gainors experienced no harassing conduct during this period.

- After Conner had been released from jail in February 2004, the Gainors once again began receiving crank calls from an unidentified caller.

- On January 6 or 7, 2005, James's vehicle was keyed.

- During November 2005, crank calls from an unidentified caller to James at work escalated, as did calls to Rhonda's parents, and James filed a report with police.

- On November 30, 2005, James confronted Conner after he observed her keying his vehicle.

¶7 In addition, Joy Stolz testified that she observed Conner key Stolz's vehicle in October 2003. Conner's attorney stated that Conner was prepared to stipulate that Conner keyed Stolz's vehicle and was convicted for it. However, the court permitted the State to complete its examination of Stolz and the facts surrounding the incident.

¶8 Although the court initially admitted the evidence regarding Conner's prior acts directed at the Gainors as other acts evidence, by the close of trial the court had reached the conclusion that the evidence was properly admitted to establish the course of conduct element of the offense. Among the jury instructions given, the court instructed the jury as to the acts which it could find constituted a course of conduct, all of which are set forth in WIS. STAT. § 940.32(1)(a). The court enumerated nine of the eleven acts under the statute which it deemed potentially applicable:

- Maintaining a visual or physical proximity to the victim.

- Approaching or confronting the victim.

- Appearing at the victim's home or contacting the victim's neighbors.

- Entering property owned, leased or occupied by the victim.

- Contacting the victim by telephone or causing the victim's telephone or any other person's telephone

> to ring repeatedly or continuously regardless of whether a conversation ensues.
>
> - Photographing, videotaping, audiotaping, or, through any other electronic means, monitoring or recording the activities of the victim.
> - Sending material by any means to the victim, or, for the purpose of obtaining information about, disseminating information about, or communicating with the victim, to a member of the victim's family or household or an employer, coworker or friend of the victim.
> - Placing an object on or delivering an object to property owned, leased or occupied by the victim.
> - Causing a person to engage in any of the acts described above.

The State's closing argument proceeded in accordance with the jury instructions. During the argument, the prosecutor referred both to Conner's prior conviction for violation of the harassment injunction in 2003, as well as to acts which occurred both prior to and after the conviction, which the State contended established Conner's course of conduct with respect to the Gainors.

¶9 Conner was convicted of count one—stalking James, and was acquitted of counts two and three—stalking Rhonda and causing criminal damage to property. Conner moved for judgment notwithstanding the verdict, which was denied. She also sought postconviction relief, which was also denied. Conner appeals. We reference additional facts as needed in the discussion below.

DISCUSSION

¶10 Conner raises three issues on appeal: (1) the plain meaning of WIS. STAT. § 940.32(2m)(b) requires that the two acts constituting the course of conduct subjecting her to an enhanced penalty must have occurred after her most

recent prior conviction in 2003; (2) the circuit court erred in admitting the other acts evidence, both with respect to the acts against the Gainors and with respect to Conner's keying of the Stolz vehicle; and (3) she did not receive adequate notice of the stalking charge. We address each in turn.

TIME FRAME FOR COURSE OF CONDUCT WITHIN THE MEANING OF WIS. STAT. § 940.32(2m)(b)

¶11 WISCONSIN STAT. § 940.32 creates three distinct classifications of stalking offenses. *See* ***State v. Warbelton***, 2009 WI 6, ¶24, 315 Wis. 2d 253, 759 N.W.2d 557. Subsections (2) and (2e) each set forth separate requirements for Class I felony stalking. Relevant to this appeal is sub. (2), which provides that to be guilty of stalking, a defendant must have "engage[d] in a course of conduct directed at a specific person" and that the actor "knows or should know that at least one of the acts that constitute the course of conduct will cause the specific person to suffer serious emotional distress." "Course of conduct" is defined as "a series of 2 or more acts carried out over time, however short or long, that show a continuity of purpose." Section 940.32(1)(a). Subsection (2m) enumerates five factors which elevate a stalking offense under sub. (2) to a Class H felony. Subsection (3) enumerates three factors which elevate a stalking offense under sub. (2) to a Class F felony.[7]

¶12 The stalking offense at issue in this appeal is WIS. STAT. § 940.32(2m)(b), which elevates the crime of stalking under sub. (2) to a Class H

[7] The penalty for a Class I felony is "a fine not to exceed $10,000 or imprisonment not to exceed 3 years and 6 months, or both"; the penalty for a Class H felony is "a fine not to exceed $10,000 or imprisonment not to exceed 6 years, or both"; and the penalty for a Class F felony is "a fine not to exceed $25,000 or imprisonment not to "exceed 12 years and 6 months, or both." WIS. STAT. § 939.50(3)(f), (h) and (i).

felony if the defendant has a prior conviction for any offense against the same victim within the past seven years. It provides as follows:

> **(2m)** Whoever violates sub. (2) is guilty of a Class H felony if any of the following applies:
>
> ....
>
> (b) The actor has a previous conviction for a crime, the victim of that crime is the victim of the present violation of sub. (2), and the present violation occurs within 7 years after the prior conviction.

¶13 Conner contends that under the plain meaning of these provisions, once an individual has been convicted of a crime involving the same victim, the perpetrator must, within seven years of the prior offense, have committed at least two subsequent acts constituting a course of conduct in order to be subjected to the subsection's enhanced penalty. Thus, Conner argues that the acts used to establish the crime of stalking under WIS. STAT. § 940.32(2m)(b) must be confined to acts which occurred after her June 2003 conviction for violating the Gainors' restraining order. The State takes the position that under the plain meaning of these provisions, the course of conduct may include acts that occurred prior to Conner's June 2003 conviction.

¶14 The question of whether a defendant was denied the due process right to a fair trial is a question of law that we review de novo. *See* ***State v. Hoover***, 2003 WI App 117, ¶29, 265 Wis. 2d 607, 666 N.W.2d 74. So too is our analysis of the applicable time frame for determining the course of conduct under which Conner was charged, which presents an issue of statutory construction. ***Heritage Farms, Inc. v. Markel Ins. Co.***, 2009 WI 27, ¶5, 316 Wis. 2d 47, 762 N.W.2d 652. In interpreting a statute, we attempt to discern the legislature's intent. ***State v. Schwebke,*** 2002 WI 55, ¶26, 253 Wis. 2d 1, 644 N.W.2d 666. We

begin by looking at the plain language of the statute "because we assume that the legislature's intent is expressed in the words it used." ***State v. Doss,*** 2008 WI 93, ¶30, 312 Wis. 2d 570, 754 N.W.2d 150 (citation omitted). In addition, we interpret statutory language in the context in which it is used, "not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***State ex rel. Kalal v. Circuit Court,*** 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110.

¶15 If our process of analysis reveals a plain, clear statutory meaning, then there is no ambiguity and thus no need to consult extrinsic sources of interpretation, such as legislative history. ***Id.*** "[A] statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses." ***Id.***, ¶47.

¶16 We focus our inquiry on the wording in WIS. STAT. § 940.32(2m)(b) which applies an enhanced penalty in situations in which the "present violation of sub. (2)" occurs within seven years after a prior conviction for a crime against the same victim. Under Conner's view, the term "present violation of sub. (2)" means that each of the two or more acts making up a course of conduct must occur within seven years of the defendant's prior conviction. Under the State's view, the term means that the final act constituting a course of conduct must occur within seven years of the defendant's prior conviction, although the preceding act or acts may have occurred prior to that time. Stated differently, the State reads the statute to contemplate that the seven years applies to the date upon which the crime of stalking is *completed*, which of necessity means the date upon which at least the second act (constituting a course of conduct) occurs. We conclude that the provision is capable of being reasonably understood in either sense, and is thus ambiguous.

¶17 Because we find ambiguity, we turn to evidence of the underlying purposes of the scheme of enhanced penalties for stalking as they are set out in the statutes. In ***Warbelton***, 315 Wis. 2d 253, ¶¶33-34, the supreme court ruled that the facts enumerated in the four subsections under WIS. STAT. § 940.32(2m) are essential elements of the stalking violation, rather than penalty enhancers. The court referred to the underlying reasoning that led to the adoption of the stalking statutes nationwide, including Wisconsin, in the early 1990s.[8] It cited language from an article published by the National Institute of Justice which noted, "Stalkers may be obsessive, unpredictable, and potentially violent. They often commit a series of increasingly violent acts, which may become suddenly violent, and result in the victim's injury or death." ***Id.***, ¶36 (citing Nat'l Inst. of Justice, U.S. Dep't of Justice, *Project to Develop a Model Anti-Stalking Code for States* 49 (1993)). In light of the nature of the stalking offense, the Institute advocated that states establish a "continuum of charges that could be used by law enforcement officials to intervene at various stages." ***Id.***, ¶37 (citing *Project to Develop a Model Anti-Stalking Code for States* at 49). The supreme court observed that Wisconsin has done precisely that through its statutory scheme that delineates three degrees of stalking depending on the presence of aggravating factors. ***Id.***, ¶39.

¶18 Conner's interpretation of WIS. STAT. § 940.32(2m)(b) is inconsistent with the reasoning underlying the statute. Under her view, if a person has a long history of harassing a victim without an ensuing conviction and is then convicted of any type of crime against the victim, none of the previous stalking

[8] The Wisconsin stalking statute was adopted in 1993. *See* 1993 Wis. Act 96, § 2.

behavior can be considered in seeking an enhanced penalty under sub. (2m)(b) for a new stalking offense if any of the prior acts occurred more than seven years before the present offense. The conviction would effectively serve to sever the continuum of stalking behavior that could be taken into consideration in making the charging decision, and would permit the consideration of only certain of the acts closer in time to the presently charged offense. Conner's interpretation would frustrate the purpose of authorizing law enforcement to intervene at any point along a continuum of aggravated behavior committed by a person with a history of harassment and stalking, who may suddenly become violent. Thus, the State's construction of the statute is the more reasonable result in light of the statutory scheme here at issue.[9]

¶19 We conclude that the seven year time restriction specified in WIS. STAT. § 940.32(2m)(b) requires that only the final act charged as part of a course of conduct occur within seven years of the previous conviction, and does not restrict by time the other acts used to establish the underlying course of conduct element of sub. (2).[10] In the present case, there is no dispute that the final act charged, the keying of the Gainors' vehicle, occurred within seven years of Conner's previous conviction, and the jury properly considered the entire history

[9] Because we are able to clarify legislative intent with respect to the disputed provision, the rule of lenity, which provides that ambiguous penal statutes should be interpreted in favor of the defendant, does not come into play. *See* ***State v. Cole***, 2003 WI 59, ¶67, 262 Wis. 2d 167, 663 N.W.2d 700 (rule of lenity comes into play when two conditions are met: (1) the penal statute is ambiguous; and (2) we are unable to clarify the intent of the legislature).

[10] We note that the fact that WIS. STAT. § 940.32(1)(a) requires a "continuity of purpose" with respect to acts comprising a course of conduct serves to delimit the applicable time period.

of acts undertaken by Conner against James, showing a continuity of purpose, to establish Conner's course of conduct.[11]

OTHER ACTS EVIDENCE

¶20 Conner argues that the circuit court improperly admitted, as other acts evidence, evidence of acts Conner committed against the Gainors dating back to the year 2000 and the acts underlying Conner's prior conviction for keying Stolz's vehicle. "[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." WIS. STAT. § 904.04(2). However, other acts evidence may be admissible if offered for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*

¶21 To determine the admissibility of other acts evidence, a three-part test inquiry is employed. *State v. Sullivan*, 216 Wis. 2d 768, 771-72, 576 N.W.2d 30 (1998). The first step is an evaluation of whether the evidence is to be introduced for a permissible purpose under WIS. STAT. § 904.04(2). *Id.* at 772. The second step is an evaluation of whether the evidence is relevant under WIS. STAT. § 904.01. *Id.* The third step is an evaluation of whether, as required by WIS. STAT. § 904.03, the probative value of the evidence is outweighed by the danger of unfair prejudice. *Id.* at 772-73.

[11] Conner also argues that the prosecutor's closing argument improperly informed the jury that in determining whether Conner engaged in a course of conduct, it could consider acts committed by Conner which occurred before Conner's June 2003 conviction. Because we conclude that these acts may be considered as part of the course of conduct requirement of WIS. STAT. § 940.32(2), we similarly conclude that the prosecutor's argument was not improper.

¶22 The admission of evidence is generally a discretionary decision for the circuit court. ***Id.*** at 780. We will sustain the court's evidentiary ruling if we find that the court "examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." ***Id.*** at 780-81.

Acts Relating to the Gainors

¶23 The circuit court initially ruled that evidence of Conner's acts relating to the Gainors between 2000 and 2005 was admissible under WIS. STAT. § 904.04(2) for the purpose of establishing motive, and also for the purpose of establishing context because the evidence would provide background to the relationship between the parties. Conner argues that this ruling was improper because evidence of prior harassing conduct does not demonstrate a motive for later harassing conduct and, therefore, the evidence was admitted for an improper purpose.[12]

¶24 In response, the State contends that the evidence of Conner's prior acts against the Gainors was not other acts evidence within the meaning of WIS. STAT. § 904.04(2), but was instead evidence offered to establish a course of conduct, which is an element of the stalking offense. The State observes that "[t]he problem acts such as these present is that proof of the specific acts appears the same whether offered to prove character or to prove a required element in the State's case." The State stresses, however, that because the evidence was not offered to prove Conner's character in order to show that she has a propensity to act a certain way, it was not barred by § 904.04(2). We agree.

