STATE OF WISCONSIN

COURT OF APPEALS
DISTRICT IV

Case No. 2014AP2721-CR

STATE OF WISCONSIN
PLAINTIFF-RESPONDENT,

V.

ANDREI R. BYRD,
DEFENDANT-APPELLANT.

APPEAL FROM AN ORDER DENYING POSTCONVICTION RELIEF AND JUDGMENT OF CONVICTION ENTERED IN THE ROCK COUNTY CIRCUIT COURT, THE HONORABLE RICHARD T. WERNER, PRESIDING

BRIEF OF DEFENDANT-APPELLANT

JENNIFER M. SEVERINO
State Bar Number 1066034
Attorney for Defendant-Appellant
Severino Law Offices, LLC
524 Main Street, Suite 202
Racine, Wisconsin 53403
(262) 632-5199
(262) 995-7315 (Fax)
jennifermseverino@gmail.com

TABLE OF CONTENTS

STATEMENT OF THE ISSUES.....1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....2

STATEMENT OF THE CASE.....3

ARGUMENT.....24

I. APPLICABLE LAW AND STANDARD OF REVIEW.....24

II. THE TRIAL COURT ERRED BY USING WISCONSIN CRIMES OF DISORDERLY CONDUCT AND ATTEMPTED BATTERY INSTEAD OF THE ILLINOIS CRIME OF ASSAULT WHEN INSTRUCTING THE JURY ON THE CRIME OF BAIL JUMPING, COMMITTING A NEW CRIME, AND THE STATE FAILED TO PRODUCE A SUFFICIENCY OF EVIDENCE TO PROVE A NEW CRIME WAS COMMITTED.....25

A. The trial court erred in providing the jury with Wisconsin jury instructions regarding the new crime element of the bail jumping charge.....26

B. The State did not produce sufficient evidence for a reasonable trier of fact to find Byrd committed a new crime.....29

III. THE CUMULATIVE EFFECT OF TRIAL COUNSEL'S ERRORS RESULTED IN INEFFECTIVE ASSISTANCE OF COUNSEL.....30

A. Byrd's trial counsel should have moved for a mistrial or dismissal on the joined case before the trial started when it became clear the state would not be able to meet the evidentiary burden. A reasonable attorney would have moved to dismiss a joined case where the state will not meet the evidentiary burden in one of the cases.....31

B. Byrd's trial counsel provided ineffective assistance by failing to advise Byrd the risks of not stipulating to portions of bond conditions in a trial for bail jumping. A reasonable attorney would have stipulated to the bond conditions so the jury would not hear how the bond conditions came about, or hear specifics of the conditions unrelated to the case at hand.....32

C. Byrd's trial counsel provided ineffective assistance by failing to sufficiently advocate the defense of necessity. A reasonable attorney would have properly researched and presented the defense.....34

D. The cumulative effect of trial counsel's errors establishes prejudice.....36

CONCLUSION.....37

CERTIFICATIONS.....38,39

TABLE OF AUTHORITIES

CASES CITED PAGE

Crawford v. Washington, 541 U.S. 36 (2004)...4,8,11,12,28

State v. Henning, 261 Wis. 2d 664,
660 N.W.2d 698 (Ct. App. 2003).....12,13,14

State v. Hauk, 257 Wis. 2d 579,
652 N.W.2d 393 (Ct. App. 2002).....14,26,28,33

State v. Lee, 122 Wis.2d 266,
362 N.W.2d 149 (1985).....24

State v. Linton, 329 Wis. 2d 687,
791 N.W.2d 222 (Ct. App. 2010).....32

State v. Ludwig, 124 Wis.2d 600,
369 N.W.2d 722 (1985).....24

State v. Pitsch, 124 Wis. 2d 628,
369 N.W.2d 711 (1985).....24

State v. Poellinger, 153 Wis. 2d 493,
451 N.W.2d 752 (1990).....29

State v. Theil, 264 Wis.2d 571,
665 N.W.2d 305 (Ct. App. 2003).....36

Strickland v. Washington, 466 U.S. 668 (1984).....24, 31

State v. West, 181 Wis.2d 792,
512 N.W.2d 207 (Ct. App. 1993).....27, 28

STATUTES CITED

Wis. Stat. § 939.03,
Jurisdiction of State Over Crime.....26,27

Wis. Stat. § 939.24, Attempt 1

Wis. Stat. § 946.49(1), Bail Jumping.....1,3,25

Wis. Stat. § 940.19(1), Battery 1

Wis. Stat. § 969.03(2),
Release of Defendants Charged with Felonies 25

CONSTITUTIONAL SOURCES

U.S. Const. amend XI.....30

U.S. Const. amend XIV.....2,26

Wis. Const., Article 1, §7.....1

STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT IV

Case No. 2014AP2721-CR

STATE OF WISCONSIN
PLAINTIFF-RESPONDENT,

V.

ANDREI R. BYRD,
DEFENDANT-APPELLANT.

BRIEF OF REPSONDENT-APPELLANT

STATEMENT OF THE ISSUES

1. Byrd was charged with bail jumping under Wis. Stat. § 946.49(1) after he was arrested and charged with assault in Illinois for acts committed in Illinois. Did the circuit court err by instructing the jury that the "no new crimes" element of Wis. Stat. § 946.49(1) is satisfied if the state proves beyond a reasonable doubt that Byrd's actions would have constituted disorderly conduct under Wis. Stat. § 974.01(1) *or* attempted battery under Wis. Stat. §§ 940.19(1), 939.24 as if they had occurred in Wisconsin?

The circuit court answered affirmatively, finding that because Byrd was unable to cite to any Wisconsin case law on point, the court was not improper in instructing the jury on violations of Wisconsin law instead of violations of Illinois law. (R. 58:1; App. 278).

2. Did deficiencies in trial counsel's performance - failing to properly protect the jury from hearing about a joined case that was ultimately dismissed during trial, failing to protect the jury from hearing about a no-contact bail condition not part of the current case, and failing to properly argue an affirmative defense of necessity- when viewed cumulatively, establish prejudice amounting to ineffective assistance of counsel under the sixth and fourteenth amendments of the United States Constitution and art. I, sec. 7 of the Wisconsin Constitution?

The circuit court answered negatively, finding that trial counsel's actions were pursuant to the overall strategy of defense and therefore were reasonable. (R. 58:1-2; App. 278-279)

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Respondent-Appellant, Andrei Byrd, requests oral argument pursuant to *Wis. Stat.* § 809.22. Oral argument would help further develop the theories of the parties.

Furthermore, publication of the court's decision is also warranted as this is a matter of first impression with no specific precedent on the issue of which state's law applies when a new crime is alleged as part of a bail jumping charge.

STATEMENT OF THE CASE

Charges

This is an appeal from an order denying post-conviction relief in State of Wisconsin v. Andrei R. Byrd, Rock County Case Number 12-CF-1429. (R. 58:1-2; App. 278-279). Byrd was charged with four counts of felony bail jumping, in violation of Wis. Stat. §§ 946.49(1)(b) and 939.50(3)(h). (R. 1-3; App. 101-103). The charges arose out of an incident that occurred on May 10, 2012 in Rockford, Illinois. (Id.). Byrd was accused of acting disorderly at a residence and accused of moving quickly toward his daughter's mother B.H. and raising his hand to her face. (Id.). The responding Rockford, Illinois police officer arrested Byrd for the crime of assault. (Id.). At the time, Byrd was out on bail for two Wisconsin felony cases. (Id.). Byrd was charged with two felony bail jumping charges for failing to comply with the terms of his bonds of not leaving Rock County and two felony bail jumping charges for failing to comply with the terms of his bonds to not commit any new crime. (Id.).

