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 A JUDGMENT OF CONVICTION ENTERED IN THE ROCK COUNTY CIRCUIT COURT, THE HONORABLE RICHARD T. WERNER, PRESIDING

REPLACEMENT BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General

CHRISTINE A. REMINGTON
Assistant Attorney General
State Bar #1046171

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8943
(608) 266-9594 (Fax)
remingtonca@doj.state.wi.us

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ISSUES PRESENTED

1. This court will reverse and order a new trial on a claim of jury instruction error only if the instructions communicated an incorrect statement of the law. Here, the jury instructions told the jury that it must find Andrei R. Byrd committed a crime while on bond and defined the elements of the alleged crime. Did the circuit court properly communicate the correct statement of the bail jumping law?

2. Did Byrd prove that his attorney performed deficiently or caused him prejudice by failing to move for a mistrial that would not have been granted, by failing to stipulate to something Byrd told him not to stipulate to, or by failing to obtain evidence that would not have helped his case?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

SUPPLEMENTAL STATEMENT OF THE CASE

On October 26, 2011, Byrd had a bond hearing for two felony, Rock County Circuit Court cases: 2008CF2765 and 2009CF427 (73:42-45). He signed bond forms in each case and thereby agreed that he shall not commit any crimes and he may not leave Rock County (73:44, 46-47). Byrd told the court he understood that he could not leave Rock County (73:49).

On May 10, 2012, while the felony bonds remained in effect, Officer Edward King responded to an emergency call in Rockford, Illinois at Lashonda Sykes's home (73:47-48, 68-69, 104). Officer King saw Byrd arguing with B.H. (73:70). He spoke to B.H. and then attempted to speak to Byrd (73:70). Byrd ignored Officer King, walked past him, and moved towards B.H. (73:70). Officer King saw Byrd come within two feet of B.H. with his right hand raised above his head and B.H. moved backwards very quickly (73:71-72). Officer King arrested Byrd (73:72). The State charged Byrd with four counts of felony bail jumping (1:1-2).

On July 4, 2012, Byrd again went to Rockford (73:54-55). While there, Byrd hit B.H. in the face, head, and upper body several times (73:65). He also hit a child who told Byrd to stop hitting B.H. (73:65). B.H. tried to drive away, and Byrd held onto the side of the car (73:55, 58-59, 61-62). The State charged Byrd with bail jumping for committing a new crime (73:63-64).

The two cases were joined for trial (22). Byrd moved for a court order that without B.H.'s testimony, the jury could not hear testimony regarding the July 4 incident (27:1-2). The court did not rule on the motion, and sought an offer of proof from the State (72:10).

On the morning of trial, Officer Jesse Washington had not yet arrived to give the offer of proof for the State (73:2). The State suggested that they pick the jury rather than wait for the officer to arrive (73:2-3). Byrd agreed as long as the State did not mention any of the underlying facts behind the July 4 incident during voir dire (73:3). The State agreed to that limitation (73:4).

The jury heard that Byrd faced four counts of bail jumping stemming from a May 10 incident and one count of bail jumping for an incident on July 4 (73:7-10). The jury did not hear more specific information about either incident during voir dire.

Officer Washington still had not arrived after jury selection (73:33). The State agreed to make its opening statement without referring to the specific facts of the July 4 incident (73:34). The State discussed the May 10 incident in detail (73:38-39). The State told the jury about another incident in July, but said that it would not go into that incident because it was not sure what the evidence would show (73:39-40). The State said the jury would hear that Byrd engaged in disorderly conduct and attempted battery in violation of the bond condition not to commit crimes and left Rock County in violation of the bond condition not to leave the county (73:40). The State asked the jury to find Byrd guilty (73:40).

The State called Officer King who told the jury that he saw Byrd, in Rockford, come within two feet of B.H. with his right hand raised above his head, and that B.H. moved backwards very quickly (73:68-69, 71-72).

Once Officer Washington arrived, the State then made its offer of proof outside the presence of the jury (73:54-62). The court concluded that the State could not meet its burden without testimony from B.H., and dismissed the case stemming from the July 4 charge with prejudice (73:65-66).

Amy Edwards testified that on October 26, 2011, Byrd signed two felony bond forms indicating that he would not commit new crimes or leave the county (73:42-43). The transcript from the bond hearing indicated that Byrd could not have contact with "Ms. Pounds" (33:Ex. 1).[1] Byrd objected to the bond form, and the court overruled his objection (73:35-37).