[12] Conner does not address the admissibility of the evidence for the purpose of establishing context.

¶25 Although the circuit court initially permitted the admission of the evidence in order to prove motive and to provide context, the court later ruled that the evidence was admissible to establish the course of conduct element of the offense of stalking.[13] Evidence of Conner's prior actions between 2000 and 2005 was direct proof of that course of conduct and, as we explained in paragraphs 17-19 above, the acts comprising a defendant's course of conduct are not limited to a particular time frame. *See* WIS. STAT. § 940.32(2) and (2m)(b).

¶26 Aside from being offered for an admissible purpose, to be admissible, all evidence must also be relevant and not unfairly prejudicial. *See* WIS. STAT. §§ 904.02 and 904.03. There is no question that "evidence which serves to prove an element of a crime is relevant." ***State v. Alexander***, 214 Wis. 2d 628, 641, 571 N.W.2d 662 (1997). Thus, the evidence of Conner's prior acts against the Gainors was plainly relevant.

¶27 Conner argues that she stipulated to the prior convictions necessary to establish the status element of WIS. STAT. § 940.32(2m)(b), and therefore the detailed testimony regarding the numerous calls and threats, harassing behavior and vehicular damage were unnecessary and unfairly prejudicial. It is true that Conner's stipulation to the conviction would have been sufficient to satisfy the *prior conviction* element of § 940.32(2m)(b), and would have made further evidence of that conviction superfluous and unfairly prejudicial. *See* ***Old Chief v. United States,*** 519 U.S. 172, 117 S. Ct. 644 (1997) (concluding that a court abused its discretion by admitting evidence of a prior felony when the defendant offered

[13] The circuit court also repeated its ruling to this effect when denying Conner's postconviction motion for a new trial.

to stipulate that he had a prior felony conviction). However, the stipulation did not eliminate the need for the State to present evidence proving Conner engaged in a *course of conduct* directed at James and Rhonda. The holding in ***Old Chief*** applies only to a defendant's status, "not to any element of the criminal act forming the basis for the current charge." ***State v. Veach***, 2002 WI 110, ¶124, 255 Wis. 2d 390, 648 N.W.2d 447. The general rule is that "the prosecution is entitled to prove its case by evidence of its own choice" and "that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it." ***Old Chief***, 519 U.S. at 186-87. Because a course of conduct is not a status element, the general rule applies in the present matter. Accordingly, we conclude that the probative value of this evidence outweighed any prejudicial effect and that the evidence was properly admitted.

Acts Relating to Keying the Stolz Vehicle

¶28 With respect to the criminal damage to property charge, the circuit court ruled that testimony regarding the acts underlying Conner's conviction for causing criminal damage to Stolz's vehicle was other acts evidence admissible for the purpose of establishing identity by *modus operandi.* At trial, Stolz testified as to the manner in which Conner damaged her vehicle, which was similar to the manner in which Conner allegedly damaged James's vehicle. Stolz also testified as to Conner's method of disguise, which was similar to the description of Conner's attire when she allegedly keyed James's vehicle.

¶29 Conner does not contend that the purpose for admitting this evidence was improper under WIS. STAT. § 904.04, nor does she argue that the evidence was unfairly prejudicial under WIS. STAT. § 904.03. She does, however, argue that this evidence was not relevant because her identity at the scene of the keying

incident was not at issue and because her identity "was not an issue at trial." The State responds that identity was at issue because at the scene of the incident and during her testimony at trial, Conner denied that she had keyed James's vehicle. We agree with the State that Conner's identity was at issue and, therefore, conclude that the evidence was properly admitted for purposes of proving that issue.

ADEQUATE NOTICE OF CHARGES

¶30 Finally, Conner argues that because the information charging her with stalking under WIS. STAT. § 940.32(2m)(b) only referenced the November 30, 2005 date on which James's vehicle was keyed, she was not given notice that acts committed on prior occasions also formed the basis of the two stalking charges, which she claims was a violation of her due process rights.[14] She contends that although count three of the information charging her with criminal damage to property was sufficient, counts one and two of the information charging her with stalking were insufficient because they did not inform her that these offenses were grounded in part on conduct which occurred on a date other than November 30, 2005.

¶31 The supreme court has explained,

> Procedural due process requires that a defendant have notice of a specific charge and an opportunity to be heard at trial on the issues raised by the charge. The purpose of the

[14] Conner contends that the charges contained in the Information violated her due process rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 7 and 8 of the Wisconsin Constitution. The Sixth Amendment provides in part: "[T]he accused shall enjoy the right ... to be informed of the nature and cause of the accusation." Article I, section 7 of the state constitution provides in part "[T]he accused shall enjoy the right ... to demand the nature and cause of the accusation against him."

> information is to inform the defendant of the charges against him. Notice is the key factor.

Manson v. State, 101 Wis. 2d 413, 431, 304 N.W.2d 729 (1981) (citations omitted). Our review of the sufficiency of a pleading presents a question of law that we review independently. *See* ***State v. Chambers***, 173 Wis. 2d 237, 251, 496 N.W.2d 191 (Ct. App. 1992).

¶32 Citing ***State v. Kaufman***, 188 Wis. 2d 485, 492, 525 N.W.2d 138 (Ct. App. 1994) (citation omitted), Conner argues that the information must inform the accused of "the time frame in which the crime allegedly occurred." While this may be true as a general proposition, the facts in ***Kaufman*** are readily distinguishable from those in the present case. Kaufman was charged with two counts of welfare fraud for receiving public assistance and intentionally failing to notify the Department of Social Services within ten days of a change of fact as originally stated in her application for public assistance. ***Id.*** at 488. Count one of the information alleged a time period between June 21, 1991 and September 22, 1991. ***Id.*** The State argued, however, that the crime charged was a continuing offense which began prior to June 21. We concluded that the information did not provide Kaufman with adequate notice of the charges against her because, in that situation, the State had the discretion to decide whether to charge the crime as one continuous offense, a single offense, or a series of single offenses, and the information did not notify her that she would have to prepare a defense to a continuing violation. ***Id.*** at 491-92.

¶33 The present situation is different. Here, a course of conduct is an element of the charged offense, not a charging option within the State's discretion. The law does not require that the information specify with particularity upon which dates the course of conduct occurred, and Conner provides no authority for

such a requirement. The supreme court has stated that "[i]n drafting an information the state should not have to spell out every act which would comprise an element of the crime ...." ***Wilson v. State***, 59 Wis. 2d 269, 275-76, 208 N.W.2d 134 (1973). Instead, allegations of the elements of the crime charged will suffice. ***Id.*** at 276.

¶34 Pursuant to WIS. STAT. § 940.32(2m)(b), a defendant is guilty of stalking with a previous conviction within seven years if:

> (1) the defendant intentionally engaged in a course of conduct directed at the victim;
>
> (2) the course of conduct would have caused a reasonable person to suffer serious emotional distress or fear bodily injury to himself, herself or a member of his or her household;
>
> (3) the defendant's acts caused the victim to suffer serious emotional distress;
>
> (4) the defendant knew or reasonably should have known that the conduct would cause a reasonable person under the same circumstances to suffer serious emotional distress;
>
> (5) the defendant had a previous conviction for a crime;
>
> (6) the victim of the previous crime is the victim in the present case; and
>
> (7) the crime in the present case occurred within seven years after the previous conviction.

The information alleged that:

> (1) Conner intentionally engaged in a course of conduct directed at James;
>
> (2) her conduct would have caused a reasonable person to fear bodily injury or death;
>
> (3) her conduct caused James to fear bodily injury or death;

> (4) Conner knew or reasonably should have known that her conduct would cause a person to fear bodily injury or death;
>
> (5) Conner had a previous conviction for a crime;
>
> (6) James, the victim of the previous crime, is the victim in the present case; and
>
> (7) the crime in the present case occurred within seven years after the previous conviction.

Each of the elements of stalking under § 940.32(2m)(b) were present in the information. The pleading is therefore compliant with the requirements articulated in ***Wilson.*** To the extent that Conner was unaware that the applicable course of conduct could properly include acts that occurred on dates prior to November 30, 2005, her misapprehension was attributable to an incorrect reading of § 940.32(2m)(b) rather than to an insufficient information. Accordingly, we conclude that Conner had notice of the charges against her and that her due process rights were not violated.

CONCLUSION

¶35 For the reasons discussed above, we affirm the judgment of conviction and order denying Conner postconviction relief.[15]

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

[15] The State contends that Conner did not timely object to the prosecutor's closing argument and notice of the charged offenses and thus has forfeited these objections. However, because we have affirmed the judgment and order of the circuit court, we do not reach these arguments.

STATE OF WISCONSIN : CIRCUIT COURT RICHLAND COUNTY

CLERK OF CIRCUIT COURT
STACY KLEIST
FILED
MAY 09 2008
RICHLAND COUNTY, WI
CASE NO.

STATE OF WISCONSIN,

Plaintiff

-vs-

JANET A. CONNER,

Defendant

Case No. 2005-CF-119

ORDER DENYING POST CONVICTION RELIEF

The defendant's motion for new trial is denied fur the following reasons: (1) other acts evidence relating to the alleged victims of the present case from the year 2000 onward was properly admitted to establish an element of the charged offense, a "course of conduct" as defined in Wis. Stat. §940.32(1)(a), and; (2) there was no error in admitting other acts evidence relating to the defendant's prior conviction for Criminal Damage to Property despite the defendant's offer to stipulate to the prior conviction.

IT IS HEREBY ORDERED that the defendant's Motion for New Trial is denied in its entirety.

Dated: 5/6, 2008

Hon. Michael J. Rosborough
Vernon County Circuit Judge

COUNTY OF VERNON
MAY - 6 2008
KATHY BURGS
CLERK OF COURTS

STATE OF WISCONSIN CIRCUIT COURT RICHLAND COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

JANET A. CONNER,

Defendant.

ORDER

Case No. 05-CF-119

The motion to dismiss the complaint is hereby denied in that: (1) it was rendered moot by the finding of probable cause at the preliminary hearing; and (2) would in any event have been denied if ruled upon prior to the preliminary hearing, because the complaint set forth sufficient facts to establish probable cause.

Dated this 30 day of May, 2007.

Michael J. Rosborough
Circuit Court Judge

THE COURT: We'll take up State versus Janet Connor, case 05 CF 119. Please state the appearances.

MR. SHARP: State appears by Richland County District Attorney Andrew Sharp.

MR. MAYS: Good afternoon, Your Honor. Janet Connor appears in person with attorney Steven Mays. Also with me is the sentencing consultant employed by Ms. Connor, Lisa Andreas.

THE COURT: This is the time set for sentencing. Before we proceed with that, though, there's motions -- there's a motion that's been filed by the defendant for judgment notwithstanding. And the court's received a copy of that as well as Mr. Sharp's reply. So we'll take that up first.

What would you like to say about your motion, Mr. Mays?

MR. MAYS: I tried to make the motion, Judge, as thorough as possible. I did as well read -- receive and read Mr. Sharp's response and I would rest my argument based on the motion that I submitted, no argument.

THE COURT: Mr. Sharp, do you wish to say anything about the motion?

MR. SHARP: The only other point that I would make is I checked the case law to see if a judg-

ment non absentia verdicto is permissible in a criminal case and there does seem to be at least un- published case law where such a motion was used. I think that it is more properly denominated a motion to dismiss based on insufficiency of the evidence. And the actual test would be that the court would have to find that no reasonable jury could find the defendant guilty based on the evidence because of the utter lack of evidence to support the charges.

The court has, of course, heard the evidence in this case and could make that determination on its own, but I think that that would be the appropriate -- the actual appropriate standard for such a motion.

THE COURT: Do you want to add anything, Mr. Mays?

MR. MAYS: No, Your Honor.

THE COURT: Okay. Well, the court is satisfied, having presided at the trial and having considered the arguments of counsel with regard to the admissibility of certain evidence, that the applicable law requires the court to deny this motion in that the court is satisfied that its evidentiary rulings were correct and the court is satisfied that there was sufficient evidence to support the jury's verdict.

Accordingly, the motion is denied.

verdict?

MR. SHARP: No.

THE COURT: Okay, Mr. Mays, issues as to the instructions?

MR. MAYS: Well, I have a concern, Your Honor, with the listing -- and I'm referring to page three and four and five where it indicates acts that you may find constitute a course of conduct are limited to. Then it lists a bunch of things that the evidence in this case has no way of supporting, and then the 275 cautionary instruction, it states: Evidence has been presented regarding other conduct of the defendant for which the defendant is not on trial. I mean, that kind of supports my position.

I -- I look at others approaching or confronting the victim as being one that arguably the evidence would support and placing an object on or delivering an object to property owned by the victim, I guess, I can see that if that's what we're looking at with the keying of the car, placing an object on the car, and all the other ones, it's almost inviting them to consider all this other stuff that came in. I mean, the photographing, videotaping, audiotaping, sending material by any means to the victim, I mean, if anything, James Con -- Jim Gainor's, you know, the one who admitted that. But I

just think listing all of them invites the ability to consider what we're telling them in 275 that they can't.

THE COURT: Mr. Sharp?