Pre-trial Motions

Joinder of Cases

Byrd was also charged with one count of felony bail jumping in Rock County Case Number 12-CF-1621 for an incident involving Byrd and B.H. occurring two months after the charges at hand. (R. 65: 1-2). On April 2, 2013, a pretrial hearing was held on the state's motion to join the both cases. (See R. 65). The court joined the cases to be heard at one trial finding that because they both alleged felony bail jumping charges occurring within a relatively short period of time that Byrd would not be prejudiced by such joinder. (R. 65: 4-5).

Motions in Limine – Case Number 12-CF-1621

On August 9, 2013, Byrd's trial counsel Attorney Joshua Klaff[1] filed Motions in Limine for both cases. (R. 27:1-2). One of the pre-trial rulings Attorney Klaff asked the court to make was,

> That understanding that this court has previously joined both cases for trial, that if the State does not have the alleged victim testify in case 12-CF-1621, that pursuant to *Crawford v. Washington*[2], 541 U.S. 36 (2004), that the State be barred from introducing any evidence from case 12-CF-1621, because said evidence's effect of being unfairly prejudicial to the defendant would greatly outweigh any probative value in case 12-CF-1429.

(*Id.*). A motion hearing was held the same day, at which the state replied to Attorney Klaff's request by stating he was asking the court to take away the state's discretion in terms of whether or not the state felt it could prove the case without B.H. testifying. (R. 72:8). The state continued by stating that there was other evidence even apart from B.H.'s testimony which would establish at the very least disorderly conduct. (R. 72:9). Attorney Klaff responded by stating that at a minimum there should be an offer of proof the day of trial in regards to case number 12-CF-1621 to see what evidence the state has. (*Id.*). The court ruled that it was premature to rule on the issue, but that the offer of proof

---

[1] Attorney Klaff represented Byrd after Attorney Lane Fitzgerald withdrew. Attorney Fitzgerald was present at, and argued against the state's motion for joinder.

[2] *Crawford v. Washington*, 541 U.S. 36 (2004), holding that under the Confrontation Clause the defendant has the right to confront and cross-examine witnesses against him.

was probably a good solution to look into on the day of trial. (*Id.*).

Motions in Limine – Bond Conditions

Also discussed by the parties at the August 9th Motion Hearing was the issue of establishing Byrd was out on bond for two Rock County cases when he allegedly committed the bail jumpings in both of the new cases. (R. 72:18-19). Attorney Klaff stated he assumed that the state would have someone from the clerk of court's office authenticate the bond conditions. (R. 72:18). Attorney Klaff argued it was not relevant what the underlying charges of the cases were, and the state could just say Byrd was on bond without reading the charges. (*Id.*).

The state agreed, but stated it wanted to show the jury a copy of the bond form with Byrd's signature on it, to indicate he had been provided a copy. (*Id.*). The state added the clerk had changed their practice and they did not list the charges anymore, therefore the entire bond form could be introduced. (R. 72:18-19). The court asked the state to confirm this and the state replied it just looked at the bond forms and did not see the charges. (R. 72:19). The court then agreed with Attorney Klaff's request. (*Id.*).

Evidence presented at trial

Evidence for Case No. 2012-CF-1621

On the morning of trial, August 12, 2013, the state informed the parties for case number 12-CF-1621, arising out of the second incident, the only evidence it would be able to offer was the testimony of one police officer, who would not be coming to court until 11am. (R. 73:2-3; App.

107-108). The state also informed the parties it did not think it would be able to proceed any further with the case if the court ruled this evidence was insufficient, prompting a dismissal with prejudice. (Id.). Attorney Klaff had initially alerted the court to the issue, stating that it could become problematic if voir dire was held before the state's offer of proof (R. 73:2; App. 107). After the state explained how it wanted to proceed, Attorney Klaff stated he did not have a problem with the jury hearing about the additional felony bail jumping charge, but asked the state not be allowed to bring up any facts of that case during voir dire or its opening statement until the court decided on the offer of proof. (R. 73:3; App. 108).

During the court's opening statements to the jury regarding the cases and charges, the court stated in case number 12-CF-1621, Byrd was charged with intentionally failing to comply with the term of his bond to not commit any new crime. (R. 73:9-10; App. 114-115). Before the state made its opening statement, it clarified with the court, outside the presence of the jury, that the court wanted the state to proceed without stating specific details of the second incident in order to keep a clean record. (R. 73:34; App. 117). During the state's opening statement, after giving details of the first incident and case, it stated,

> You will hear another incident or I believe you may hear evidence of another incident that happened in July of 2012, a couple months later, when the defendant had been released on the bond in 2012 bond, which had the condition that he not commit any crime. And you may hear – I believe you may hear evidence in terms of that incident, but I am not going to go into detail at this point because I am not sure exactly what evidence, if any, you will hear on that case. It should be a relatively short case. I believe the documentation – clearly the documentation and the

> testimony you will hear from the State's witnesses will clearly support the State's position that the defendant engaged in disorderly conduct, attempted battery, violation of the bond, and obviously that he left Rock County in violation of his bond. And at the conclusion of the trial I will ask you to find the defendant guilty on all counts of bail jumping. Thank you.

(R. 73:37-40; App. 120-123).

After putting forth its first witness, the state made an offer of proof for the 12-CF-1621 case outside the presence of the jury. (*See* R. 73: App. 52-66). The state called one witness to testify, Officer Jesse Washington of the Rockford Illinois Police Department. (R. 73:53-54). Officer Washington testified he responded to a car accident on July 4, 2012, and observed injuries on B.H. and Byrd. (R. 73:54-62). Officer Washington ultimately testified he arrested Byrd for domestic battery. (R. 73:62; App. 135). The state argued to the court a reasonable trier of fact could infer Byrd inflicted the injuries on B.H., but conceded without having B.H. present, it was not able to prove it had been done without consent. (R. 73:63; App. 136). The state argued although B.H. could not be located and was not available to testify, the officer's testimony clearly established at a minimum Byrd committed the crime of disorderly conduct. (R. 73:62-63; App. 135-136). The state concluded by stating it had met its burden for providing a prima facie case of bail jumping for committing disorderly conduct. (*Id.*).

Attorney Klaff responded by asking the court for a dismissal of the case because the criminal complaint alleged the crime committed was a battery and there was no

evidence put forth by the state in the offer that a battery took place. (R. 73:63-64; App. 136-137). Attorney Klaff argued there were obvious *Crawford* violations present as Byrd had a right to face his accuser in court at the time of trial. (R. 73:64; App. 137).

The court stated the criminal complaint for this case clearly alleged a battery as the crime committed and there were Crawford issues present. It granted Attorney Klaff's motion and dismissed the case with prejudice. (R. 73:65-66; App. 138-139). The court asked the parties if they wanted the court to tell the jury this case had been dismissed and they were not to consider it at this point or any further point, or if they wanted to wait until the close of the state's case. (R. 73:67; App. 140). The state asked the court to tell the jury at the close of its case or during final jury instructions and Attorney Klaff agreed with its request. (Id.).