At the close of the State's case, Byrd moved to dismiss two of the remaining bail jumping counts because the State failed to prove that Byrd committed a crime (73:76). He argued that the State could not meet its burden without B.H.'s testimony and that the State failed to meet its burden to show that Byrd's actions violated Illinois law (73:76-79). The State responded that it needed to show that Byrd committed a crime under Wisconsin law, not Illinois law, and that it met its burden (73:80). The court agreed with the State and denied Byrd's motion (73:86).

Sykes testified for Byrd. She said that on May 10, around 6:00 p.m., she called the police because someone scared her (73:94-95). Sykes said that Byrd arrived at her home at the same time as the police, and they arrested him (73:96). Byrd came to Sykes's house to pick up his daughter (73:97). She did not see Byrd walk aggressively towards B.H. with his hand in the air (73:97). Sykes denied telling officers that Byrd needed to be removed from her house because he drank too much alcohol and was "acting foolish" (73:99). Sykes claimed she told the officers they arrested the wrong person (73:102).

Byrd testified that he received a call that there was "a situation" at Sykes's house, so he drove to Rockford to protect his daughter (73:104). Byrd denied walking towards B.H. or raising his hand to her (73:105). Byrd did not call the police to tell them he feared that his daughter was in danger (73:107).

The State recalled Officer King who said that he was dispatched to Sykes's house just before midnight, not 6:00 p.m.

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[1]The trial transcript indicates that the jury saw the bond form that had the same condition (73:44). The form does not appear in the appellate record.

(73:113). Sykes said in her 911 call that she needed officers to remove Byrd from her house because he had consumed too much alcohol and was acting foolish by arguing with B.H. (73:114). Officer King was "positive" he saw Byrd move toward B.H. in an attempt to strike her (73:115).

The court told the jury that it need not consider the July 4 incident and that the July 4 incident should have no bearing on the jury's decision in the May 10 incident (73:129). The court read the jury the instruction for bail jumping (73:130-35). The court told the jury that counts one and two alleged violations of the bond in case number 2008CF2765 and counts three and four alleged violations of the bond in case number 2009CF427 (73:131). The court told the jury that in counts one and three, the State alleged that Byrd violated the condition of his bonds by committing the crimes of disorderly conduct and attempted battery (73:131). The court read the model jury instructions for disorderly conduct, attempted battery, and necessity (73:131-34).

The jury convicted Byrd of all four counts of bail jumping (73:161-62). The court placed Byrd on probation for three years (74:24).

Byrd filed a postconviction motion arguing that the circuit court erred in giving the jury instruction for the Wisconsin crimes of disorderly conduct and attempted battery rather than the Illinois equivalents and that his attorney provided ineffective assistance by failing to object to the instructions as written (49).

At a postconviction hearing, Byrd's trial attorney, Joshua Klaff, testified that he started his representation after the joinder of the two cases (75:3-4). Attorney Klaff did not move for a mistrial at the beginning of the trial because he knew that the case would be dismissed if the State did not call any witnesses (75:7). Attorney Klaff instead kept the State from mentioning the facts of the July 4 incident to the jury (75:8).

Attorney Klaff explained that Byrd would not stipulate to anything (75:10-11). Attorney Klaff told Byrd that this all-or-nothing approach had risks and explained those risks (75:12-13). In that

conversation, Attorney Klaff probably told Byrd that one of the risks was that the jury would see Ms. Pounds's name, but Attorney Klaff did not specifically recall telling Byrd that (75:13).

Attorney Klaff noted that Sykes testified that she called 911 around 6:00 p.m. when she actually placed the call around midnight (75:21). Attorney Klaff said he cannot promote perjury so he could not try to change Sykes's story (75:21).

The circuit court denied Byrd's motion (58). Byrd appealed (76).

ARGUMENT

I. The circuit court properly advised the jury.

A. Standard of review.

This court reviews the circuit court's jury instructions under a deferential standard. *State v. Wille*, 2007 WI App 27, ¶ 23, 299 Wis. 2d 531, 728 N.W.2d 343. This court will reverse and order a new trial only if the jury instructions communicated an incorrect statement of the law. *Id.* Whether jury instructions are a correct statement of the law is a question of law that this court reviews *de novo*. *Id.* (citing *State v. Neumann*, 179 Wis. 2d 687, 699, 508 N.W.2d 54 (Ct. App. 1993)).