MR. SHARP: But I think that they can, and I think that part of my motion was to establish the course of conduct that is necessary, given that I know that there was some testimony by the Gainors as to all of the subjects that the court has included.

You know, it's an interesting instruction because --

THE COURT: Well, it's an interesting statute. I mean, you know, it's -- well, anyway, it's enough said.

MR. SHARP: It says course of conduct and it says committed over a period of time. I think it by it's own definition invites a backward looking consideration and I believe that it's appropriate the way the court has done it.

THE COURT: What are you proposing in the alternative, Mr. Mays?

MR. MAYS: I'm proposing simply giving any of them that there is evidence to support them with regard to this alleged criminal damage to property. Clearly maintaining a visual or physical proximity to the victim, I suppose you could argue that one way or

another she was near them; did she maintain it? No; I think it was pretty brief and she left.

Approaching or confronting the vicitm, I guess that turning around by her was confronting Jim.

Appearing at the victim's home or contacting the victim's neighbors, there's no evidence of that at all with regard to the allegations here.

THE COURT: My understanding of the state's theory of the case, that goes back to 2000, right?

MR. MAYS: Yeah.

MR. SHARP: Right.

MR. MAYS: And there's the big risk then where they can say, well, her testimony is Janet went back there in 2001, well she's going to be convicted on prior bad acts then.

THE COURT: No, I think that's the nature of stalking. The nature of the statute is that it talks here about a time frame at some point -- what does it say -- there's some language in here someplace about the course of conduct means a series of two or more acts carried out over time, however short or long, that show a continuity of purpose.

My understanding of the state's theory of this case is that it goes back to 2000 when they broke up or when Mr. Gainor allegedly tried to break up their relation-

ship and that a series of things have happened to the Gainors since then that they attribute to your client. And whether the jury believes that that has occurred and that your client is responsible for any or all of these things is, you know, for the jury to decide whether the state has proved that by evidence beyond a reasonable doubt. And that that's the stalking; stalking gone on for seven years, more or less, right?

MR. SHARP: Correct.

THE COURT: That's their theory of the case.

MR. MAYS: And I would submit the prior conviction, which is an element, is a couple years ago; 2003. And that this is another act within that time period.

THE COURT: What is another act?

MR. MAYS: Alleged scratching of the vehicle --

THE COURT: Right.

MR. MAYS: -- is another act and demonstrates continuity of purpose or course of action, whatever the language. Course of action that is for no other reason than to harass, etcetera, and so on. But then, I mean, there's things prior to 2003 when she got these phone call convictions that boy, we could go back to that and then there's the real possibility she gets

convicted on prior bad acts, which is exactly what the statutory purpose is to not allow.

THE COURT: No, I don't agree, which I don't think when there's a charge of stalking, I think all of that potentially can be considered by the jury. So I -- I disagree with your analysis; I think the state's entitled here to proceed on their theory of the case and if the state, meaning Mr. Sharp, feels that he's got evidence in this case of each of those things that he's asked me to set forth, well, so be it. He can have a crack at it. That's my view of it.

So the court will give instruction 1284 as presented over objection.

What else do you have, Mr. Mays?

MR. MAYS: I didn't see the defendant elects to testify.

THE COURT: It's in the end of the 300, which is on page 15. The defendant has testified in this case. You should not discredit, etcetera.

MR. MAYS: Ahhh. Again, I was focusing on the other ones. Presuming, you know, 157, 148, 149, 137 are all standard, aren't --

THE COURT: Yes, they are.

MR. MAYS: Yes, I won't argue with those. I'm wondering if we're not being redundant -- okay, no,

State of Wisconsin | Circuit Court | Richland County

STATE OF WISCONSIN
Plaintiff,
-vs-

JANET A. CONNER
30376 Oak Ridge Drive
Richland Center, WI 53581
DOB: 07/06/1967
Defendant.

DA Case No.: 2005RI000542
Assigned DA/ADA: Wm. Andrew Sharp
Agency Case No.: 2005-724A
Court Case No.: 2005CF000119

CIRCUIT COURT
ANN ROBINSON
FILED
MAY 10 2006
RICHLAND COUNTY, WI
CASE NO.

INFORMATION

I, Wm. Andrew Sharp, District Attorney for said County, hereby inform the Court that:

Count 1: STALKING - PREVIOUS CONVICTION W/IN 7 YRS, REPEATER

The above-named defendant on or about Wednesday, November 30, 2005, in the City of Richland Center, Richland County, Wisconsin, did intentionally engage in a course of conduct directed at a specific person to wit: James F. Gainor that causes that person to fear and that would cause a reasonable person to fear bodily injury or death to herself and where the actor knows or reasonably should know that the conduct placed the person in reasonable fear of bodily injury or death to himself. The actor has a previous conviction for a crime within 7 years of the present violation and the victim of that crime is also the victim of the present violation, contrary to sec. 940.32(2m)(b), 939.50(3)(h), 939.62(1)(b) Wis. Stats., a Class H Felony, and upon conviction may be fined not more than Ten Thousand Dollars ($10,000), or imprisoned not more than six (6) years, or both.

And further, invoking the provisions of sec. 939.62(1)(b) Wis. Stats., because the defendant is a repeater, having been convicted of three counts of Violating An Harassment Restraining Order on June 30, 2003, in Richland County, Wisconsin, the victims in all three counts being James Gainor and Rhonda Gainor, which conviction(s) remain of record and unreversed, the maximum term of imprisonment for the underlying crime may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than 4 years if the prior conviction was for a felony.

Count 2: STALKING - PREVIOUS CONVICTION W/IN 7 YRS, REPEATER

The above-named defendant on or about Wednesday, November 30, 2005, in the City of Richland Center, Richland County, Wisconsin, did intentionally engage in a course of conduct directed at a specific person to wit: Rhonda S. Gainor that causes that person to fear and that would cause a

reasonable person to fear bodily injury or death to herself and where the actor knows or reasonably should know that the conduct placed the person in reasonable fear of bodily injury or death to himself. The actor has a previous conviction for a crime within 7 years of the present violation and the victim of that crime is also the victim of the present violation, contrary to sec. 940.32(2m)(b), 939.50(3)(h), 939.62(1)(b) Wis. Stats., a Class H Felony, and upon conviction may be fined not more than Ten Thousand Dollars ($10,000), or imprisoned not more than six (6) years, or both.

And further, invoking the provisions of sec. 939.62(1)(b) Wis. Stats., because the defendant is a repeater, having been convicted of three counts of Violating An Harassment Restraining Order on June 30, 2003, in Richland County, Wisconsin, the victims in all three counts being James Gainor and Rhonda Gainor, which conviction(s) remain of record and unreversed, the maximum term of imprisonment for the underlying crime may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than 4 years if the prior conviction was for a felony.

Count 3: CRIMINAL DAMAGE TO PROPERTY, REPEATER

The above-named defendant on or about Wednesday, November 30, 2005, in the City of Richland Center, Richland County, Wisconsin, did intentionally cause damage to the physical property of another, a 1996 Chevrolet Blazer, belonging to James F. Gainor, without that person's consent, contrary to sec. 943.01(1), 943.01(2)(d), 939.50(1)(i), 939.62(1)(b) Wis. Stats., a Class I Felony, and upon conviction may be fined not more than Ten Thousand Dollars ($10,000), or imprisoned not more than three and one-half (3.5) years, or both.

And further, invoking the provisions of sec. 939.62(1)(a) Wis. Stats., because the defendant is a repeater, having been convicted of three counts of Violating An Harassment Restraining Order on June 30, 2003, in Richland County, Wisconsin, the victims in all three counts being James Gainor and Rhonda Gainor, which conviction(s) remain of record and unreversed, the maximum term of imprisonment for the underlying crime may be increased by not more than 2 years.

and against the peace and dignity of the State of Wisconsin.

Date: May 10, 2006

District Attorney
State Bar No. 1003703

110

The information in this case charges that on or about November 30, 2005, in Richland County, Wisconsin, the defendant did intentionally:

COUNTS 1 & 2: engage in a course of conduct directed to specific persons, to wit: James F. Gainor in Count 1 and Rhonda S. Gainor in Count 2, that causes such persons to suffer serious emotional distress, the defendant having a previous conviction within 7 years of the present offenses and the victims of the present offenses also having been the victims of the prior offenses, in violation of §§940.32(2m)(b), 939.50(3)(h) and 939.62(1)(b) of the Wisconsin Statutes, crimes commonly known as stalking with a previous conviction within 7 years;

COUNT 3: cause damage to the physical property of another, a 1996 Chevrolet Blazer belonging to James F. Gainor, without his consent, contrary to §§943.01(1), 943.01(2)(d), 939.50(1)(i) and 939.62(1)(b), a crime commonly known as criminal damage to property.

To these charges, the defendant has entered pleas of not guilty which means the State must prove every element of each offense charged beyond a reasonable doubt.

1284 STALKING — § 940.32(2)

As to Counts 1 and 2, you are instructed that:

Statutory Definition of the Crime

Stalking, as defined in § 940.32(2) of the Criminal Code of Wisconsin, is committed by one who intentionally engages in a course of conduct directed at a specific person that causes that person to suffer serious emotional distress and that would cause a reasonable person to suffer serious emotional distress and where the actor knows or should know that the conduct will cause the person to suffer serious emotional distress.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally engaged in a course of conduct directed at James F. Gainor in Count 1 and Rhonda S. Gainor in Count 2.

"Intentionally" requires that the defendant acted with the purpose to engage in a course of conduct directed at the person named in the Count under consideration.

"Course of conduct" means a series of two or more acts carried out over time, however short or long, that show a continuity of purpose. Acts that you may find constitute a course of conduct are limited to:

- Maintaining a visual or physical proximity to the victim.
- Approaching or confronting the victim.
- Appearing at the victim's home or contacting the victim's neighbors.
- Entering property owned, leased or occupied by the victim.
- Contacting the victim by telephone or causing the victim's telephone or any other person's telephone to ring repeatedly or continuously regardless of whether a conversation ensues.
- Photographing, videotaping, audiotaping, or, through any other electronic means, monitoring or recording the activities of the victim.
- Sending material by any means to the victim, or, for the purpose of obtaining information about, disseminating information about, or communicating with the victim, to a member of the victim's family or household or an employer, coworker or friend of the victim.
- Placing an object on or delivering an object to property owned, leased or occupied by the victim.

- Causing a person to engage in any of the acts described above.

2. The course of conduct would have caused a reasonable person to suffer serious emotional distress. "Suffer serious emotional distress" means to feel terrified, intimidated, threatened, harassed, or tormented. This does not require that the person named in the count under consideration received treatment from a mental heath professional.

Member of a family" means a spouse, parent, child, sibling, or any other person who is related by blood or adoption to another.

To determine whether this element is established, the standard is what effect the course of conduct would have had on a person of ordinary intelligence and prudence in the position of the person named in the count under consideration under the circumstances that existed at the time of the course of conduct.

3. The defendant's acts caused the person named in the count under consideration to suffer serious emotional distress.

4. The defendant knew or should have known that at least one of the acts constituting the course of conduct would cause the person named in the count under consideration to suffer serious emotional distress.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

1284A STALKING: PENALTY FACTORS — § 940.32(2m) and (3)

If you find the defendant guilty, you must answer the following question, either "Yes" or "No": Did the defendant have a previous conviction for a crime, was the victim of that crime the victim of the crime in this case, and did the crime in this case occur within 7 years after the previous conviction?

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the answer to that question is "yes."

If you are not so satisfied, you must answer the question "no."

Also I am asking that you not consider what would happen to Janet Conner if you found her guilty because that's going to be totally up to the honorable judge; that is his province and that's not something that you are to concern yourselves with. As he told you, you are to search for the truth in this case.

Starting out with the evidence, obviously Ms. Conner admits that she was there on the date and time in question, that it was her in the incident. There's been evidence that she has been convicted of committing crimes against the Gainors in the past. As to her motive, I think that was amply borne out by the testimony, the history between the parties. As to her M.O. or the identification issue, she has a conviction for damaging a vehicle and that was the Joy Stoltz vehicle, I'm talking about that again.

It's my opinion that the evidence in this case is ample and sufficient to find her guilty on all three counts.

I want to point out, I want to make this very clear, because it's going to be a question that you're going to be asked, but I think there is no dispute that she was convicted of a crime against both James Gainor and Rhonda Gainor. It was a violation of a restraining order; there is a judgment of conviction in there

somewhere, and that was less than seven years ago. So that's one of the questions on the verdict. I don't think that that's disputed.

The nature of that was making the telephone calls to the hospital and, of course, that fits one of the subjects that the judge just read to you concerning the course of conduct that you may consider in deciding whether or not she is guilty of the stalking charges. One of those is contacting the victim by telephone and causing the person's telephone to ring repeatedly, etcetera.

I think there's also evidence in the case that she audiotaped the activities of the victim. Remember, there's the conversation on December 27 of 2000 where she was audiotaping Mr. Gainor without him knowing about it.

Maintaining a visual or physical proximity to the victim, I think there's evidence to that. Approaching or confronting the victim, both of those happen on December 30 of 2005, for instance. Appearing at the victim's home, there's the testimony, and Ms. Conner has admitted that she did go to his home, for instance, on October 4, 2000, and then came back the next day with her sister Judy on October 5 of 2000, at which time they received more of a dustup.

reconcile the evidence upon any reasonable hypothesis consistent with the defendant's innocence, you should do so and return not guilty verdicts.