At the close of the case, outside the presence of the jury, the court proposed telling the jury specifically it had dismissed case number 2012-CF-1621, and instructing the jury this had no bearing on the decision they must reach on the current case. (R. 73:116-117; App. 183-184). The state stated it preferred the court telling the jury the case was no longer before them. (R.73:117; App. 184). The state expressed concern there would be a risk the jury might draw adverse inferences from a dismissal of a case which could affect how they decided the remaining pending charged. (*Id.*). Attorney Klaff argued the fact of the matter was the court dismissed the case, and the jury was permitted be allowed to know that. (*Id.*). The court replied by stating prejudice could go both ways, and found the state could be prejudiced by the original proposal. (*Id.*). Therefore, the court ultimately instructed the jury that,

> [Y]ou will recall when this case or these cases were called this morning there were two cases called this morning . . . I will advise you that the case that is numbered 12CF1621 is no longer before you for deliberation. And you are instructed that the fact that that is no longer before you has no bearing on your decision that you must reach in 12CF1429.

(R. 73:129; App. 189).

Bond Conditions

On the morning of trial, after discussing the offer of proof for case number 12-CF-1629, the state informed the court it had advised Attorney Klaff it had edited copies of the bail bond hearing transcript which it intended to present to the jury. (R. 73:4; App. 109). The state added it was only providing one page of the transcript, the portion where the court gave Byrd clear instructions regarding his bond conditions and to not leave the state or Rock County. (*Id.*). The court asked Attorney Klaff if he had seen the transcript excerpt and if it was acceptable to him. (*Id.*). Attorney Klaff replied he didn't object because the excerpt was basically the presiding judge saying what the bond conditions were. (R. 73:4-5; App. 109-110). Attorney Klaff added the transcript excerpt went beyond being generic because it listed specific conditions, but he did not see how he was not going to allow it to come into the record. (R. 73:5; App. 110).

After the jury was selected, and prior to the state making its opening statement, Attorney Klaff brought up the bail issue again outside the presence of the jury. (R. 73:35; App. 118). The issue he had was that a condition Byrd not to have any contact with a Ms. P. was on the transcript excerpt and on the bond form. (Id.). Attorney Klaff stated this particular no contact order was not an issue in this case and it was prejudicial given the allegations of

domestic violence in this case. (Id.). The state replied it had already cleared this with Attorney Klaff earlier during motions in limine, and further the state had already made the copies and had the bond form on the screen. (R. 73:36; App. 119). The state assured the court it did not intend to unduly highlight this provision during trial. (Id.). The court found the provision was part of the bond and it did not affect the case otherwise. (R. 73:37; App. 120).

The state's first witness was Amy Edwards, an employee of the Rock County Clerk of Courts. (R. 73:41; App. 124). While the state had the bond form on the projector for the jury to view, it asked Ms. Edwards to read the conditions on one of the bond forms out loud,

> The defendant shall appear at all court dates. If there is a change of address it must be given in writing within 48 hours to the clerk of court. The defendant shall not directly or indirectly threaten, harass, intimidate any victims or victim in the action. May not leave Rock County. And no contact with a Ms. [P.].

(R. 73:44; App. 127).

Ms. Edwards read the same conditions out loud a second time for the next bond form the state provided on the projector. (R. 73:47; App. 130). The state next asked the court to take judicial notice of a transcript from October 26, 2011 and asked Ms. Edwards to read the court comments based on the stipulation with Attorney Klaff the court was speaking in this portion of the transcript. (R. 73:48-49; App. 131-132). Ms. Edwards read the presiding circuit court judge's orders to Byrd from the transcript to the jury, which ended with the admonition, "Is not to have any contact direct or indirectly with Ms. Pound[s]." (R. 73:49; App. 132). The transcript excerpts were published and submitted as Exhibit 1 to the jury. (R. 73:48; 33; App. 48, 104-106).

New Crime Condition of Bond

After the court dismissed case number 12-CF-1621, the state presented its second witness, Officer Edward King from the Rockford Illinois Police Department. (R. 73:68; App. 141). Officer King testified that around midnight on May 10, 2012 he was dispatched to complainant Roshonda Sykes' residence. (R. 73:68-69; App. 141-142). Officer King stated went into the kitchen of the residence because he heard arguing. (R. 73:69; App. 142). Officer King identified Byrd as one of the two individuals in the kitchen and B.H. as the other. (R. 73:69-70; App. 142-143). Officer King testified he separated the individuals and spoke with B.H. for a few minutes first. (R. 73:70; App. 143). Officer King stated he then attempted to speak with Byrd, but Byrd ignored him and walked past him toward B.H. with his hand up raised at her. (Id.). Officer King stated B.H. moved backward quickly when this happened and he immediately placed Byrd under arrest for assault (R. 73:71-72; App. 144-145).

After Officer King's testimony, the state rested and the court excused the jury. (R. 73:76; App. 149). Attorney Klaff moved the court to dismiss counts one and three, the bail jumping counts for committing a new crime. (*Id.*; *See* 1; App. 149, 101-102). Attorney Klaff argued first, with regard to the previously raised *Crawford* issue, that Byrd was arrested for assault and without B.H. present to testify, it would be impossible for the jury to know whether he committed the assault. (R. 73:76; App. 149).

Attorney Klaff's second ground for dismissal was that the state had not met its burden to prove Byrd's actions violated Illinois law. (R. 73:76-79; App. 149-152). He argued felony bail jumping cases require jury instructions of the alleged conduct and the state failed to provide the law from Illinois for the assault charge Byrd was arrested for. (Id.). Attorney Klaff stated it was improper for the state

to provide Wisconsin jury instructions describing Byrd's conduct because his arrest was for a crime specifically defined in another jurisdiction. (R. 73:77; App. 150). Attorney Klaff cited to *State v. Henning*[3], which held in felony bail jumping cases instructions of the alleged crime must be read to the jury. (Id.). Excerpt from Attorney Klaff's thorough argument:

> We make this argument for two reasons. The first reason, largely echoing our *Crawford* issue, is that this officer did testify that he arrested Mr. Byrd for assault. Without [B.H.] here it would be impossible for this jury to know whether or not he committed the assault. And without [B.H.] and without Mr. Byrd having the right to face his accuser in this case, [B.H.], we are asking for a dismissal. Alternatively, and I think most importantly . . . [t]he State has not met their burden in this case. The State chose to prosecute an action outside the geographical territorial and jurisdictional boundaries of the State of Wisconsin and outside of Rock County, Wisconsin. They chose to prosecute a case originating from the State of Illinois. The State of Wisconsin, and, admittedly, we don't see too many bail jumps that come from out of state, but we reviewed case law and the case law says that's well within the State they can charge actions outside of this jurisdiction. However, the State has not put one piece of evidence into this record that what Mr. Byrd did in Illinois was against the law. We don't have any definitions. We don't have crime defined. We have no jury instructions from Illinois. We have no law from Illinois. That was the State's burden in this case. The State – for the State to feel that they can use Wisconsin jury instructions that have no jurisdiction

[3] *State v. Henning*, 261 Wis. 2d 664, 660 N.W.2d 698 (Ct. App. 2003).