B. Legal principles.

When the State alleges that a defendant violated his bond by committing a crime, it need not obtain a conviction for the underlying crime. *See State v. Hauk*, 2002 WI App 226, ¶ 14, 257 Wis. 2d 579, 652 N.W.2d 393. To convict, a jury must find evidence sufficient to conclude beyond a reasonable doubt that a defendant intentionally violated his bond by committing a crime. *Id.* ¶ 19.

This court has defined a crime as "an offense against the social order . . . that is dealt with by community action rather than by an individual or kinship group." *State v. West*, 181 Wis. 2d 792, 796, 52 N.W.2d 207 (Ct. App. 1993). More recently, this court questioned

that definition. *Hauk*, 257 Wis. 2d 579, ¶ 17 n.3. The legislature defined a crime as "conduct which is prohibited by state law and punishable by fine or imprisonment or both." Wis. Stat. § 939.12. This court found this definition instructive in determining legislative intent. *Hauk*, 257 Wis. 2d 579, ¶ 17 n.3.

C. The jury instruction properly articulated the law.

The court properly articulated the bail jumping statute by using the elements of the Wisconsin crimes of disorderly conduct and attempted battery to explain the element that Byrd committed a crime because Wisconsin law applies. Even if Illinois law applies, the crimes are substantially similar, and the jury would have heard the same instruction. The jury heard the proper instruction regarding the bail jumping charge.

The jury instruction listed the elements of bail jumping, and the court read the model instruction in its entirety (73:130-35). Byrd's complaint is with the last part of the instruction. Byrd argues that the jury should not have heard the elements of the crimes of disorderly conduct and attempted battery, but instead should have heard the elements of the Illinois crime of assault. Byrd's brief at 26-28.

The relevant portion of the jury instruction states:

> [The defendant is charged with violating a condition of bond that required that (he) (she) not commit any crime. The State alleges that the defendant committed the crime of _____. The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant committed the crime of _____.
>
> The crime of _____ is committed by one who
> LIST THE ELEMENTS OF THE ALLEGED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTIONS AS NECESSARY.]

Wis. JI-Criminal 1795 (2010) (footnote omitted).

The State must prove that the defendant committed a crime, and must name that crime. *Id.* The instruction does not articulate which jurisdiction the crime and its elements should come from. Nothing limits the State's ability to prove Byrd committed the crime of bail jumping by committing a specific crime. The statute and jury instruction simply tell the jury that the State must prove that the defendant committed a specific crime by proving each element of that crime. As long as the State can meet its burden it has discretion to choose the relevant crime.

The legislature left it to the State's discretion to allege which crime from which jurisdiction the defendant committed. So the State can prove that a defendant committed bail jumping by committing a crime as defined by Wisconsin law. A crime is "conduct which is prohibited by state law and punishable by fine or imprisonment or both." Wis. Stat. § 939.12. Byrd's bond prohibited him from committing a "crime" (73:44, 46-47).

Here, the State presented evidence that Byrd committed the crimes of disorderly conduct and attempted battery. Byrd does not challenge the sufficiency of the evidence presented that he committed these crimes. The jury concluded that Byrd violated his bond by committing disorderly conduct and attempted battery (73:161-62). The circuit court properly instructed the jury.

Further, even if the State had chosen to use the elements of attempted battery and disorderly conduct from Illinois law, the jury would have heard the same instruction because Illinois and Wisconsin criminalize the same behavior.

In Wisconsin, a person commits attempted battery when he or she attempts to cause bodily harm to another by an act done with intent to cause bodily harm to that person or another without the person's consent. Wis. Stat. §§ 939.32(1), 940.19(1). In Illinois, attempted battery is defined as when a person acts with intent to knowingly and without legal justification by any means (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual and he or she does any act that constitutes a substantial step toward the commission of that offense. 720 Ill. Comp. Stat. Ann. 5/8-4, 5/12-3.

The two states define the crimes of attempted battery in a very similar way. Both require an act toward commission of the crime and intent to commit the crime. *See* Wis. Stat. § 939.32(1); 720 Ill. Comp. Stat. Ann. 5/8-4. Both require an intention to cause bodily harm. *See* Wis. Stat. § 940.19(1); 720 Ill. Comp. Stat. Ann. 5/12-3. If anything, the Illinois statute is broader because it allows a conviction when a person "makes physical contact of an insulting or provoking nature." 720 Ill. Comp. Stat. Ann. 5/12-3. Even using Illinois law, the jury instruction would have essentially been the same as the one given.[2] The circuit court did not improperly instruct the jury.