Thank you very much for your time.

MR. SHARP: Ladies and gentlemen, the jury instructions -- we're beating this to death, I think -- a reasonable hypothesis. It's reasonable in light of all the evidence. Again, it's the whole enchilda.

The evidence in this case, three eye witnesses, etcetera, the history, is that -- is that that woman got caught red-handed doing this. Reconcile the evidence in light of that. She got caught red- handed. Her M.O. She gets caught red-handed just like she did with Joy Stoltz getting caught red-handed.

The whole thing about the fact this was Wednesday afternoon and so on and so forth, she says in her statement she didn't care if she got caught with the Joy Stoltz thing. And Wednesday afternoon, Richland Center, of course it's five minutes to 3:00, it's ten to 3:00, whatever time it was, kind of the dead time of the afternoon, nobody around.

There's their vehicle, huge, sitting there all by itself. She walks past it, you know, she got out of the car first and saw it there and when she went to the post office and came back and there it was again, and she's

going to the library and she goes in, it's on her brain and she's coming out and she walks past it again, puts the book away, she comes back and does this thing. It's -- that's the evidence in this case.

There's no evidence, except from the Gainors, that the scratches were fresh. Again, John Annear, police chief of Richland Center said that he looked at it, that he said to be fresh scratches, that was his testimony. That's why he took the stuff, whatever manner that he did.

And I also want to point out, just going back to doing it out in the open and stuff, it's not like she was Zoro, pulling this thing out and swsh, swsh, swsh, (sound) for everyone to see. Jim Gainor said she had the thing in her hand and she was walking along like this trying to do it very fairly surreptitiously.

Mr. Mays says he doesn't want you to convict her for these prior squabbles. I just want to point out that the stalking charges require two or more acts and just the convictions from the hospital with the telephone calls, well there you got three for that matter because three convictions. It's not a bunch of back and forth, so on and so forth; there's that if you believe that, I mean, those three incidents in and of themselves and then the -- the car scratching on top of

it is an additional one, plus just whether you want to consider it all, the videotaping and the other things that were testified to.

We should have taken the door off of the Gainor car or we should have put it on a flatbed and hauled it away. Well, how would the Gainors have felt about that? It's bad enough that their car got scratched, now the police officers are going to dismantle and impound it on them. I don't know if that's exactly what a victim wants under those circumstances.

Now, I'm just going to leave -- oh, Jim said that he started out from the hedgerow in his statements. My observation on that, and we've got a couple of htings here where Mr. Mays and I were remembering the evidence differently, and again, it's up to you folks. He starts up from the hedgerow, meaning he was walking along it seeing this stuff happen. He didn't come out until after Ms. Gainor passed him in the vehicle. And I'd ask you to consider his testimony on the stand, obviously, but you can also look at his testimony from the preliminary hearing, which is supposedly what Mr. Greenwold was basing his diagram on. And Rhonda didn't see him because he was still there against the hedgerow. That's again my interpretation of the evidence.

And anyway, remember now, I also want to just point

THE COURT: Okay, so the hearing -- so that's granted and if there isn't an order, you can double check on that and I'll sign one, if you need one.

MR. HOUSE: Thank you, sir.

THE COURT: Now, the other issues about trial errors, improper argument, etcetera, there -- that's not evidentiary, right? In other words, you're not seeking to offer any evidence.

MR. HOUSE: No, sir.

THE COURT: Okay. In a nutshell then, would it be fair to say that what you're doing, at least on the evidentiary error issues, is asking the court to reconsider what it already did and you're not offering any new case law, any change in the law, etcetera.

MR. HOUSE: I cited several cases, but -- that I don't think had been cited before in my motion.

THE COURT: But they're cases that were decided at the time we had the trial; they're not subsequent cases.

MR. HOUSE: That's correct, Your Honor.

THE COURT: Okay.

MR. HOUSE: There's a relevant decision that's recommended for publication now; I haven't cited that because it hasn't been published yet on the issue of improper closing arguments, but.

THE COURT: Right, I'm familiar with that case.

All right, so basically we're just rehashing what we already did.

MR. HOUSE: To some extent, I don't believe it's been addressed in quite the way I've addressed it and --

THE COURT: Yeah.

MR. HOUSE: -- certainly not integrating -- we haven't really addressed the affect of the jury instructions or lack of instructions. I think --

THE COURT: On the lack of instructions issue, tell me about that, what -- I recall seeing that in your motion. You're contending the court should have given some additional instruction?

MR. HOUSE: Yes, Your Honor.

THE COURT: Okay, is that -- was that a situation where --

MR. HOUSE: The other acts evidence. The only instruction given was related to the incident of a keying of Joy Stoltz's car. I know the way it was done, the court's ruling at the trial on this was that the State was permitted to rely upon all those other alleged acts from 2000 onward to establish the element of a course of conduct. And quite frankly, I think the State

-- that would be a correct ruling had the State pursued a prosecution under Section 940.32(2), a Class I felony rather than the Class H felony, which it did prosecute Ms. Conner on, which requires the -- that they establish a course of conduct; that being two or more acts committed after the prior conviction.

Much of the testimony at trial, much of the evidence presented dealt with all these other acts from 2000 up to 2003 and it was those other acts that were alleged that no instruction was given on. The State was permitted to utilize that to establish the element of a course of conduct and in fact argue that the jury could find the course of conduct from those acts that occurred prior to the June 30, 2003, conviction.

THE COURT: So your argue -- are you arguing the court should have given additional instructions sua sponte or are you arguing the court failed to give instructions that the defendant offered?

MR. HOUSE: The defendant did not offer a specific instruction; the defendant requested an instruction be given related to those other acts. The State had previously stated that they would propose an instruction -- instruction related to those other acts and didn't. And the defendant initially -- we initially objected to the form of the instruction on the element

ruling, which the State obviously support, that the course of conduct could include the prior acts that the defense is arguing about. That is the whole link for all of their arguments, that the course of conduct should not have included those prior acts and in light of the fact that the court ruled that the course of conduct did include those acts, I think that there was nothing improper with the State's arguments.

THE COURT: All right. Well, here's -- here's what -- what I'm going to do with regard to the defendant's motion.

Let me start by saying having fought this battle at length for the better part of a week, as I recall, in Richland County, about the dumbest thing I could do as a trial judge would be to grant a motion for a new trial where counsel is merely raising and seeking to relitigate the same issues that the court ruled on in the trial court. This is not a situation where there -- there's been some major shift in the direction of Wisconsin law after the trial that would lead the court to say well, now, wait a minute, in light of this new line of case law, this should have been approached differently.

Every trial is unique and this case -- or every case is unique and every trial, of course, also is

unique. But this case is unique for reasons that are evident and known to everyone involved with it. The court is satisfied that this defendant received a fair trial. No defendant ever receives a perfect trial; there really isn't such a thing.

Whether there were errors in this case I think is something that the Court of Appeals should short -- should sort out and if the Court of Appeals is of the opinion that this defendant did not receive a fair trial due to evidentiary error or improper arguments by the prosecutor or any other reason, they will so find, they will then order a new trial and presumably give this judge or some other judge a road map of how to give this defendant a fair trial.

They may, on the other hand, say that while she didn't get a perfect trial, she got an adequate trial. She had a trial that meets constitutional due process; conviction affirmed. They may find that errors were harmless.

But I think that's the proper result here, that neither, to be candid about it, my time or your breath should be spent in relitigating that which has already been litigated.

So to make your record, you've made your record; the court denies the motion and if you need an order to

STATE OF WISCONSIN CIRCUIT COURT RICHLAND COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs. Case No. 05 CF 119

JANET A. CONNER,

Defendant,

MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT

The defendant, JANET A. CONNER, appearing specially by her attorneys, MAYS LAW OFFICE, LLC, pursuant to Wis. Stat. § 974.02, respectfully moves this Court for the entry of an Order vacating the conviction on Count One in this matter and enter a finding of not guilty, notwithstanding the jury's verdict of guilty, upon the following grounds:

1. By a Criminal Complaint filed with the Circuit Court for Richland County on December 7, 2005, the defendant was charged with three counts, one count of stalking, contrary to Wis. Stats. § 940.32(2m)(b), with James F. Gainor identified as the victim, a second count of stalking with Rhonda S. Gainor

identified as the victim, and one count of criminal damage to property, contrary to 943.01(1).

2. Each count of the Criminal Complaint identified "on or about Wednesday, November 30, 2005," as the date of offense, at which time the State alleged that the defendant did use a key or other sharp device to scratch the paint of a 1996 Chevrolet Blazer owned by Rhonda and James Gainor.

3. In State v. Escobedo, 44 Wis. 2d 85, 170 N.W.2d 709 (1969), Wisconsin's Supreme Court addressed the application of judgment notwithstanding verdict in criminal proceedings. The Court stated:

> A motion notwithstanding the verdict amounts to a post-verdict motion for a directed verdict. It raises only questions of law and admits all facts supporting the jury's verdict. It is, in a sense, a demurrer to the evidence. It admits the facts found but contends that as a matter of law those facts are insufficient, though admitted, to constitute a cause of action.
>
> If a motion for judgment non obstante veredicto is granted, the court must accept as true the fact findings of the jury but decides the case on grounds other than those relied upon by the jury. We believe that 46 Am.Jur.2d, Judgments, sec. 127, page 400, correctly states the effect of the motion as viewed by this court: 'The application may not be granted on the ground that the verdict is against the weight of the evidence.'

Id. at 91.

4. Likewise, for the purposes of this motion only, the defendant does not challenge that sufficient evidence was adduced at trial to satisfy the elements

of Wis. Stat. § 940.32(2m)(b), which, in the present case, are:

1. The defendant intentionally engaged in a course of conduct directed at [James Gainor].
2. The course of conduct would have caused a reasonable person to [suffer serious emotional distress].
3. The defendant's acts [caused James Gainor to suffer serious emotional distress].
4. The defendant knew or should have known that at least one of the acts constituting the course of conduct would [cause James Gainor to suffer serious emotional distress].

WIS JI-CRIMINAL 1284. Rather, the defendant asserts that the evidence relied upon by the jury in reaching its guilty verdict could not properly support that verdict.

5. While evidence sufficient to support a stalking conviction against the defendant may have been introduced at trial, such evidence was not related to the specific incident charged in this case.

6. Count One specifically alleges that the basis for the stalking charge is the defendant's conduct on November 30, 2005, i.e. the damaging of the Gainors' vehicle. However, the jury concluded that the defendant was not guilty of Count Three, damaging the Chevy Blazer belonging to James and Rhonda Gainor on November 30, 2005. Thus, it is apparent that the jury's guilty verdict on Count 1 rests on evidence of other acts introduced by the State.

7. At the jury trial in this matter, the State introduced, over the defendant's previously stated objections, evidence of a number of prior harassing or threatening acts allegedly committed by the defendant, dating back to July of 2000. In Old Chief v. United States, 519 U.S. 172 (1997), the U.S. Supreme Court noted that "Although . . . `propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged--or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment--creates a prejudicial effect that outweighs ordinary relevance." (Citing United States v. Moccia, 681 61, 63 (1st Cir. 1982)). Clearly, if the jury did not believe that the defendant damaged the Gainors' vehicle as charged Count Three, then the conviction on Count One was necessarily based on the evidence of other acts, which is precisely the improper result with which the Old Chief court was concerned. Consequently, while this other acts evidence may have supplied a basis for the jury to conclude that all of the elements of stalking were met, the result is clearly improper because that conclusion was based on prior acts, not the alleged acts which formed the basis of the violation charged in Count One.

8. Moreover, the State has secured a conviction on Count One by essentially making an end run around the defendant's due process and Sixth

Amendment rights to fair notice of the charge and opportunity to defend. See State v. Fawcett, 145 Wis. 2d 244, 250, 426 N.W.2d 91 (Ct. App. 1988). A defendant is entitled to notice of the charges against her, as well as the underlying facts and time frame. Id. at 253, State v. Dekker, 112 Wis. 2d 304, 310, 332 N.W.2d 816 (Ct. App. 1983). The charging portion of the Criminal Complaint in this matter identifies November 30, 2005, as the date on which the offense was committed. However, the jury's conclusion that the defendant was not guilty of damaging the Gainors' vehicle on that date necessarily means that its finding of guilt on Count 1 was based on evidence of acts other than those allegedly occurring on the date identified in the Criminal Complaint. In other words, the defendant was charged with a particular offense, occurring at a particular time, and instead convicted for a history of uncharged allegations. Sustaining such a conviction would render the defendant's above-mentioned due process and Sixth Amendment rights utterly meaningless.

9. Because the jury's verdict on Count One was manifestly and improperly based on the consideration of evidence of prior acts, and because a conviction based on such uncharged acts outside the time frame identified in the Criminal Complaint amounts to a violation of the defendant's due process and

Sixth Amendment Right, the defendant respectfully asks this Court to set aside the jury's guilty verdict and enter a finding of not guilty.

Dated at Madison, Wisconsin, September 24, 2007.