> in Mr. Byrd's conduct in the State of Illinois, simply can't be. We cannot have this jury decide Mr. Byrd's actions on Wisconsin law which is not in effect in the State of Illinois. To allow this to get back to this jury – in State v. *Henning* . . . holds that in felony bail jumping cases, instructions of the alleged conduct must be read to the jury. In this particular case, Wisconsin jury instructions have no bearing and no effect on this jury. . . [the State] could have subpoenaed somebody from the Winnebago clerk of courts office in Illinois to bring jury instructions with them . . . [t]here is a part of that assault charge that talks about reasonable apprehension. We don't know what reasonable -- we don't know what Illinois reasonable apprehension is . . . Without instructions, without law, without definition, the State has failed to meet their burden . . . This jury, if they are allowed to go back and decide a crime without law, they would be guessing and speculating. The State has closed. They had ample opportunity. They have failed to meet their burden.

(R. 73: 76-80; App. 149-153).

The state responded by arguing Byrd was released on Wisconsin bonds which stated he should not commit a new crime, and a logical interpretation of that provision was not to commit a crime as defined under Wisconsin law. (R. 73:80; App. 153). The court stated it would take this under advisement and make a ruling after reading the *Henning* case, and confirmed with Attorney Klaff this was the only case law on the subject he was aware of. (R. 73:83; App. 156).

After a recess, the parties reconvened and the court agreed with the state and ruled Wisconsin jury instructions

for the crimes of disorderly conduct and attempted battery would be given to the jury. (R. 73:84-86; App. 157-159). The court stated it was reasonable to believe if a felony bail jumping is charged subsequent to a defendant committing a new crime, the crime should be defined within the statutes of Wisconsin, whether or not the conduct occurs within the state. (R. 73:86; App. 159). The court also cited to *State v. Hauk*[4], which held a bail jumping conviction premised on the commission of a further crime does not require proof of conviction of the further crime; it requires evidence sufficient to allow the jury to conclude beyond a reasonable doubt that the defendant violated bond by committing the crime. (R. 73:85-86; App. 158-159). Because *Hauk* held the jury must be properly instructed regarding the elements of the further crime, the court felt the instructions to be given to the jury were instructions of what violating disorderly conduct and attempted battery in Wisconsin held. (R. 73:86; App. 159). The court dismissed Attorney Klaff's motion and adopted the state's argument to this matter. (*Id.*). Attorney Klaff later reiterated his objection arguing the court did not have jurisdiction to give the jury Wisconsin law in Illinois conduct. (R.73:90; App. 160). The court replied, "You may be making some law one way or the other here, Mr. Klaff." (*Id.*).

Not leaving Wisconsin Condition of Bond

The defense presented two witnesses to rebut the bail jumping counts premised on Byrd leaving the state. (See R. 94-112; App. 161-179). As the defense's first witness, Ms. Sykes testified she had called the Rockford Police on May 10, 2012 for an individual causing a disturbance at her residence and the police had incorrectly arrested Byrd, despite her objections. (R. 73:94-102; App. 161-169). Ms. Sykes testified Byrd was only at her residence briefly and she did not observe Byrd act aggressively towards B.H. (R.73:97; App. 164). On cross

---

[4] *State v. Hauk*, 257 Wis. 2d 579, 652 N.W.2d 393 (Ct. App. 2002).

the state asked Ms. Sykes, "You indicated this incident happened at 6 o'clock in the evening?" to which she said "yes." (R. 73:98; App. 165).

On direct, Attorney Klaff had initially asked Ms. Sykes, "[a]nd at about 6 p.m. or roughly that time, what was going on at your house?" to which she had answered she was having a house-warming party. (R. 73:94-95; App. 161-162). On cross the state asked Ms. Sykes, "[i]sn't it true the police did not arrive until about midnight?" which she confirmed. (R. 73:98; App. 165). The state then asked Ms. Sykes if she told the responding officer Byrd had consumed too much alcohol and he was acting foolish, which she denied. (R. 73:99; App. 166).

Byrd next testified he had gone to Rockford around 11 p.m. on May 10, 2012 because he had been notified of a situation going on at Ms. Sykes home where his young daughter was present. (R. 73:104; App. 171). Byrd stated he arrived, and an officer stated he wanted to ask Byrd a few questions, and subsequently arrested him. (R. 73:104-105; App. 171-172). He testified he never argued with B.H., never stepped towards her, and never raised his hand at her. (R. 73:105; App. 172). On cross, the state confirmed with Byrd he thought his daughter's life was in jeopardy, and he subsequently drove roughly half an hour to Rockford to get her. (R. 73:107; App. 174). The state further asked Byrd,

> And did you call the police to say, hey, I think my daughter might be in trouble. You better get over here and do something? . . . Knowing that your daughter could potentially be in danger, you decided the best course of action instead of calling the police was to go down yourself personally, despite how much time it took you to get down there?

(R. 73:107-108; App. 174-175). Byrd replied he had not, he went off instinct and it was his responsibility as a parent. (Id.).

After Byrd's testimony, the state countered the defense's evidence with rebuttal testimony of Officer King (R. 73:112-115; App. 179-182). Officer King testified Ms. Sykes had told him specifically that Byrd needed to be removed from her home, because he had consumed too much alcohol and he was acting foolish. (R. 73:114; App. 181).

Jury Instructions

Regarding counts two and four, relating to the bond violations of leaving the state, Attorney Klaff sought to introduce jury instructions on the defense of necessity to show Byrd had not left Wisconsin voluntarily, (R. 73:121), this was based on the testimony of the defense witnesses Ms. Sykes and Byrd. (Id.).

Next, the parties discussed instructions for counts one and three; Attorney Klaff asked if the state was alleging disorderly conduct as per one of the counts and attempted battery as per the other, "or is the state alleging sort of a two for one?" (R. 73:122; App. 185). The state responded they were pretty identical counts in terms of the new crime, so the jury could be instructed they could convict if the state proved guilty beyond a reasonable doubt of *either* disorderly conduct or the attempted battery as applied to either of the two counts from either case. (*Id.*, emphasis added). Attorney Klaff objected to this, stating it could be a problem if the jury came back and asked the court what to do if they found for the disorderly, but not the battery. (R. 73:123; App. 186). The state replied Byrd was charged with committing a crime in violation of two separate bonds,

there were two separate crimes the state was alleging he committed- disorderly conduct and attempted battery,

> So my position would be the jury could find the defendant committed disorderly conduct or attempted battery. And find the defendant guilty of both of the bail jumping crimes. I don't see how there is any logical way to say, well, it's only going to be disorderly conduct from this new crime bail jumping and it's only going to be attempted battery for this new crime bail jumping. All the State has to prove is the defendant committed a crime. And if there is multiple crimes then if the jury agrees the defendant committed at least one of those crimes, he should be found guilty on both bail jumpings.

(R. 73:123-124; App. 186-187).

Attorney Klaff pointed out the Information stated no to commit any new crime, singular. (R. 73:124; App. 187). The court agreed with the state, "[C]ommitting a crime could be the DC and or the attempted battery on each. I think that that's the logical conclusion to reach." (R. 73:125; App. 188).

