STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2013 AP 000830 CR

STATE OF WISCONSIN,

Plaintiff – Respondent,

v.

TINA M. JACOBSEN,

Defendant – Appellant.

REPLY BRIEF OF DEFENDANT – APPELLANT

APPEAL FROM AN ORDER DENYING MOTION FOR POST-CONVICTION
RELIEF PURSUANT TO WIS. STAT. SEC. (RULE) 809.30(2)(h)
ENTERED IN THE CIRCUIT COURT FOR OUTAGAMIE COUNTY
THE HONORABLE MARK J. MCGINNIS PRESIDING

JOHN MILLER CARROLL LAW OFFICE

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INTRODUCTION

In the opening brief, the Defendant-Appellant, Tina M. Jacobsen ("Jacobsen"), sufficiently demonstrates that the trial court erred by ruling that she was not entitled to a plea withdrawal due to a manifest injustice caused by the ineffective assistance of counsel.

Specifically, Jacobsen contends that counsel was ineffective for a failure to raise the issues of the charges against her being either multiplicitous, duplicitous, vague, or indefinite. With brevity in mind, Jacobsen will briefly touch on arguments raised by the State in its response brief.

ARGUMENT

I. THE STATE'S POSITION ON MS. JACOBSEN'S INEFFECTIVE ASSISTANCE OF COUNSEL ARGUMENT

The State asserts that Jacobsen is not entitled to a plea withdrawal because her counsel was not ineffective because the issues Jacobsen raised on appeal are meritless. (St. Br. at pg. 5).

A. The State's Position on Duplicity and Wisconsin Stat. §971.36

The State argues that the *Copening/Miller* doctrine allows the prosecutor discretion "to charge a defendant's action as one continuing offense if the separately chargeable offenses are committed by the same persona at substantially the same time and relation to one continued transaction." *Miller*, 257 Wis. 2d 124, ¶23.

The State argues that the *Copening/Miller* doctrine combined with Wisc. Stat. §971.36 explicitly allows the prosecution to charge Jacobsen as it did because in Counts 1, 3, 5, 7, and 8 the money stolen belonged to CBC and the funds were all stolen according to a single deceptive scheme. (St. Br. at pg. 12). If the State's logic is correct then Counts 1, 3, 5, 7, and 8 could have been charged as **one** continuing

offense. The State fails to justify the decision to charge five separate counts if Jacobsen's actions were truly all in furtherance of a single deceptive scheme, or to show any authority that allows the State to pick and choose which offenses to group together for charging purposes.

The State further argues that no double jeopardy concerns came into play because each count is different in fact. (St. Br. at pg. 13). What the State fails to acknowledge is that each separate offense combined by the State to create each count is different in fact.

B. The State's Position on Multiplicity

1. The State's Argument that the Counts are Not the Same in Fact

In the next section of the State's brief the State points out that the counts are not the same in fact although the counts are based on a single reimbursement scheme. (St. Br. at pg. 14). In support of this argument the State asserts that the offenses are based on different time periods and are different in nature. (St. Br. at pg. 14). The State argues each act involved a different amount of money taken on a different date provable by different paperwork and accounting records. The State, citing *Warren*, 229 Wis. 2d at 180, also declares

that "every decision by Jacobsen to repeat her reimbursement scheme required a new volitional departure rendering each offense different in nature." (St. Br. at pg. 15). If this is true then this would require the State to charge each offense separately, but the State instead decided to charge one offense for every year. Does this mean that on January 1st of each year Jacobsen made a conscious decision to commit theft for the entire proceeding year?

2. The State's Position on Cumulative Punishments

Jacobsen agrees with the State's argument that the charges may be charged as one continuous scheme or as individual offenses. However, Jacobsen fails to understand how the State determined it was within their discretion to charge multiple counts not based on individual offenses. The State again has failed to establish the authority to charge in this way.

Next, the State asserts that Jacobsen would have rather been charged in the way decided by the State instead of charged with 289 individual acts of theft. However, this argument was not raised by Jacobsen. Jacobsen instead avers that she should have been charged properly according to the

law. Whether it be with one continuing offense or 289 separate offenses.