Respectfully Submitted,

JANET A. CONNER, Defendant

MAYS LAW OFFICE, LLC
Attorneys For the Defendant
5944 Seminole Centre Court, Suite 200
Madison, WI 53711

BY: _____

STEPHEN E. MAYS
State Bar No. 1025716

STATE OF WISCONSIN

IN SUPREME COURT

No. 2008AP1296-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JANET A. CONNER,

DEFENDANT-APPELLANT-PETITIONER.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV, AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POST-CONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR RICHLAND COUNTY, THE HONORABLE MICHAEL J. ROSBOROUGH, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

WARREN D. WEINSTEIN
Assistant Attorney General
State Bar #1013263

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9444
(608) 266-9594 (Fax)
weinsteinwd@doj.state.wi.us

TABLE OF CONTENTS

CASES CITED

Page

Page

STATUTES CITED

Page

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITY

STATE OF WISCONSIN

IN SUPREME COURT

No. 2008AP1296-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JANET A. CONNER,

DEFENDANT-APPELLANT-PETITIONER.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV, AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POST-CONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR RICHLAND COUNTY, THE HONORABLE MICHAEL J. ROSBOROUGH, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are appropriate.

STATEMENT OF THE CASE

The State charged Janet Conner with stalking James (count 1) and Rhonda (count 2) Gainor in violation of Wis. Stat. § 940.32(2) and (2m) (1:1). The complaint and information alleged Conner had a conviction for a previous crime, the Gainors were the victim of her previous crime and the conviction occurred within seven years of the present violation (1:1-2, 4; 29:1-2) The complaint and information also alleged a third count of criminal damage to property (1:2; 29:2).

A jury found Conner guilty of stalking James[1] (78), but acquitted her of stalking Rhonda and causing criminal damage to property (79, 80). The circuit court sentenced her to four years, six months, consisting of one year, six months initial confinement and three years extended supervision (93).

Conner appealed to the court of appeals. As relevant here, Conner contended that the circuit court improperly interpreted Wis. Stat. § 940.32(2m)(b) when it admitted as proof of her "course of conduct," evidence of acts that preceded her conviction for violating a harassment injunction the Gainors obtained against her. She also contended the information did not provide her with adequate notice of the charged stalking offense. The court of appeals affirmed Conner's judgment of conviction and the order denying her motion for post-conviction relief in a published decision, *State v. Conner*, 2009 WI App 143, ¶ 1, 321 Wis. 2d 449, 775 N.W.2d 105.

[1] To avoid confusion, the State will refer to the Gainors by their first names.

The court of appeals concluded that the seven year time restriction specified in Wis. Stat. § 940.32(2m)(b) requires that only the final act charged as part of a course of conduct occur within seven years of the previous conviction, and does not restrict by time the other acts used to establish the underlying course of conduct element of Wis. Stat. § 940.32(2). *Conner*, 321 Wis. 2d 449, ¶ 19.

As to Conner's claim that the information did not afford her sufficient notice of the charge to comport with due process, the court concluded:

> Each of the elements of stalking under § 940.32(2m)(b) were present in the information. The pleading is therefore compliant with the requirements articulated in *Wilson* [*v. State*, 59 Wis. 2d 269, 275-76, 208 N.W.2d 134 (1973)]. To the extent that Conner was unaware that the applicable course of conduct could properly include acts that occurred on dates prior to November 30, 2005, her misapprehension was attributable to an incorrect reading of § 940.32(2m)(b) rather than to an insufficient information.

Conner, 321 Wis. 2d 449, ¶ 34.

This court granted Conner's petition for review.

STATEMENT OF FACTS

The court of appeals summarized the facts the State presented as follows:

> At trial, James testified that he and Conner had been involved in a brief relationship that ended in May 2000, and

that shortly thereafter he began seeing Rhonda, whom he married in 2001. He testified that in September 2000, Conner began a pattern of harassing behavior involving him as well as Rhonda, and that this activity continued for several years thereafter. The Gainors, as well as other witnesses, testified to the following events, which we have summarized for ease of understanding:

- James received numerous phone calls from Conner on about September 14, 2000.
- Conner entered James's home on October 4, 2000 and used his phone to call James, who was at Rhonda's home.
- Conner and her sister appeared at James's home on October 5, 2000, and stated that she wanted to talk to Rhonda, who was inside, because she had "bad things" to say about James.
- James received many "crank phone calls" at his home, Rhonda's home and his place of work during October and November 2000.
- Conner called James during the first week of December 2000 and stated that she was going to cause problems with Rhonda when the couple attended James's work Christmas party.
- When James left work a few days after his work Christmas party in December 2000, he discovered that the tires on his vehicle had been flattened.
- On December 15, 2000, James discovered upon leaving work that the windshield on his vehicle had been shattered.
- On December 25, 2000, James received a voicemail message from Conner warning him to watch where

he parked so that Conner "wouldn't be tempted to do something to it since she's so psychotic."

- Conner confronted James at his place of employment on December 27, 2000 and secretly recorded their conversation.
- During January 2001, the Gainors received magazine subscriptions they had not ordered, received "crank phone calls" at work, and had someone call twice to cancel their reservation at the facility hosting their wedding reception.
- A harassment injunction was issued on February 16, 2001 and was effective until February 16, 2003.
- The Gainors received numerous "crank phone calls" at home and at work between February 2001 and June 2003.
- On various dates between February 2001 and June 2003, paint was dumped on the hood of James's vehicle; the passenger side of the vehicle was keyed; spray paint was painted down the passenger side of and across the windshield of James's vehicle; the windshield of James's vehicle was shattered; and Superglue was squirted into the door locks of two of James's vehicles.
- Conner was convicted in June 2003 of violating the harassment injunction, was sentenced to 90 days in jail, and was released in September 2003.
- The Gainors again began receiving numerous "crank calls" in September 2003.
- Conner was in jail on an unrelated matter between October 2003 and February 2004 and the Gainors experienced no harassing conduct during this period.

- After Conner had been released from jail in February 2004, the Gainors once again began receiving crank calls from an unidentified caller.
- On January 6 or 7, 2005, James's vehicle was keyed.
- During November 2005, crank calls from an unidentified caller to James at work escalated, as did calls to Rhonda's parents, and James filed a report with police.
- On November 30, 2005, James confronted Conner after he observed her keying his vehicle.

Conner, 321 Wis. 2d 449, ¶ 6.

STANDARD OF REVIEW

The case requires this court to interpret Wis. Stat. § 940.32(2) and (2m). Statutory interpretation presents an issue of law, which this court reviews *de novo*. *State v Davis*, 2008 WI 71, ¶ 18, 310 Wis. 2d 583, 751 N.W.2d 332. Conner also argues she was deprived of due process because the charging documents did not provide her with adequate notice of the charges. The sufficiency of a pleading presents a legal issue which this court decides without deference. *State v. Chambers*, 173 Wis. 2d 237, 251, 496 N.W.2d 191 (Ct. App. 1992).

ARGUMENT

I. WISCONSIN STAT. § 940.32(2) AND (2M) DO NOT REQUIRE TWO ACTS SUBSEQUENT TO ANY CONVICTION RECITED IN SUBSECTION (2M).

Conner interprets Wis. Stat. § 940.32(2) and (2m) to require that the entire course of conduct element of stalking occur subsequent to the conviction which serves to elevate a Class I felony to a Class H felony under Wis. Stat. § 940.32(2m)(b). Conner repeatedly refers to the court of appeals' summarized evidence above as "other acts" evidence based on her reading of the statute. It is true the circuit court initially admitted the evidence of Conner's behavior toward the Gainors as "other acts" (49), however, "by the close of trial the [circuit] court had reached the conclusion that the evidence was properly admitted to establish the course of conduct element of the offense" (102); *Conner*, 321 Wis. 2d 449, ¶ 8. The court of appeals agreed that all of the acts beginning in 2000 constituted evidence of Conner's course of conduct. *Id.* ¶ 24. Conner did not include a separate issue challenging that court of appeals holding in her petition for review. Rather, her petition rested solely on her claim that the lower courts misinterpreted Wis. Stat. § 940.32(2m). She does not directly address the evidentiary basis for the admission of the individual acts in her brief. Therefore, the only issues before this court are the due process notice claim and the interpretation of Wis. Stat. § 940.32(2) and (2m). If the court of appeals

correctly interpreted the statute, it follows that Wis. Stat. § 904.04 does not bar the evidence Conner labels "other acts." *See State v. Scheidell*, 227 Wis. 2d 285, 294, 595 N.W.2d 661 (1999) (Evidence of an element of the specific crime charged is admissible).

The relevant portions of Wis. Stat. § 940.32(2) and (2m)(b) provide:

> (**2**) Whoever meets all of the following criteria is guilty of a Class I felony:
> (a) The actor intentionally engages in a course of conduct directed at a specific person that would cause a reasonable person under the same circumstances to suffer serious emotional distress or to fear bodily injury to or the death of himself or herself or a member of his or her family or household.
> (b) The actor knows or should know that at least one of the acts that constitute the course of conduct will cause the specific person to suffer serious emotional distress or place the specific person in reasonable fear of bodily injury to or the death of himself or herself or a member of his or her family or household.
> (c) The actor's act causes the specific person to suffer serious emotional distress or induces fear in the specific person of bodily injury to or the death of himself or herself or a member of his or her family or household.
>
> . . . .
>
> (**2m**) Whoever violates sub. (2) is guilty of a Class H felony if any of the following applies:
> (a) The actor has a previous conviction for a violent crime, as defined in s. 939.632(1)(e)1., or a previous conviction under this section or s. 947.013(1r), (1t), (1v), or (1x).

(b) The actor has a previous conviction for a crime, the victim of that crime is the victim of the present violation of sub. (2), and the present violation occurs within 7 years after the prior conviction.
(c) The actor intentionally gains access or causes another person to gain access to a record in electronic format that contains personally identifiable information regarding the victim in order to facilitate the violation.
(d) The person violates s. 968.31(1) or 968.34(1) in order to facilitate the violation.
(e) The victim is under the age of 18 years at the time of the violation.

. . . .

(**3**) Whoever violates sub. (2) is guilty of a Class F felony if any of the following applies:
(a) The act results in bodily harm to the victim or a member of the victim's family or household.
(b) The actor has a previous conviction for a violent crime, as defined in s. 939.632(1)(e)1., or a previous conviction under this section or s. 947.013(1r), (1t), (1v), or (1x), the victim of that crime is the victim of the present violation of sub. (2), and the present violation occurs within 7 years after the prior conviction.
(c) The actor uses a dangerous weapon in carrying out any of the acts.

Wisconsin Stat. § 940.32(1)(a) defines a "course of conduct" to mean "a series of 2 or more acts carried out over time, however short or long, that show a continuity of purpose . . . ." The subsection then lists 10 specific acts included.

If the words chosen for the statute exhibit a plain, clear statutory meaning, without ambiguity, the statute is applied according to the plain meaning of the statutory terms. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. Plain meaning may be ascertained not only from the words employed in the statute, but from the context. *Id.* Courts interpret statutory language in the context in which those words are used; "not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.*

Conner's interpretation requires the entire course of conduct element of stalking to occur after the operative event which elevates the Class I felony of § 940.32(2) to the Class H felony of § 940.32(2m),[2] in this case a conviction in which one of the Gainors was a victim. In other words, she reads the statute to require a new course of conduct (at least two acts) following the conviction.

No explicit language in Wis. Stat. § 940.32(2) sub. (2m) limits the course of conduct element to two or more acts occurring subsequent to the requisite event elevating the crime of stalking to Class H. If such a limitation exists, it is implicit. But the language of § 940.32(1)(a) is inconsistent with Conner's reading of sub. (2m) because the acts comprising the course of conduct may be "carried out over time, ***however short or long*** . . ." (emphasis added). This language evidences the Legislature's intent not to limit in

[2] The same argument Conner advances here would apply equally to events denominated in Wis. Stat. § 940.32(3) which elevate stalking to a Class F felony.

any way, the period of time over which specific acts comprising a course of conduct may be carried out. Conner would restrict the course of conduct "carried out over time" to time after a conviction involving the same victim.

Wisconsin Stat. § 940.32(2)(a) further requires a defendant's course of conduct to be "directed at a specific person" and cause "a reasonable person under the same circumstances to suffer serious emotional distress or . . . fear" of harm. Wis. Stat. § 940.32(2)(a). Conner reads the subs. (2m) and (3) requirements to eliminate some of those circumstances: the circumstances occurring prior to the requisite event. In Conner's view, a defendant is only subject to the greater crime if the circumstances after the requisite event (her conviction here) caused the "specific person" (James) to suffer serious emotional distress or fear harm based entirely on circumstances occurring after her conviction.

The State reads Conner's argument to include the corollary that no act before the conviction may be considered as proof of the course of conduct for the "present violation." The evidence of acts occurring before the conviction may be admitted, if at all, only in compliance with Wis. Stat. § 904.04. In the circuit court, Conner opposed evidence of acts prior to her conviction on this basis. Such opposition reveals that Conner's view relegates all of the acts prior to her conviction as evidence of something other than the course of conduct element even if those acts comprise, in the language of Wis. Stat. § 940.32(2), a specific person's circumstances. In light of sub. (2)(a)'s explicit reference to the "same

circumstances" of the "specific person," Conner's position is an unreasonable interpretation of the language.

Conner focuses on the term "after" in sub. (2m)'s phrase "the present violation occurs within 7 years after the prior conviction." She argues this language means that a "course of conduct," two or more acts, must occur "after" the prior conviction. (Conner is silent on whether acts prior to her conviction may be admitted to prove her course of conduct if at least two acts occurred after her conviction; her opposition to the evidence of her prior acts here suggests her position is they may not).