When the jury returned, the court first instructed them case number 12-CF-1621 was no longer before them for deliberation and that fact could not have any bearing on their decision for the case at hand. (R. 73:129; App. 189). The court next defined the crime of bail jumping to the jury, and that in counts one and three, Byrd was charged with violating a condition of bond that required he not commit any crime. (R. 73:131; App. 191). The court stated the state alleged Byrd committed the crimes of disorderly

conduct and attempted battery, and the state must prove beyond a reasonable doubt Byrd committed the crimes of disorderly conduct and attempted battery. (*Id.*). The court went through the elements of both crimes. (R. 73:131-134; App. 191-194). The court then gave the necessity defense,

> The State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant was not acting lawfully under the defense of necessity. The law allows a defendant to act under the defense of necessity only if the pressure of natural physical forces cause the defendant to believe that his act was the only means of preventing imminent death or great bodily harm to himself or to others and which pressure caused him to act as he did. In addition, the defendant's beliefs must have been reasonable . . .

(R. 73:133-134; App. 193-194).

Closing Arguments

At the beginning of its argument, the state apologized to the jury that "there was a mention of another case that is no longer before you." (R. 73:142; App. 196). The state commented on the credibility of the defense witnesses, noting Ms. Sykes indicated the incident happened at 6 o'clock in the evening. (R. 73:143; App. 197). The state negated the defense's "bogus claim" of necessity by stating any reasonable person in Byrd's position would have called 911, "I would submit to you any reasonable person who thought their child was in danger, what would be the first thing they'd do? They would call 911." (R. 73:146; App. 200). The state went to the other two counts, telling the jury they could find Byrd guilty of disorderly conduct or attempted battery or both, "[a]s long as you all agree that the defendant committed one of those two crimes he is guilty of both bail jumping for . . . committing a new crime." (R. 73:147-148; App. 201-202).

Over the state's objections, Attorney Klaff told the jury during closing the only charge Byrd was arrested for in Illinois was assault, but nevertheless went through the elements of disorderly conduct and attempted battery arguing the evidence did not prove Byrd had committed either. (R. 73:150-151; App. 205-205). On counts two and four Attorney Klaff argued in the moment Byrd felt he needed to do what he did, leave the state. (R. 73:153; App. 207). The state responded to Attorney Klaff's arguments, noting again Byrd did not call 911. (R. 73:154-158; App. 208-209).

Verdict and Sentencing

The jury found Byrd guilty of all four counts of felony bail jumpings. (R. 73:161-162). A sentencing hearing was held on October 16, 2013, and the court withheld sentence, placing Byrd on three years of probation (R. 74:24; 39:1; App. 216). Byrd timely filed a notice of intent to seek postconviction relief. (R. 40).

Postconviction Proceedings

Postconviction Motion

Byrd filed a motion for postconviction relief arguing the circuit court erred when it instructed the jury on Wisconsin law instead of Illinois law. (See R. 49; App. 217-226). Additionally, the motion argued Attorney Klaff was ineffective for failing to properly protect the jury from hearing about case number 12-CF- l621, failing to protect the jury from hearing about a no-contact bail condition with Ms. P., and failing to properly argue the affirmative defense of necessity he brought forth. (Id.). The motion argued the cumulative effect of Attorney Klaff's errors amounted to ineffective assistance of counsel. (Id.).

Postconviction Motion Hearing

A postconviction hearing on Byrd's motion was conducted on October 15th, 2014. (See R. 75; App. 227-265). Byrd5 called Attorney Klaff as the first witness. (R. 75:2; App. 228). Attorney Klaff testified he did not move for a mistrial when the state first told the parties they only had one witness for case number 12-CF-1621; he limited what the jury would hear about the case before the offer of proof was made. (R. 75:6-9; App. 232-235).

---

[5] Through Attorney Farheen Ansari.

Byrd asked Attorney Klaff about the bond conditions involving Ms. P. being read on the record, and Attorney Klaff stated Byrd had an aggressive stance during the case and did not want him to stipulate to anything. (R. 75:9-10; App. 235-236). Byrd asked Attorney Klaff if he specifically told Byrd not stipulating to everything would result in Ms. P.'s name being read and told to the jury and he stated he could not recall. (R. 75:12-13; App. 238-239).

Attorney Klaff next testified about the offer of proof that was brought for case number 12-CF-1621, the eventual dismissal, as well as his attempt to dismiss case number 12-CF-1429. (R. 75:13-17; App. 239-243).

Attorney Klaff testified about the affirmative defense of necessity he put forth at trial, stating he did not think it would be helpful to recall Ms. Sykes on the stand to clarify the issue of whether the incident involving the officers happened at 6 p.m. or 11p.m.. (R. 75:17-23; App. 243-249). Attorney Klaff testified one of the biggest weaknesses in this defense was when the state told the jury in closing Byrd could have called the police. (R. 75:25; App. 251). Byrd asked Attorney Klaff if he had discussed with Byrd as to why he did not call the police and Attorney Klaff stated Byrd had said he does not trust police and he needed to get there to save his child. (R. 75:26; App. 252). Attorney Klaff added this was a valid point for people with a distrust of the police, and admitted he did not put forth this evidence or make this argument to the jury. (R. 75:26-27; App. 252-253).

Byrd briefly took the stand to testify the assault case in Illinois had been resolved earlier in the year. (R. 75:38-39; App. 264-265). The court stated it would take the matter under advisement and set a briefing schedule for the parties to make closing arguments. (R. 75:39; App. 265).

Postconviction Motion Briefing

Byrd filed a closing argument on August 12, 2014, arguing further the jury instruction for assault, the sole crime for which he was arrested on May 10, 2012, should have been provided to the jury. (R. 55:1-2; App. 266-267). Byrd attached the Illinois jury instructions to the motion in support of his motion. (R. 55:5-7; App. 270-273).

Byrd next argued Attorney Klaff's testimony proved he was deficient at trial by not moving to dismiss case number 12-CF-1621 after the state told the parties it did not think it would be able to proceed ever after their offer of proof, because the alleged victim was not present to testify as to the elements of the underlying new crime constituting the bail jumping charge. (R. 55:2; App. 267). Byrd further argued Attorney Klaff's testimony showed he did not adequately discuss the risks of not stipulating to certain matters, such as the bond condition in place, and by not reviewing the bond condition the state had previously provided him. (R. 55:3; App. 268). Lastly Byrd argued Attorney Klaff chose to present an affirmative defense of necessity but did not properly present the defense by clarifying Ms. Sykes testimony as to the incident occurring at 6 p.m., and providing Byrd's testimony or his own argument as to why someone in his position would not call 911 in this circumstance. (R. 55:3-4; App. 268-269). Byrd argued the cumulative effect of these errors would have resulted in a different outcome in the case, thus depriving him of effective assistance of counsel. (R. 55:4; App. 269).

The state filed a response to Byrd's post-conviction motion on October 29, 2014. (See R. 57; App. 274-277). The state argued the only issue in the case was whether or not Byrd committed a crime as defined by Wisconsin law, and the fact he was arrested for a different crime in Illinois was completely irrelevant. (R. 57:1-2; App. 274-275). The state added even if the court erred by not instructing the jury on assault as defined by Illinois law, the evidence presented at trial clearly established Byrd committed that offense as well. (R. 57:2; App. 275). The state said Byrd

never alleged Illinois lacks a law prohibiting disorderly conduct containing elements of the offense comparable to Wisconsin's disorderly conduct. (Id.). Lastly the state argued any error in the failure to provide the requested jury instruction for assault was harmless. (Id.).