Disorderly conduct in Wisconsin is defined as: "Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance." Wis. Stat. § 947.01. In Illinois, a person commits disorderly conduct when he or she knowingly: "Does any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace." 720 Ill. Comp. Stat. Ann. 5/26-1. Both statutes encompass Byrd's behavior. If the circuit court had instructed the jury based on the Illinois crimes, the instruction would not have significantly changed. The circuit court properly instructed the jury.

Byrd seems to believe that the State must prove he committed assault under Illinois law. Byrd's brief at 27-28. Presumably, this is because Byrd faced an assault charge in Illinois. But the State, not the defendant, has the discretion to choose the charges including which crime it believes the defendant committed while on bond. The State was not limited by the crime charged in Illinois. The State need not

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[2]Byrd raises the hypothetical of a defendant possessing marijuana in Colorado, where it is legal, and then being charged with bail jumping for committing the crime of possession of marijuana in Wisconsin. Byrd's brief at 28. That hypothetical is substantially different from the facts in this case. There is no need to address what jury instruction would be required in that situation. Here, both Illinois and Wisconsin criminalize the same behavior. The jury would have received a substantially similar instruction if the court had instructed the jury based on Illinois law.

convict a defendant of the underlying crime. *See Hauk*, 257 Wis. 2d 579, ¶ 14-18. Instead, the jury must conclude beyond a reasonable doubt that Byrd committed a "crime." *Id.* ¶ 19.

The State could choose any crime that fit Byrd's actions. And the jury need not conclude that Byrd committed assault, but whether Byrd's actions constituted a crime. The State chose disorderly conduct and attempted battery. The court properly instructed the jury.

The jury knew that it must find that Byrd agreed, as a condition of his bond, not to commit a crime. It knew that the State believed Byrd committed disorderly conduct and attempted battery. It knew the elements of disorderly conduct and attempted battery. And it concluded that Byrd was guilty of bail jumping. The jury instruction communicated a correct statement of the law. *See Wille*, 299 Wis. 2d 531, ¶ 23. This court will reverse and order a new trial only if the jury instructions mislead or communicate an incorrect statement of the law. *Id.* This court should affirm the circuit court's instructions.

II. Byrd's attorney did not provide ineffective assistance at trial.

A. Standard of review.

Whether a lawyer rendered ineffective assistance is a mixed question of law and fact. *State v. Manuel*, 2005 WI 75, ¶ 26, 281 Wis. 2d 554, 697 N.W.2d 811. The circuit court's findings of fact will be upheld unless they are clearly erroneous. *Id.* Whether the defendant's proof satisfies either the deficient performance or the prejudice prong is a question of law that this court reviews without deference to the circuit court's conclusions. *Id.*

B. Legal principles.

A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Love*, 2005 WI 116,

¶ 30, 284 Wis. 2d 111, 700 N.W.2d 62. If the court concludes that the defendant has not proven one prong of this test, it need not address the other. *Strickland*, 466 U.S. at 697.

To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. To demonstrate prejudice, the defendant must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *see Love*, 284 Wis. 2d 111, ¶ 30.

C. Byrd failed to meet his burden to prove his attorney provided ineffective assistance.

Byrd argues that his attorney was ineffective at trial for: (1) failing to move for a mistrial, (2) failing to stipulate to Byrd's bond conditions, and (3) not properly setting forth the necessity defense. Byrd's brief at 30. Byrd's claims must fail. He does not prove that his attorney provided ineffective assistance, and this court should affirm the circuit court's order.

1. The court would not have granted a motion for mistrial.

There were no grounds for the circuit court to grant a mistrial. In deciding a mistrial motion, the circuit court must determine whether the claimed error was sufficiently prejudicial to warrant a new trial. *State v. Doss*, 2008 WI 93, ¶ 69, 312 Wis. 2d 570, 754 N.W.2d 150. Byrd fails to articulate any error, let alone a sufficiently prejudicial error. The court would not have granted a mistrial motion, so Byrd fails to show deficient performance or prejudice.

The jury did not hear any facts of the July 4 crime. At trial the jury heard that Byrd faced five counts of felony bail jumping for events that happened on May 10 and July 4 (73:7-10). The State only told the jury that it did not know what the evidence would show about the July 4 incident (73:38-39). After the State's offer of proof,

the court dismissed the count related to the July 4 incident with prejudice (73:65-66).