But the statute does not say "the [course of conduct] occurs within 7 years after the prior conviction"; it says the "the *present violation* occurs within 7 years after the prior conviction." Wis. Stat. § 940.32(2m)(b). What, then, is the "present violation?" Conner does not say. *State v. Thums*, 2006 WI App 173, 295 Wis. 2d 664, 721 N.W.2d 729, is instructive in determining the "present violation" because the court of appeals had to determine when Thums' "present violation" occurred in order to decide which truth in sentencing (TIS) penalty scheme applied to his conviction. *Thums*, 295 Wis. 2d 664, ¶ 1.

Thums was convicted under Wis. Stat. § 940.32(3)(c) of stalking his former girlfriend during a period between August 1, 2002, and May 13, 2004. *Thums*, 295 Wis. 2d 664, ¶ 2. During that time, on February 20, 2004, Thums planted an eleven-inch knife blade in the seat of his former girlfriend's car. *Id.* When police attempted to apprehend Thums, he fled, leading

them on a high speed chase striking two squad cars in the process. *Id.* ¶ 3. The State charged Thums with six offenses resulting from the chase but not with stalking. *Id.* ¶ 4. While Thums was out on bail, he committed another act of stalking. *Id.* The State then charged Thums with the two additional crimes of stalking with a dangerous weapon and felony bail-jumping. *Id.*

On February 1, 2003, TIS-II became effective. *Id.*¶ 6, n.1. TIS-II reduced stalking with a dangerous weapon from a Class C felony to a Class F felony, a reduction of the maximum penalty of fifteen years to 12.5 years. *Id.* ¶ 6. Thums' sentence exceeded the TIS-II penalty scheme. *Id.* The State argued that because stalking, a continuing offense, straddled the effective date of the penalty change, the sentencing court should apply the penalty scheme in place when the "course of conduct" began. *Id.* ¶ 8. The court of appeals rejected this argument. It held that since use of a dangerous weapon was an element of stalking with a dangerous weapon, (s*ee State v. Warbelton*, 2009 WI 6, 315 Wis. 2d 253, 759 N.W.2d 557), Thums had not committed that offense until he had used a knife blade on February 20, 2004. *Thums*, 295 Wis. 2d 664, ¶ 11. Thus *Thums* stands for the proposition that at a minimum, the "present violation" must contain all of the elements of the crime, in this case along with the other elements, a "course of conduct" and Conner's conviction, the elevating element of sub. (2m) or (3).

It is clear from the opinion that much of the course of conduct at issue in *Thums* occurred prior to February 20, 2004, when Thums planted the knife blade. The State's argument was premised

on the fact that the course of conduct began before February 1, 2003, when TIS-II took effect. *Thums'* conviction therefore rests on a course of conduct occurring in part before his use of the knife blade, the act elevating his crime under sub. (3). This is at odds with Conner's reading of the language "within 7 years after the prior conviction."

When a series of criminal acts can be viewed as a single act, a series of single acts or a continuing offense, Wisconsin cases have repeatedly acknowledged a prosecutor's broad discretion in determining whether to charge a single count or multiple counts. *State v. Glenn,* 199 Wis. 2d 575, 584, 545 N.W.2d 230 (1996); *State v. Lomagro*, 113 Wis. 2d 582, 587, 335 N.W.2d 583 (1983). So the "present violation" in sub. (2m) is best defined as the charge alleged in the charging documents. *Thums* alludes to this result. The *Thums* court observed:

> Certainly, Thums' conduct met all the elements for stalking while TIS-I remained in effect. Whether the court could have applied TIS-I penalties to the ongoing course of Thums' conduct constituting that offense, which "straddled" the effective dates of TIS-I and TIS-II, would present a closer question that we need not resolve at this time; the State did not charge Thums with simple stalking.

Thums, 295 Wis. 2d 664, ¶ 8, n.2. This footnote suggests the *Thums* court would have defined the "present violation" by reference to the charging documents.

Conner also relies on Wis. Stat. § 947.013(1t). Wisconsin Stat. § 947.013 criminalizes harassing behavior. Subsection (1t)

elevates certain harassing behavior to a Class I felony if "the person has a prior conviction under this subsection or sub. (1r), (1v), (1x) or s. 940.32(2), (2e), (2m), or (3) involving the same victim and the present violation occurs *within 7 years of the prior conviction."* Conner points out that this statute does not contain the word "after" as Wis. Stat. § 940.32(2m) does.

Conner's reliance on Wis. Stat. § 947.013(1t) is misplaced. First, many of (1t)'s referenced subsections apply to single acts. Subsection (1r) refers to sub. (1m) which applies not only to a course of conduct or repeated acts, sub. (1m)(b), but to the act of striking, shoving, kicking or other physical contact, sub. (1m)(a). Second, an act is "within 7 years" of an event if it occurs less than seven years before the event or less than seven years after the event. The language of sub. (1t) therefore applies to a fourteen year window. Inserting the word "after," in Wis. Stat. § 940.32(2m) removes the seven years before the event and requires at least some part of an element, most likely the course of conduct, to occur after the conviction. So too, Wis. Stat. § 940.32(2e). That subsection provides that "[a]fter having been convicted of [enumerated] sexual assault[s]" or "domestic abuse" "the actor engages in ***any of the acts*** listed in sub. (1)(a) 1 to 10." Wisconsin Stat. § 940.32(2e) contains no language whatever about a seven year period. So a violation of Wis. Stat. § 940.32(2e) need not be within seven years.

To illustrate the difference between Wis. Stat. § 940.32(2m) and (3) on the one hand, and Wis. Stat. § 947.013(1t) on the other, recall the facts of *Thums.* Thums committed his course of

conduct beginning August 1, 2002, and continuing through May 13, 2004. *Thums*, 295 Wis. 2d 664, ¶ 2. On February 20, 2004, Thums used a dangerous weapon. But "he committed his final act of stalking" while out on bail following the knife incident. *Id.* ¶ 4. So at least one act showing a continuity of purpose (the course of conduct) occurred after Thums used a dangerous weapon. This fact pattern fully complies with the requirements of sub. (3)'s language (which is identical to (2m)'s language in this regard). It is exactly what the Legislature intended.

By contrast, if the Legislature had used the language of Wis. Stat. § 947.013(1t) in § 940.32(3), Thums could have been charged with a violation of stalking with a dangerous weapon on February 20, 2004, when all of the elements of a stalking with a dangerous weapon existed. The State would not have had to wait for one additional act in the course of conduct to occur after February 20. The "present violation" of sub. (e) would be "within 7 years" of use of the dangerous weapon under § 947.013(1t)'s language because the course of conduct began on August 1, 2002, and continued up to February 20, 2004. The course of conduct was less than seven years before use of the dangerous weapon and was, therefore, "within 7 years" of that use.

Lastly, Conner criticizes the court of appeals for relying on what she characterizes as dicta in this court's *Warbelton* decision. After determining that the language of Wis. Stat. § 940.32(2m)(a) created an additional element to an enhanced crime, the *Warbelton* Court stated, "[o]ur analysis is confirmed by the legislative history of stalking statutes in Wisconsin and nationally." *Warbelton*,

315 Wis. 2d 253, ¶ 35. The *Warbelton* court then extensively cited to and quoted from Nat'l Inst. of Justice, U.S. Dep't of Justice, *Project to Develop a Model Anti-Stalking Code for States* (1993) (Nat'l Inst. of Justice).

In rejecting Conner's interpretation of Wis. Stat. § 940.32(2m)(b), the court of appeals cited *Warbelton's* announced legislative history.

> The [*Warbelton*] court referred to the underlying reasoning that led to the adoption of the stalking statutes nationwide, including Wisconsin, in the early 1990s. It cited language from an article published by the National Institute of Justice which noted, 'Stalkers may be obsessive, unpredictable, and potentially violent. They often commit a series of increasingly violent acts, which may become suddenly violent, and result in the victim's injury or death.' *Id.* ¶ 36 (citing Nat'l Inst. of Justice, U.S. Dep't of Justice, *Project to Develop a Model Anti-Stalking Code for States* 49 (1993)). In light of the nature of the stalking offense, the Institute advocated that states establish a 'continuum of charges that could be used by law enforcement officials to intervene at various stages.' *Id.* ¶ 37 (citing *Project to Develop a Model Anti-Stalking Code for States* at 49). The supreme court observed that Wisconsin has done precisely that through its statutory scheme that delineates three degrees of stalking depending on the presence of aggravating factors. *Id.* ¶ 39.

Conner, 321 Wis. 2d 449, ¶ 17. The court of appeals relying on *Warbelton* then concluded that:

> Conner's interpretation of Wis. Stat. § 940.32(2m)(b) is inconsistent with the reasoning underlying the statute. Under her view, if a person has a long history of

> harassing a victim without an ensuing conviction and is then convicted of any type of crime against the victim, none of the previous stalking behavior can be considered in seeking an enhanced penalty under sub. (2m)(b) for a new stalking offense if any of the prior acts occurred more than seven years before the present offense.

Id. ¶ 18.

This court recently concluded "the court of appeals may not dismiss a statement from an opinion by this court by concluding that it is dictum." *Zarder v. Humana Insurance Co.*, 2010 WI 35, ¶ 58, ___ Wis. 2d ___, ___ N.W.2d ___. Whether or not the *Warbelton* court's recitation of the stalking statutes' legislative history is "dicta" or not,[3] the court of appeals was not free to ignore this court's declarations regarding Wis. Stat. § 940.32(2m)'s legislative history.

The *Warbelton* Court announced the following as a part of § 940.32(2m)'s legislative history:

> Unlike with other crimes against life and bodily security, the mental state of the victim--as well as the mental state of the perpetrator--is an element of the crime of stalking. The Institute explained, 'Stalking may involve conduct intended to be an expression of the stalker's feelings toward the victim.' [Nat'l Inst. of Justice] at 9. 'Since stalking statutes criminalize what otherwise

[3] As the *Zarder* Court pointed out there are "two disparate lines of Wisconsin cases defining dicta." *Zarder*, 2010 WI 35, ¶ 52, n.19. *Compare State v. Picotte*, 2003 WI 42, ¶ 61, 261 Wis. 2d 249, 661 N.W.2d 381, with *State v. Sartin*, 200 Wis. 2d 47, 546 N.W.2d 449 (1996).

> would be legitimate behavior based upon the fact that the behavior induces fear, the level of fear induced in a stalking victim is a crucial element of the stalking offense.' *Id.* at 48.

Warbelton, 315 Wis. 2d 253, ¶ 36.

The legislative history as declared by the *Warbelton* decision confirms the court of appeals interpretation of the statute here. As the court of appeals pointed out, Conner's interpretation of the statute would frustrate the purpose of authorizing law enforcement to intervene at any point along a continuum of aggravated behavior committed by a person with a history of harassment and stalking, who may suddenly become violent. More importantly, Conner's interpretation of Wis. Stat. § 940.32(2m) would effectively remove part, perhaps a major part, of the State's proof of "the level of fear induced in a stalking victim" by limiting the fear inducing behavior the jury would hear to those circumstances following a conviction with the very victim in whom a defendant induced such fear. But as indicated by the Legislature's use of the phrase "same circumstances" when referring to the victim, and as noted by the *Warbelton* court, "the level of fear induced in a stalking victim is a crucial element of the stalking offense." *Id.*

The circuit court and the court of appeals correctly interpreted Wis. Stat. § 940.32(2m) in concluding that Conner's acts from 2000 through November 30, 2005, were part of Conner's course of conduct directed at James.

II. CONNER RECEIVED ADEQUATE NOTICE OF THE CHARGES AGAINST HER.

Conner argues she was deprived of due process because she did not receive adequate notice of the charges.

Initially, Conner has waived this issue. An objection challenging the sufficiency of the complaint must be raised before trial by motion or it is deemed waived. *See State v. Copening*, 103 Wis. 2d 564, 570, 309 N.W.2d 850 (Ct. App. 1981). Conner did file a motion to dismiss the complaint but that motion questioned whether the complaint established probable cause, not whether it gave sufficient notice to satisfy due process (13; 14). The trial court did not address notice in rejecting Conner's motion. The court held that the issue was moot, (the motion was deferred until after the preliminary hearing where probable cause was established), and that the complaint set forth sufficient facts to establish probable cause (51).

The procedural due process requirements of the Wisconsin Constitution, art. I, § 7 and the Sixth Amendment to the United States Constitution guarantee an accused the right to be informed of the nature and cause of the accusation. *State v. Cheers*, 102 Wis. 2d 367, 403-04, 306 N.W.2d 676 (1981). The test for gauging the adequacy of the pleadings in light of the defendant's right to notice and opportunity to defend was set forth in *State v. George*, 69 Wis. 2d 92, 97, 230 N.W.2d 253 (1975), quoting *Holesome v. State*, 40 Wis. 2d 95, 102, 161 N.W.2d 283 (1968):

> In order to determine the sufficiency of the charge, two factors are considered. They are, whether the accusation is such that the defendant (sic) determine whether it states an offense to which he is able to plead and prepare a defense and whether conviction or acquittal is a bar to another prosecution for the same offense.

The ultimate question is one of reasonableness. *See State v. Stark*, 162 Wis. 2d 537, 545, 470 N.W.2d 317 (Ct. App. 1991).