The State then goes on to say that subjecting Jacobsen to only one felony would be absurd as the penalty exposure for her stealing close to $500,000 would be equal to that of someone who stole $10,001. (St. Br. at pg. 16). However, if the State was looking for maximum exposure the option was there to charge Jacobsen with each individual theft.

II. THE STATE'S POSITION ON *GEORGE*

The State acknowledges that the ruling in *State v. George*, 69 Wis. 2d 92, 230 N.W. 2d 253 (1975) appears to be on point in this case. However, the State argues that the present case is distinguishable from George because there is no pleading statute allowing gambling cases to be charged as one continuing offense or with single specific offenses. (St. Br. at pg. 18). However, earlier in its brief, the State argued "the *Copening/Miller* doctrine is generally applicable to all criminal statutes." As described previously in this brief and the State's brief the *Copening/Miller* doctrine allows charging identical to that of the ruling in *George*. (St. Br. at pg. 11).

Next, the State argues that the present case and *George* are also distinguishable because the theft statute includes a graduated penalty structure and the commercial gambling statute does not. (St. Br. at pg. 18). Again, if the State's purpose in charging Jacobsen with multiple counts was to maximize exposure the State had the option not to charge Jacobsen with one continuing offense, but to charge her with each individual offense.

Jacobsen asserts that George is directly on point and urges this Court to determine this issue accordingly.

III. THE STATE'S ARGUMENT IN SUPPORT OF ITS CHARGING DECISION

The State then relies on *Grayson* as an authority to allow charging Jacobsen with one charge for each year. Jacobsen asserts that the charging structure in Grayson is clearly distinguishable. The language of Wis. Stat. § 948.22(2) explicitly states a time period of 120 days as the benchmark for each charge of failure to support. In contrast, the theft statute does not supply any specified time period, nor does it allow a prosecutor to determine what the time period should be.

The State continuously argues that Wis. Stat. § 971.36 stands for the proposition that the State has the right to pick and choose which offenses can be combined together to create a single criminal charge. (State's Brief, *passim*). Jacobsen strongly disagrees with this contention. If the legislature intended for the State to be permitted to group offenses into counts at its choosing then the statute would provide for more than the two options it currently does.

Furthermore, Jacobsen did not argue that the legislature intended to preclude cumulative punishments. Jacobsen simply argues that the way in which she was charged is improper and not supported by either statute or case law.

IV. THE STATE'S POSITION ON INEFFECTIVENESS OF COUNSEL

Because the Attorney Peterson failed to raise the above issue, he performed deficiently which is the first prong of the *Strickland* test. The second prong under the *Strickland* test is also satisfied because Ms. Jacobsen stands convicted of higher class felonies than she would have had the charging process been proper. A defendant need not show that her sentence would have been any less severe, because conviction

for a more aggravated felony should be alone sufficient to establish prejudice. *Cf.* *State v. Fritz*, 212 Wis. 2d 284, 297, 569 N.W.2d 48, 54 (Ct. App. 1997) ("A second felony conviction is 'prejudice' irrespective of whether the actual time served would have been less under an accepted plea-bargained guilty plea.").

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court of Appeals reverse the decision of the Outagamie County Circuit Court denying Jacobsen's Post-Conviction Motion and remand this matter to the trial court for further proceedings.

Dated this 27th day of September, 2013.

Respectfully Submitted,
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FORM AND LENGTH CERTIFICATION

I, John M. Carroll, hereby certify that this brief conforms to the rules contained in s. 809.19 (8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1,439 words.

Dated this 27th day of September, 2013.

_____

John Miller Carroll
State Bar #1010478

ELECTRONIC BRIEF CERTIFICATION

I, John M. Carroll, hereby certify in accordance with Sec. 809.19(12)(f), Stats, that I have filed an electronic copy of a brief, which is identical to this paper copy.

Dated this 27th day of september, 2013.

_____

John Miller Carroll
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