The state argued Byrd had inaccurately stated the state was did not think they would be able to proceed with the case regardless of the offer of proof. (R. 57:2-3; App. 275-276). The state said the transcript clearly reflected that if its offer of proof was insufficient, the case would have to be dismissed. (R. 57:3; App. 276). The state added after providing Officer Washington's testimony, the state made a vigorous and eloquent argument as to why its offer of proof was sufficient to establish a prima facie case for the bail jumping. (Id.). The state argued Byrd was not prejudiced by what the jury heard about case number 12-CF-1621, that Byrd was to have no contact with Ms. P., or with Ms. Sykes testimony the incident occurred at 6 p.m.. (R. 57:3-4; App. 273-274).

Order Denying Postconviction Relief

On November 4, 2014, the circuit order issued a Memorandum Decision denying Byrd's motion. (See R. 58; App. 278-279). Specifically, the court said the Byrd could not cite any Wisconsin case law stating the court should have instructed on Illinois law instead of Wisconsin law. (R. 58:1; App. 278). Additionally, the court held Attorney Klaff's actions were reasonable as a part of an overall strategy of defense. (R. 58:1-2; App. 287-279). Byrd appeals. (R. 76). Additional facts relevant to the argument will be presented below.

ARGUMENT

I. APPLICABLE LAW AND STANDARD OF REVIEW.

Questions of Law

Questions of law, such as what Wisconsin's bail jumping, based on commission of a new crime, statute requires when a jury is to be instructed on the elements of the new crime, require independent appellate review. *State v. Lee*, 122 Wis.2d 266, 274, 362 N.W.2d 149 (1985).

Ineffective Assistance of Counsel

Whether an attorney's actions constitute ineffective assistance is a mixed question of law and fact. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, reh'g denied, 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864 (1984). A trial court's determination of what the attorney did or did not do, and the basis for the challenged conduct are factual and will not be upheld unless they are clearly erroneous. *State v. Pitsch*, 124 Wis.2d at 634, 369 N.W.2d 711 (1985). However the ultimate conclusion of whether an attorney's conduct resulted in a violation of the right to effective assistance of counsel is a question of law and this Court does not give deference to the trial court's decision. *State v. Ludwig*, 124 Wis.2d 600, 607, 369 N.W.2d 722 (1985).

II. THE TRIAL COURT ERRED BY USING WISCONSIN CRIMES OF DISORDERLY CONDUCT AND ATTEMPTED BATTERY INSTEAD OF THE ILLINOIS CRIME OF ASSAULT WHEN INSTRUCTING THE JURY ON THE CRIME OF BAIL JUMPING, COMMITTING A NEW CRIME, AND THE STATE FAILED TO PRODUCE A SUFFICIENCY OF EVIDENCE TO PROVE A NEW CRIME WAS COMMITTED.

Wis. Stat. § 946.49(1) provides whoever intentionally fails to comply with the terms of his bond is guilty of bail jumping. Byrd was released on bonds in Rock County, Wisconsin court cases 08-CF-2765 and 09-CF-427. (See R. 1; App. 101-103). When an individual charged with a felony is released on bond, as Byrd was in the above case numbers, one condition of release must always be he "not commit any crime." Wis. Stat. § 969.03(2).

Byrd was subsequently arrested for assault in Rockford, Illinois, prompting the state to prosecute him for bail jumping. (*Id.*). Rather than simply charging Byrd with two bail jumping counts for leaving the state for each case on which he was out on bail, the state chose to charge additional bail jumping counts for committing a new crime. The criminal complaint for the case at hand, 12-CF-1429 states the bail jumping in counts 1 &3 is premised upon Byrd violating his bail condition he not commit any new crimes, based upon the state reviewing a probable cause statement from the Rockford Illinois Police Department which had arrested Byrd for assault. (See R. 1; App. 101-102).

A. The trial court erred in providing the jury with Wisconsin jury instructions regarding the new crime element of the bail jumping charge.

At trial, despite the defense's objection, the court allowed the state to introduce Wisconsin jury instructions relating to disorderly conduct and attempted battery for the jury to determine if Byrd committed a new crime. (R. 34:5-7; App. 213-215). Although a criminal conviction for the new crime is not required, the jury must still conclude beyond a reasonable doubt the elements of the new crime are met. *Hauk*, 257 Wis.2d at 591.

The problem with the trial court's ruling is the jury then considered if there was sufficient evidence presented he had committed a crime beyond a reasonable doubt using two alternate Wisconsin crimes, when the incident actually occurred in Illinois and Wisconsin law would not apply in that jurisdiction. In denying Byrd's postconviction motion on this issue, the circuit court stated, "since the defendant is unable to cite any Wisconsin case law on point, this part of the Motion is denied." (R. 58:1; App. 279). It is true, there is currently no case law determining what jury instructions are proper in these circumstances, however, common sense and logic dictates the jury instruction from the state where the alleged new crime took place must be used.

Wisconsin has jurisdiction of crimes in which "any of the constituent elements of which takes place in this state." Wis. Stat. § 939.03(1)(a). The only published Wisconsin case that looks into what to do when a bond has a no new crime provision and the new crime occurred in another state concluded a criminal conviction ***in that state*** was a sufficient violation of her bond. *State v. West*, 181 Wis. 2d 792, 797, 512 N.W.2d 207, 209 (Ct. App. 1993)(emphasis added). However, in that case the defendant was found guilty of theft of Ohio by a court of Ohio, and the defendant pled to the bail jumping charge in

Wisconsin, therefore jury instructions for a new crime were not provided to a jury. *Id.* The holding in *West* established a defendant may be prosecuted in Wisconsin for committing a crime in another jurisdiction, *West*, 512 N.W.2d at 208; however it did not address a situation such as Byrd's in which the bail jumping was initially premised on Illinois assault, and then changed at trial to reflect Wisconsin disorderly conduct and attempted battery.

The definition of "state" under Wis. Stat. § 939.03(2) "includes areas within the boundaries of the state." Therefore bail jumping cases can only be premised on new crimes as codified by the state. The crime of assault is committed in Illinois when a person knowingly or intentionally engaged in conduct which places another person in reasonable apprehension of receiving bodily harm or physical contact of an insulting or provoking nature. (R. 55:7; App. 272). Battery in Wisconsin, one of the two crimes the jury was instructed on, occurs when a person causes bodily harm to another by an act done with the intent to cause bodily harm to another without the person's consent. (R. 35:6-7; App. 214-215). Attempted battery in Wisconsin occurs when a person acts toward committing the crime of battery and intended to or would have committed battery except for an intervention. (R. 35:7; App. 215). The crimes are not identical. Illinois assault requires a person to be in reasonable apprehension, an element of fear. Wisconsin attempted battery does not require a person to be in fear; it only requires the defendant attempt to inflict unwanted bodily harm to another. For example, a person could be found guilty in Wisconsin of attempted battery if he rigged a device to inflict bodily harm on a person who walks through his doorway. In this scenario, the person who walks through the doorway is never put in reasonable apprehension of bodily harm because he is unaware he will be harmed by walking through the door.