Conner refers to the information through out her argument on this point. In Wisconsin, a criminal proceeding is commenced by the filing of a complaint which is "a written statement of the essential facts constituting the offense charged" Wis. Stat. § 968.01. A criminal complaint's essential function is to set forth sufficient facts from which a reasonable person could conclude that a crime was probably committed and that the defendant probably committed it. *State v. Fawcett*, 145 Wis. 2d 244, 250, 426 N.W.2d 91 (Ct. App. 1988). The information in a felony case is filed after the preliminary examination and is based on the facts and circumstances connected with the preliminary examination. Wis. Stat. § 971.01(1).

A defendant has the benefit of both the factual allegations required in the complaint and the final statutory charges alleged in the information. *Copening*, 103 Wis. 2d at 576. An information, should recite the elements of the crime. *Wilson,* 59 Wis. 2d at 276. It should include the particular statute violated. *Wagner v. State*, 60 Wis. 2d 722, 728, 211 N.W.2d 449 (1973). The evidentiary facts constituting the alleged crime,

however, are found in the complaint and these facts need not be repeated in the information. *Copening*, 103 Wis. 2d at 577. A defendant is not denied due process because only the complaint contains sufficient notice. *See State v. Caldwell*, 154 Wis. 2d 683, 686-87, 454 N.W.2d 13 (Ct. App. 1990) (notice of repeater held sufficient to satisfy due process where repeater allegation appeared only in the complaint).

"The complaint must be considered in its entirety, and be given a common sense reading." *State v. Smaxwell*, 2000 WI App 112, ¶ 5, 235 Wis. 2d 230, 612 N.W.2d 756; *State v. Knudson*, 51 Wis. 2d 270, 275, 187 N.W.2d 321 (1971). Documents may be incorporated into the complaint by reference. "[T]o incorporate a document into a complaint some statement in the body of the complaint must indicate that another document, outside the four corners of the complaint itself, is intended to be included in the complaint." *State v. Williams,* 47 Wis. 2d 242, 252, 177 N.W.2d 611 (1970); *Smaxwell*, 235 Wis. 2d 230, ¶ 7.

The complaint in this case states:

> [T]he basis for the complainant's charge is contained in the attached police reports . . . the Property Crime Non-consent Statement signed by James Gainor and Rhonda Sugden ***and the factual basis contained in the attached Motion to Introduce Evidence of Other Crimes, Wrongs or Acts . . . all of which are incorporated into this Complaint by this reference and attachment. The factual basis in the attached Motion to Introduce Evidence of Other Crimes, Wrongs or Acts . . . is a summary of some of the history of***

> ***harassment and stalking*** perpetrated upon James Gainor and Rhonda Gainor by Janet Conner as related by James Gainor.

(1:2) (emphasis added).

The attached "Motion to Introduce Evidence of Other Crimes, Wrongs or Acts" contained a factual recitation of acts which the State later proved and from which the State contended that Conner had engaged in a course of conduct directed at James and Rhonda that would cause a reasonable person under the same circumstances to suffer serious emotional distress or to fear harm. The attachment recited:

- James and Conner had been involved in a brief relationship that ended in May 2000 (1:13).
- James began seeing Rhonda Sugden in 2000 (1:14).
- Conner began calling James in the first week of July, 2000 (1:14).
- In October 2000, Rhonda began receiving calls from Conner (1:14).
- Conner entered James's home on October 4, 2000 and used his phone to call James, who was at Rhonda's home (1:15).
- On October 5, 2000 Conner and her sister came to James's property and got into an argument with James. Conner followed Rhonda around (1:15).
- On October 6, 2000 Conner came to Rhonda's place of employment and gave her a letter containing accusations about James (1:15).
- In October and November, 2000, both James and Rhonda received numerous prank calls; caller I.D. identified the calls as coming from Conner's house and pay phones (1:15).

- Conner called Rhonda's daughter and mother numerous times in November and December 2000 (1:15-16).
- Conner called James during the first week of December 2000 and stated that she was going to cause problems with Rhonda when the couple attended James's work Christmas party (1:16).
- Conner called Rhonda and repeated her threat to cause problems at the Christmas party (1:16).
- During the first week of December 2000 James began experiencing vandalism to his vehicle including flattening his tires (1:16).
- On December 15, 2000, James discovered the windshield of his truck smashed (1:17).
- On December 25, 2000, Conner warned James to watch where he parked so that Conner "won't be tempted to" do something to it (1:17).
- On January 2, 2001, Conner called Rhonda's place of employment twice claiming to be Rhonda's mother (1:17).
- On January 4, 2001, Conner called Rhonda's son's school claiming to be Rhonda and told school officials to keep Rhonda's son off the school bus because she would pick him up. When no one picked her son up, Rhonda had to leave work to pick him up (1:17).
- On January 24, 2001, someone called twice attempting to cancel the reservation at the facility hosting their wedding reception (1:17-18).
- On January 24, 2001, someone called Rhonda's place of employment; after finding out Rhonda was on jury duty, the person called the Richland County Clerk of Court claiming to be the school nurse and informed the clerk that Rhonda needed to go to the emergency room as soon as possible. Rhonda was excused from jury duty (1:18).

- On January 26, 2001, a man called Rhonda from a pay phone Conner had previously used and threatened James (1:18).
- On January 26, 2001, James again discovered the windshield of his vehicle smashed (1:18).
- James and Rhoda received numerous magazine subscriptions they had not ordered, received crank phone calls at work, some from Conner's sister (1:18-19).
- On February 16, 2001, the circuit court enjoined Conner from harassing James and Rhonda (1:19).
- On September 29, 2001, Conner barged into James's residence and demanded he leave (1:14).
- On September 30, 2001, Conner called claiming to be "Monica"; caller I.D. identified the call as coming from Conner's sister's residence (1:14).

The complaint both used the terms "attached" and "incorporated into this complaint by this reference" (1:2). The complaint also indicated that the above incidents comprised "a summary recounting of some of the history of . . . stalking" (1:2). To the extent Conner's claim is that the complaint and information must recite each act of the course of conduct the State contends comprises that element of stalking, the State need not "spell out every act which would comprise an element of the crime; instead, an allegation of the element should suffice." *Wilson*, 59 Wis. 2d at 275-76. Given the detailed incidents in 2000 and 2001, Conner was on notice that the State intended to show a course of conduct beginning in 2000 and proceeding through the incident on November 30, 2005.

Moreover, if a defendant has actual notice to adequately plead and prepare a defense, there is no due process violation. *Chambers*, 73 Wis. 2d at 252-53. Here, James testified at the preliminary hearing to some of the acts listed above. The State also referred to the above acts in a motion to admit the acts under Wis. Stat. § 904.04 (48:5-9).

James also testified at the preliminary hearing that he got a restraining order against Conner in 2001 (109:13). After the restraining order issued, Conner violated it (109:13). The hospital where Conner worked had a system which recorded telephone calls (109:14). Police were able to identify Conner as the source for three harassing phone calls using this system (109:14). Conner was convicted for all three calls (109:14, 16, 29, 48). James also testified that when Conner was in jail on two occasions as a result of the convictions, the phone calls stopped (109:16). When she was released, the calls began again (109:16). Conner's last release was February 2004 (109:16).

Conner's claim that she was deprived of due process because she did not receive adequate notice of the charges must fail because the complaint gave her adequate notice that her course of conduct spanned the period from September 2000 through the November 30, 2005, incident. In addition, Conner had actual notice of the State's theory that her course of conduct spanned that period from the preliminary hearing, and the State's motion to admit the acts under Wis. Stat. § 904.04.

CONCLUSION

For the reasons stated above, this court should affirm the decision of the court of appeals, which affirmed Conner's judgment of conviction and the order denying her post-conviction motion for relief.

Dated at Madison, Wisconsin, this 4th day of June, 2010.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

WARREN D. WEINSTEIN
Assistant Attorney General
State Bar #1013263

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9444
(608) 266-9594 (Fax)
weinsteinwd@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,434 words.

Dated this 4th day of June, 2010.

_____

WARREN D. WEINSTEIN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 4th day of June, 2010.

_____
WARREN D. WEINSTEIN
Assistant Attorney General

STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 08-AP-1296-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JANET A. CONNER,

Defendant-Appellant-Petitioner.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

ON APPEAL FROM A FINAL ORDER
OF THE CIRCUIT COURT FOR RICHLAND COUNTY,
THE HONORABLE MICHAEL J. ROSBOROUGH, PRESIDING

Respectfully submitted,

JANET A. CONNER,
Defendant-Appellant-Petitioner

MAYS LAW OFFICE, LLC
Attorneys for the
Defendant-Appellant-Petitioner
6405 Century Avenue, Suite 103
Middleton, Wisconsin 53562
(608) 257-0440

BY: STEPHEN E. MAYS
State Bar No. 1025716

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited and Other Authorities

STATUTES CITED

OTHER AUTHORITIES

ARGUMENT

The State argues two points in its brief: (1) that Wis. Stat. 940.32 (2) and (2m) cannot be read as requiring a course of conduct occur after the qualifying prior conviction; and (2) that the petitioner's Due Process right to a fair trial and notice of the charged offense were not violated. The State additionally raises the claim that the petitioner has waived this notice issue, although acknowledging that the petitioner "did file a motion to dismiss the complaint but that motion questioned whether the complaint established probable cause, not whether it gave sufficient notice to satisfy due process." (State's brief, p. 20). In making this argument, the State, essentially assists in making the petitioner's point: that she did not challenge any notice issue at the trial court level – until that became an issue on the last day of the jury trial at the jury instruction conference, when the trial court, following the petitioner's continuing objections to the proffered "other acts" evidence, permitted the state to proceed with a theory of prosecution which included all alleged acts from 2000 to 2005 – because notice had never been an issue *until that time*. The State charged, and the petitioner prepared a defense to, an allegation "on or about November 30, 2005." The petitioner only learned at the close of proof at trial, when the trial court advised the state that it viewed the

course of conduct as consisting of all the alleged acts over the five (5) year period, that the allegation of November 30, 2005 was now not the only significant date in question.[1] Hence, the petitioner could not, prior to that time, have raised a notice issue. The petitioner objected, all along, to the admission of the proffered other acts evidence.

Moreover, and as probably said previously but will be stated more clearly, and even quite bluntly, now, even the State at trial did not view this case as the trial court ultimately suggested it be prosecuted – *not* as an incident occurring "on or about" a single date, but as a continuing course of conduct – as is evident by the State filing, and convincing the trial court to grant, a motion admitting the alleged uncharged incidents as "prior bad acts" under Wis. Stat. 904.04(2). The State did not charge, nor proceed at any time prior to the jury instruction conference (where it received a helping hand from the trial court) on the theory that the uncharged allegations spanning a course of five (5) years prior to the date in question – November 30, 2005 – constituted a "course of conduct." Instead, the State believed them to be admissible under 904.04.[2]

---

[1] The petitioner objected all along to the admission of the State's "other acts" motion. That the State now asserts waiver on the notice issue is unpersuasive.

[2] For the State to then argue in its brief that the petitioner "does not directly address the evidentiary basis for the admission of the individual acts in her brief" is also unpersuasive, and also misleading, as those very "individual acts" were previously admitted (and the petitioner clearly objected to their admission), and then

The State's arguments rely upon its interpretation of Wis. Stat. § 940.32(2m)(b), and whether the charging instrument sufficiently provided the petitioner notice of the charged offense. The petitioner's reply brief will first address the issue of waiver, then respond to the State's arguments regarding statutory interpretation, and finally the issue of whether the petitioner received sufficient notice of the offense charged in the Information.

I. THE PETITIONER HAS NOT WAIVED ANY ISSUE.

The State improperly argues that the petitioner waived her claim to a Due Process violation. For the reasons stated above, this Court should not accept such a misleading argument. However, the above argument notwithstanding, the petitioner will address this issue more fully.

The standard for reviewing a waiver of a constitutional right requires the court to "indulge in every reasonable presumption against a waiver of a constitutional right," State v. Burton, 2007 WI App. 5, ¶16, 307 Wis. 2d 232, 744 N.W.2d 889 (citation omitted), and such waiver should only be found upon a showing of an intentional relinquishment of a known right. Id.

---

became the basis for the "course of conduct" not charged by the State, but permitted to be relied on as such by the trial court. This issue is the very heart of the notice issue raised by the petitioner. To claim, therefore, that this issue is not before this Court, is a meek attempt to skirt the notice issue itself. This Court should not be fooled by such an assertion by the State.

The keystone of any waiver argument is whether a party has registered an objection with sufficient prominence such that the court understands what it is asked to rule upon. State v. Barthels, 166 Wis. 2d 876, 884, 480 N.W.2d 814, 818 (Ct. App. 1992), aff'd., 174 Wis. 2d 173; 495 N.W.2d 341 (1993). Thus, there is no need to raise a contemporaneous objection when the trial court has already overruled a defendant's objection to a legal position espoused by the state and court. See, Burton, at ¶¶11-12 (Wis. Ct. App. 2007) (citing State v. Bergeron, 162 Wis. 2d 521, 527-29, 470 N.W.2d 322 (1991)). Furthermore, a "plain" or "fundamental error which renders a trial so unfair as to deny due process may not be waived. State v. Rockette, 2006 WI App 103, ¶29, 294 Wis. 2d 611, 718 N.W.2d 269.

The petitioner objected to the jury instruction defining "course of conduct" at every stage of the proceedings. The Information was sufficient to provide the petitioner with notice of an alleged offense, based upon a course of conduct, committed "on or about Wednesday November 30, 2005" as charged. However, the State only argued that the course of conduct spanned more than five years, after the trial court provided the contested jury instruction. The petitioner specifically objected to the jury instruction at the instruction conference. The trial court overruled the petitioner's

objections and authorized the State to proceed with a legal theory encompassing over seven years of alleged acts to establish the "course of conduct." This lack of prior notice of such a legal theory – not charged by the State – is a lack of due process to which one is entitled.

II. WIS. STAT. §940.32(2m)(b) EXPLICITLY LIMITS A PROSECUTION CHARGED UNDER THAT SUBSECTION TO A PRESENT VIOLATION OF STALKING OCCURRING AFTER THE PRIOR QUALIFYING CONVICTION.

The State's brief argues that the plain language of Wis. Stat. §940.32(2m)(b) cannot be read to require that the State has the burden of establishing that a violation of Wis. Stat. § 940.32(2) occurred after the qualifying conviction. The State argues that the petitioner's position: (1) is not supported by any statutory language or the structure of the statute; (2) would prevent prosecutorial discretion in charging a continuing crime; and (3) is foreclosed by State v. Thums, 2006 WI App. 173, 295 Wis. 2d 664, 721 N.W. 729.

The State's claim that there is no statutory language in Wis. Stat. § 940.32(2m) which limits the course of conduct required in 940.32(2) to a time period after the applicable conviction, completely disregards the plain language of the statute. The petitioner was specifically charged with a violation of Wis. Stat. §

940.32(2m)(b) in Count 1 of the Information. That subsection of the statute is as follows:

> (2m) Whoever violates sub. (2) is guilty of a Class H felony if any of the following applies:
> (b) The actor has a previous conviction for a crime, the victim of that crime is *the victim of the present violation of sub. (2),* and ***the present violation occurs*** *within 7 years* ***after the prior conviction***.

(emphasis supplied).

This Court has explained that statutory interpretation relies upon the plain language of a statute "because it is assumed that the legislature's intent is expressed in the words it used." State v. Haanstad, 2006 WI 16 ¶19, 288 Wis. 2d 573, 709 N.W.2d 447 (citation omitted). A violation of subsection (2) requires a course of conduct consisting of a series of two or more acts. Wis. Stat. §§ 940.32(1)(a) and (2). The State makes much of "the present violation" language in the statute. In order for a present violation to exist there must be a series of two or more acts constituting the course of conduct under sub. (2). Contrary to the State's assertions, subsection (2m)(b) explicitly requires that the present violation of sub. (2) occur after the prior conviction in order to charge the enhanced felony penalty under that subsection. However, the State's interpretation hinges upon selectively disregarding the plain language of (2m)(b) which the petitioner was charged with violating.

The plain language of Wis. Stat. 940.32(2m)(b) is not rendered superfluous merely because the introductory passage of Wis. Stat. § 940.32(2m) does not, in isolation, contain language requiring all subsequent subsections (a) - (e) to have occurred prior to a violation of Wis. Stat. § 940.32(2).[3] It is clear from the sentence constituting sub. (2m)(b), that the "present violation" which must occur within 7 years after the prior conviction is a present violation of sub. (2) which encapsulates a "course of a conduct" consisting of two or more acts. Thus, a prosecution under (2m)(b) must establish two or more acts constituting a "course of conduct" which occur after the requisite prior conviction.

Reviewing a statutory provision in context is a proper exercise, State ex rel. Kalal v. Circuit Court for Dane County, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110, but only so long as the actual language of a subsection being examined is not completely ignored. The State's interpretation of subsection (2m)(b) explains the misguided argument that State v. Thums, 2006 WI App 173, 295 Wis. 2d 664, 721 N.W.2d 729, is applicable to the present case. The court in Thums only addressed the issue of whether

[3] The introductory passages of Wis. Stat. § 940.32(2m) or (3) do not contain language limiting the enhanced penalties to prior convictions for crimes against the same victim. To find to the contrary, as the State would seem to suggest, would lead to the absurd result that the language addressing a prior conviction against the same victim in sub. (2m)(b) would not require that the prior conviction have anything to do with the same victim because that isn't addressed in the introductory passage of (2m) or within sub. (2).

Thums could be properly sentenced under TIS I for a violation of Wis. Stat. § 940.32(3)(c) when the required act of using a deadly weapon during the "course of conduct" for the increased felony offense did not occur until TIS II was in effect. Thums, at ¶1. Thums is clearly distinguishable as Wis. Stat. § 940.32(3)(c) does not contain any language requiring that the violation of sub. (2) occur at any time period after the use of a dangerous weapon. Wis. Stat. § 940.32(3)(c) explicitly requires the State to establish use of a deadly weapon within the "course of conduct" that constitutes the offense of Stalking.

Contrary to the State's argument, the petitioner's position does not require that the plain language of Wis. Stat. § 940.32(2m)(b) requiring a present violation of sub (2) occurring after the qualifying prior conviction be superimposed onto any other subsection of Wis. Stat. § 940.32. The petitioner's interpretation only requires that one read the plain language of Wis. Stat. § 940.32(2m)(b) when addressing a prosecution under that specific subsection.

The State's interpretation of Wis. Stat. § 940.32(2m)(b) would lead to absurd results. Under the State's theory, a person may be properly convicted of the enhanced felony offense under subsection (2m)(b) on the basis of a "course of conduct" which

occurred before the operative prior conviction. Thus, the State assumes that the Wisconsin Legislature intended to enact an unconstitutional ex-post facto law in 2001 Wis. Act 109, which amended subsection (2m) to include subsection (2m)(b), because the law would then permit an enhanced felony prosecution against a person for acts committed before the law was enacted. This interpretation is absurd as "[s]tatutes generally enjoy a presumption of constitutionality that the challenger must refute." State v. Weidner, 2000 WI 52, ¶7, 235 Wis. 2d 306, 611 N.W.2d 684 (Wis. 2000) (citation omitted).

III. THE PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BY THE AUTHORIZATION OF THE USE OF EVIDENCE SPANNING A TIME PERIOD OF OVER FIVE (5) YEARS TO ESTABLISH THE "COURSE OF CONDUCT" ELEMENT OF AN OFFENSE WHERE THE INFORMATION DID NOT CHARGE A COURSE OF CONDUCT, BUT INSTEAD, CHARGED THE PEITIONER WITH A VIOLATION OCCURRING ON NOVEMBER 30, 2005

Both the criminal complaint and the Information charged the petitioner with committing a violation of Wis. Stat. § 940.32(2m)(b) against Mr. Gainor "on or about November 30, 2005."

The Information is the "accusatory pleading under our criminal system to which the defendant must plead and stand trial…" Pillsbury v. State, 31 Wis. 2d 87, 93, 142 N.W.2d 187 (Wis. 1966); see also, Clark v. State, 62 Wis.2d 194, 199-200, 214

N.W.2d 450, 452-53 (1974) (the information is the essential charging document).

The State's rather limited obligation to provide notice in the Information is summed up by example in Wis. Stat. § 971.03:

> I, ... district attorney for said county, hereby inform the court ***that on the ... day of ...., in the year ... (year)***, at said county the defendant did (state the crime) ... contrary to section ... of the statutes.

(emphasis supplied)

To ensure due process, the Information must meet the minimal requirements of notifying the accused of date of the offense, the county where the offense occurred, the offense designation, and statute charged. The date of the alleged acts constituting the offense is critical because, "the purpose of the charging document is to inform the accused of the acts he allegedly committed and to enable him to understand the offense so he can prepare his defense." State v. Waste Management of Wisconsin, Inc., 81 Wis. 2d 555, 566, 261 N.W.2d 147 (Wis. 1978).

The State, in its brief, fails to address, or better stated, ignores, the precedent cited by the petitioner which holds that the accused is denied due process when charged with an offense occurring at a certain time, but ultimately convicted of a continuing offense occurring at an earlier date either by a variance in the proof

presented at trial or by a formal amendment of the charging instrument at the time of trial. State v. Kaufman, 188 Wis. 2d 485, 492, 525 N.W.2d 138 (Ct. App. 1994); State v. Cornhauser, 74 Wis. 42, 43-44, 41 N.W. 959 (1889); State v. Neudorff, 170 Wis. 2d 608, 618-621, 489 N.W.2d 689 (Ct. App. 1992); State v. Tawanna H., 223 Wis. 2d 527, 577-78 and 580-81, 590 N.W.2d 276 (Ct. App. 1998).

Rather than addressing published authority on the issues raised, the State argues that the attachment to the criminal complaint of a motion to admit prior bad acts filed in a former, separate case was sufficient to put the petitioner on notice. The State's position seems to be that the old motion attached to the criminal complaint gave the petitioner notice that she would have to defend against alleged conduct spanning a period greater than five (5) years, even though both the complaint and Information only charged an offense occurring on November 30, 2005. The State provides no authority for the proposition that an attachment to the criminal complaint satisfies the notice requirement of the Information in a criminal prosecution, and ignores "the right to be clearly appraised of the criminal charge is constitutional in scope and cannot be avoided by mere rules of modern pleading." Martin v. State, 57 Wis. 2d 499, 506, 204 N.W.2d 499 (1973).

The State's argument regarding notice based upon the attachment to the criminal complaint of a motion to introduce other acts evidence from an earlier case also fails as that attached motion only addressed acts which allegedly occurred between September 13, 2000 and September 30, 2001. The prosecutor presented many allegations of alleged prior bad acts relating to James Gainor spanning the time period between October 2001 and the first weeks of November 2005, which were not referred to in any attachment to the criminal complaint.

To claim, as the State does, that the petitioner "was on notice that the State intended to show a course of conduct beginning in 2000 and proceeding through the incident on November 30, 2005," when the State alleged in the charging document an act "on or about November 30, 2005," is preposterous. It becomes even more absurd when, as the State points out, the prosecution filed a completely separate Motion to Introduce Evidence of Other Crimes, Wrongs or Acts," thereby seeking admission of such acts to prove motive, opportunity, intent, preparation, plan knowledge, identity, or absence of mistake or accident" under Wis. Stat. 904.04(2). With this, the only thing the petitioner was on notice of, was that the State intended to use these other uncharged acts against her – not to show a continuing "course of conduct," but as permissible under 904.04 – to

prove her guilty of an act "on or about November 30, 2005." To find that the petitioner was on notice of any allegations other than the one "on or about November 30, 2005" is to stretch the bounds of reality.

This intent by the prosecution, that the prior acts evidence was sought admission to prove the one charged act "on or about November 30, 2005", and the petitioner's understanding of that limited use, is evident by simply reading the transcript of the motion hearing held on November 21, 2006 (R. 110) in which the trial court admitted those "other acts":

> THE COURT: Okay, the court finds and concludes that as to other acts, prior acts committed against the same victims as the alleged victims in this case, I agree with what Mr. Sharp said; that as a general proposition in a case of this nature, that kind of evidence is appropriate, necessary. It goes to issues such as motive, that may be one of several permissible purposes in a situation like this. It's certainly relevant, it's not unduly prejudicial . . .
> * * *
> Now, we're back to the last question I asked before we took off on this tangent about the motion on the complaint. Is four days what we need to set for trial?
> MR. MAYS: I think if the State's permitted to bring in th[ese] other act[s], we better set two weeks.
> THE COURT: Okay, two weeks.
> MR. MAYS: If we have to bring in proof of all of that, nothing's going to be stipulated to and we're going to have mini trials on all of those little acts.

Hence, not only did the trial court admit the other acts under 904.04 – and not pursuant to a continuing "course of conduct" – but the petitioner stated her fear that a more lengthy trial would result if forced to defend against each and every "other act." Had such other

acts been (1) sought admission for, and (2) admitted by the trial court as, proof of a continuing course of conduct then, and only then, would notice not be an issue and the petitioner's due process right would not been violated in this regard.[4]

CONCLUSION

For the reasons stated above, the conviction of the petitioner must be reversed and this action remanded to the trial court with directions to grant the petitioner's Motion for New Trial.

Dated at Middleton, Wisconsin, June 18, 2010.

Respectfully submitted,

JANET A. CONNER,
Defendant-Appellant-Petitioner

MAYS LAW OFFICE, LLC
Attorneys for the
Defendant-Appellant-Petitioner
6405 Century Avenue, Suite 103
Middleton, Wisconsin 53562
(608) 257-0440

BY: _____
STEPHEN E. MAYS
State Bar No. 1025716

[4] It is worth noting that had the State intended to charge the petitioner with a course of conduct spanning five (5) years and encompassing the acts eventually admitted under sec. 904.04 (2), as opposed to a course of conduct occurring on or about November 30, 2005, there would have been no need to seek admission of those prior acts under sec. 904.04 (2). They would simply have been admissible as the charged conduct which the State was attempting to prove. It is nonsense for the State to now assert that the petitioner was on notice that these incidents constituted the charged offense when the State, itself, characterized them as other acts under sec. 904.04(2).

CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 100 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and 60 characters per line. The length of the brief is 2,999 words.

Dated, June 18, 2010.

Signed,

_____
STEPHEN E. MAYS
State Bar No. 1025716