The no new crime condition should attach to each state's jurisdiction and Wisconsin's law should not extend

to all Wisconsin bonds outside Wisconsin's jurisdictional borders. Allowing the Wisconsin Criminal Code to attach to all Wisconsin bonds would bring about ludicrous results. In another example, if an individual on a Wisconsin bond traveled to the state of Colorado and possessed marijuana (where it is legal to do so) he would not be committing a bail violation because possession of marijuana is legal in the jurisdiction he is in. This should not be considered a new crime. If the court had concerns about marijuana use and wanted to include that as part of his bond, the bond would reflect a no possession of marijuana in addition to a new crime provision of the bond.

Byrd was charged with a violation of Illinois law, and under *West*, he was lawfully charged with bail jumping in Wisconsin for committing a new crime. Under *Hauk*, the state was not required to show a conviction for the assault, but the state was required to submit jury instructions for the new crime of assault for the jury to independently find Byrd guilty of it beyond a reasonable doubt. In providing the offer of proof for case 12-CF-1621, the state conceded it was unable to prove the element of consent in the battery without the victim present. (R.73:63; App. 136). The state attempted to argue the officer's testimony clearly established a crime of disorderly conduct. When the court dismissed case 12-CF-1621, it stated the probable cause portion of the criminal complaint in the case clearly alleged a battery as the new crime. (R.73:66; App. 139). The court agreed with Attorney Klaff there would be *Crawford* violations if the state were able to proceed without the victim. (R.73:65-66; App. 138-139). This scenario is no different than the issue at hand. The crime of assault required a showing of the victim's reasonable apprehension and Byrd was unable to confront the victim at court. The state received a windfall when it was permitted to substitute both disorderly conduct and attempted battery for assault in this case.

B. The State did not produce sufficient evidence for a reasonable trier of fact to find Byrd committed a new crime.

If the trial court had used the proper Illinois jury instruction to instruct the jury concerning the elements of the new alleged crime, assault, there would have been insufficient evidence to convict Byrd of felony bail jumping in counts 1 & 3. The state would not have been able to prove Byrd engaged in conduct which placed B.H. "in reasonable apprehension of receiving bodily harm or physical contact on an insulting or provoking nature," because she was not available to testify. (R. 55:5-7; App. 270-273).

In *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990), the Court held

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the [S]tate and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it. (citations omitted).

Without B.H.'s testimony, no trier of fact, acting reasonably, could have found Byrd guilty of bail jumping when applying the Illinois assault statute to the new crime element. Without her testimony, there would have been zero evidence as to that element, and therefore, there would not have been a sufficiency of evidence to support the conviction of Byrd on counts 1 & 3.

Moreover, even if this Court finds the trial court properly instructed the jury using the Wisconsin jury instructions for attempted battery and disorderly conduct, the convictions must still be overturned due to insufficiency of evidence.

There was no testimony from any witnesses concerning Byrd's behavior being disorderly, nor was there any testimony he engaged in conduct amounting to an attempted battery, because, again, there was no testimony from B.H. concerning lack of consent. Because disorderly conduct requires Byrd was somehow causing or provoking a disturbance, and attempted battery requires a lack of consent, there is a clear insufficiency of evidence to convict Byrd on these counts even using the Wisconsin jury instructions.

III. THE CUMULATIVE EFFECT OF TRIAL COUNSEL'S ERRORS RESULTED IN INEFFECTIVE ASSISTANCE OF COUNSEL.

Attorney Klaff failed to provide Byrd his Sixth Amendment right to effective assistance of counsel in three ways. First, he failed to move for a mistrial or dismissal of case 12-CF-1621 after it was clear the state would not meet is burden in the joined case. Second, he failed to attempt to stipulate to Byrd's bond conditions, resulting in the jury hearing prejudicial information in addition to hearing about case 12-CF-1621. Third, Attorney Klaff did not property set forth the affirmative defense of necessity for counts two and four.

To establish ineffective assistance of counsel, a defendant must show trial counsel's representation was deficient, and the defendant was prejudiced by trial counsel's deficiencies. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance occurs when "counsel's performance [falls] below an objective standard of reasonableness." *Id.* at 688. Prejudice requires "a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id.* at 694). In this case, this means if counsel did not perform deficiently, at least one juror would have changed his verdict on the ultimate issue.

A. Byrd's trial counsel should have moved for a mistrial or dismissal on the joined case before the trial started when it became clear the state would not be able to meet the evidentiary burden. A reasonable attorney would have moved to dismiss a joined case where the state will not meet the evidentiary burden in one of the cases.

Once it became clear the state would first be presenting an offer of proof and admitted the case would likely be dismissed with prejudice, Attorney Klaff should have moved for a mistrial.

A defense attorney should strive to limit the amount of damaging information a jury hears about the defendant. Information the defendant committed a similar crime is such information a defense attorney should seek to limit. Further, there was no reasonable strategic reason for Attorney Klaff to allow this evidence. Evidence the client committed a similar crime at a different time does nothing to help the defense and Attorney Klaff should have attempted to attack the crime before the jury knew of its existence, heard it entailed a bail jumping charge, and it was mysteriously not before the jury anymore.

When it became clear the state would not have enough evidence, the defense should have insured the prejudicial effect of hearing this evidence be removed and moved for a mistrial. This would insure the jury was deciding the issue solely on the facts of that case instead of deciding it on now impermissible "other acts" evidence.

There is inherent prejudice any time two cases are held in the same trial. *See State v. Linton*, 329 Wis. 2d 687, 791 N.W.2d 222 (Ct. App. 2010). There is a risk the jury will prematurely conclude a defendant is guilty if they are being presented with two separate cases. *See id.* This is particularly likely in Byrd's trial as both cases had to do with bail jumping. The potentially prejudicial effect the joinder of the cases would have was apparent as Byrd's previous defense attorney had argued against joinder of these cases for this exact reason. (*See* R. 65).

Counsel's failure to request a mistrial or dismissal resulted in prejudice against Byrd because the jury heard of another bail jumping count and another alleged victim.

B. Byrd's trial counsel provided ineffective assistance by failing to advise Byrd the risks of not stipulating to portions of bond conditions in a trial for bail jumping. A reasonable attorney would have stipulated to the bond conditions so the jury would not hear how the bond conditions came about, or hear specifics of the conditions unrelated to the case at hand.

The fact Byrd was on a Wisconsin bail/bond was not disputed by the defense. Despite this, the defense allowed the state to bring in evidence of the no-contact order with Ms. P. that created the bail/bond. Attorney Klaff addressed the issue at the motion in limine hearing, but failed to realize the inflammatory nature of this testimony and objected to the jury hearing about the no-contact order right before the clerk testified. (R. 73:35; App. 118). At this point, state argued it was too late, that Klaff previously did not have any objection to her testimony. (R. 73:35-36; App. 118-119). Therefore, the court accepted the state's

response. (R. 73:36; App. 119). A reasonable attorney would have objected to evidence earlier or offered a stipulation to the conditions prior to trial. The defense was not disputing the bail conditions and had no strategic reason to allow the testimony.

It is not uncommon for attorneys to stipulate to matters prior to trial, for purposes of saving time, and more importantly, to prevent any additional prejudice toward the defendant. In *State v. Hauk*, the defendant's attorney filed a document with the court prior to trial, stating Hauk wanted to stipulate to some of the elements of bail jumping. *Hauk*, 257 Wis. 2d at 586. As a result, Hauk's jury was never informed she was charged previously with a felony or misdemeanor, was never asked to decide whether she was released from custody on bond, or whether she intentionally failed to comply with the terms of her bond. *Id.* Instead, the only question before the jury was whether she had committed a new crime. *Id.*

Byrd's credibility was ultimately at issue in this case as he testified he never assaulted B.H., and his reason for leaving Wisconsin, as well as other issues. Byrd was prejudiced not only by the jury hearing there was an additional bail jumping case against him, but further that there was another potential alleged victim in his life, Ms. P. This prejudice tainted the jury's view of Byrd, making it impossible for him to receive a fair verdict.

C. Byrd's trial counsel provided ineffective assistance by failing to sufficiently advocate the defense of necessity. A reasonable attorney would have properly researched and presented the defense.

A crucial fact in dispute was the identity of the individual causing the disturbance at Ms. Sykes' house. (*See* R. 73; App. 107-212). Officer King responded to a dispatch; he did not listen to the 911 call, which may have detailed the identity of the individual causing the disturbance. Neither the state, nor Attorney Klaff, requested the 911 call in a hope to identify the disorderly subject the night of the call. (R. 75:21; App. 247). At a minimum, Attorney Klaff should have explicitly attacked the state for failing to provide such evidence.

The lack of such evidence made is so the identity of the individual causing the disturbance was only based on testimony at trial. This placed the credibility of Ms. Sykes and Byrd against the credibility of Officer King regarding who caused the disturbance. When examining Ms. Sykes on this issue, Attorney Klaff asked her what she was doing at 6:00 p.m. the night of May 10th, 2012. (R. 73:94; App. 161). Ms. Sykes responded she was having a house-warming party at her house, and then went into a description of the disorderly individual at her house. (R. 73:95; App. 162). The actual time of the 911 call and the ensuing arrest of Byrd occurred around or after 11:00 p.m. that night. (R. 73:113; App. 180). The state used this discrepancy, which was a misunderstanding based on Ms. Sykes initial testimony she was having a party at 6 p.m., and discredited Ms. Sykes' credibility based on the timeline of events presented in the defense's case, and repeated in its closing Ms. Sykes did not even know the correct time of the incident. (R. 73:143; App. 197). Attorney Klaff, knowing the correct time of the incident, should have offered clearer questioning on this issue to establish his defense of necessity. A reasonable attorney would have rehabilitated

Ms. Sykes' statement to portray the fact it was the party that had started around 6:00 p.m., with the incident occurring later.

Attorney Klaff offered the affirmative defense of necessity at trial. (*See* R. 73; 107-112). The defense rested on the argument Byrd heard about the disturbance at Ms. Sykes' house and then drove to Illinois to pick up his daughter. (*Id.*). To successfully maintain this argument, the defense would have to show Byrd was not the initial cause of the disturbance that caused the police dispatch. One way this could have been done was by requesting the 911 call Ms. Sykes placed. The failure of the defense to offer this evidence prejudiced the defense, however not mentioning to the jury the state did not present the 911 call prejudiced Byrd further. Attorney Klaff still had a way to successfully present this defense through Ms. Sykes' testimony to that fact. The failure of Attorney Klaff to ask clear questions of Ms. Sykes about who initially caused the disturbance, or rehabilitate her after the state's cross caused her to appear confused to the jury, thus hindering her credibility.

Attorney Klaff also failed to explain to the jury why someone in Byrd's position would not instinctively call the police to report a problem. (*See* R. 75; App. 227-265). Attorney Klaff admitted at the postconviction motion hearing he had discussed with Byrd why he had not initially called police instead of going to Rockford himself, but he failed to provide this explanation to the jury. (R. 75:25-27; App. 251-253). Attorney Klaff further admitted he knew the state asking the jury what a reasonable person in Byrd's position would do was the biggest problem of their affirmative defense, yet did nothing to explain what he knew and understood about the cultural issue of Byrd not trusting or depending on the police. (R. 75:26; App. 252).

D. The cumulative effect of trial counsel's errors establishes prejudice.

Prejudice in the context of an ineffective assistance of counsel claim "should be assed based on the cumulative effect of counsel's deficiencies." *State v. Theil*, 264 Wis.2d 571, 665 N.W.2d 305 (Ct. App. 2003). As a result, "when a court finds numerous deficiencies in trial counsel's performance, it need not rely on the prejudicial effect of a single deficiency if, taken together, the deficiencies establish cumulative prejudice." (*Id.*). In Byrd's case, Attorney Klaff's numerous deficiencies prejudiced the defense in this case:

- Trial counsel's failure to move for a mistrial when it became clear one of the joined cases would be dismissed with prejudice.
- Trial counsel's failure to stipulate to the undisputed bond condition.
- Trial counsel's failure to seek the 911 tape, and further not to attack the state not providing the 911 tape.
- Trial counsel's failure to ask clear questions of Ms. Sykes regarding the time of the incident prompting the 911 call.
- Trial counsel's failure to explain why Byrd did not call 911, and instead chose to personally save his daughter from a dangerous situation.

Taken individually, it is likely each deficiency created prejudice, however, taking all the deficiencies into account it seems certain without these errors, the mind of at least one juror would be changed. If the jury had been presented with only one bail jumping case, 12-CF-1429, had only heard of one potential alleged victim, B.H., had been presented with a more adequate affirmative defense as to why Byrd left the state, the outcome of the case would

have been different. Byrd would not have been found guilty of the bail jumping charges.

CONCLUSION

For the reasons set forth above, Respondent-Appellant respectfully asks this Court to reverse the decision of the circuit court, and vacate the convictions for all four counts of bail jumping in this matter, and order a new trial for counts two and four.

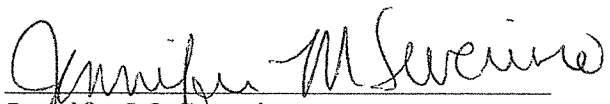
Dated this 15th day of July, 2015.

Respectfully Submitted,

Jennifer M. Severino
Attorney for Respondent-Appellant
State Bar No. 1066034
Severino Law Offices, LLC
524 Main Street, Suite 202
Racine, WI 53403
(262)632-5199

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 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of this brief is 9,846 words.



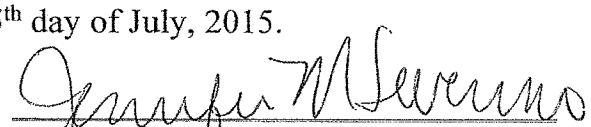
Jennifer M. Severino
Attorney for Respondent-Appellant
State Bar No. 1066034

CERTIFICATION 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 15th day of July, 2015.



Jennifer M. Severino
Attorney for Respondent-Appellant
State Bar No. 1066034

CERTIFICATION OF THIRD-PARTY
COMMERCIAL DELIVERY

I certify that on July 15, 2015, this brief or appendix was delivered to a third-party commercial carrier for delivery to the Clerk of the Court of Appeals within three calendar days. I further certify that the brief and or appendix was correctly addressed.

Dated: July 15, 2015

Jennifer M. Severino
Attorney for Respondent-Appellant
State Bar No. 1066034