Byrd believes that his attorney should have moved for a mistrial at this point, but he fails to show deficient performance or prejudice. Byrd's attorney ensured that the State never told the jury any details about the July 4 incident (75:8). Byrd fails to articulate any error, let alone a sufficiently prejudicial error. *See Doss*, 312 Wis. 2d 570, ¶ 69. The court would not have granted a mistrial motion.

The jury never heard any testimony about the July 4 incident. The jury did not hear any facts about the incident during the State's opening statement. The court would not have granted a mistrial. Byrd's attorney was not deficient. He kept the evidence out of the trial. Byrd's claim must fail.

2. Byrd knew the risks associated with his aggressive trial strategy.

Byrd claims Attorney Klaff should have stipulated to the bail conditions in order to keep the information that he could not have contact with "Ms. Pounds" from the jury. Byrd's brief at 32. But Attorney Klaff did object to the reference and that objection was overruled (73:35-37). He was not ineffective.

Byrd himself refused to stipulate to the bond conditions (75:10-11). Byrd told Attorney Klaff that "we would not be stipulating" (75:10). Attorney Klaff explained,

> We weren't going to stipulate and make the State's case easier, basically, in any sense. So the State was going to have to do everything by the numbers, including bringing a clerk in, and having the clerk testify to the bond and things of that nature. We were not going to stipulate that he was on a bond at that time. Mr. Byrd did not want me to stipulate.

(75:11). Attorney Klaff did not provide ineffective assistance. Byrd's claim is wholly without merit.

3. Byrd's attorney properly presented the defense of necessity to the jury.

Byrd complains that his attorney did not order the recording of the 911 call, rehabilitate Sykes about the time of the call, and explain to the jury why Byrd did not trust the police. Byrd's brief at 34-35. He believed that these facts would convince the jury that another man caused the initial disturbance and believe that Byrd needed to drive to Rockford to save his daughter's life. *Id.* Byrd's attorney raised the defense of necessity and presented the facts to the jury. The jury rejected the argument that Byrd's actions were necessary to protect his daughter. His attorney was not ineffective.

The defense of necessity can be raised "only if the pressure of natural physical forces caused the defendant to believe that his act was the only means of preventing [imminent public disaster] [imminent death or great bodily harm to himself (or to others)] and which pressure caused him to act as he did." Wis. JI-Criminal 792 (2005) (footnote omitted). The defendant's beliefs must also have been reasonable. *Id.*

Byrd claims his attorney should have rehabilitated Sykes on redirect to support his necessity defense. Byrd's brief at 33-34. Sykes testified that around 6:00 p.m. she called police because of a disturbance (73:94-95, 98). She said police arrived pretty quickly after she called (73:98). Attorney Klaff explained that he talked to Sykes outside the courtroom and she told him that she made the call at 6:00 p.m. (75:21). Attorney Klaff knew he was in a tough spot because he could not promote perjury and she thought she made the call at 6:00 p.m. (75:21).

Byrd argues that Attorney Klaff should have gotten Sykes to explain that she had placed the call at midnight, but fails to explain how Attorney Klaff could do that. Sykes believed she made the call at 6:00 p.m. (73:98). Attorney Klaff was bound by her testimony. He cannot make her testify to certain facts. Byrd cannot prove deficient performance or prejudice.

Byrd testified that he drove to Rockford because there "was a situation occurring at [Sykes's] house" (73:104). He said he drove

there because his "daughter['s] life was in jeopardy" (73:106). He based that belief on hearing a "commotion in the background" when he was on the phone with B.H. (73:107).

Byrd claims that in order to make his testimony believable, he needed to prove that another man, not he, caused the initial disturbance. Byrd's brief at 35. He blames his attorney for failing to prove that fact. *Id.* But there are no facts that support Byrd's testimony. His attorney was not ineffective.

Byrd offers no reason to believe that the 911 call indicated another man caused the disturbance. The 911 call may have clearly shown that Byrd was the attacker. The record does not contain the recording of the call. Byrd complains that Attorney Klaff failed to request the 911 call, but Byrd failed to include the 911 recording in his postconviction motion. He had the burden to prove his attorney was ineffective. He cannot meet the burden to prove that he suffered prejudice without the 911 call. His claim must fail.

Finally, Byrd claims his attorney was ineffective for failing to explain why he did not trust the police. Byrd's brief at 35. Byrd testified on cross that when he thought his daughter was in danger, it did not occur to him to call the police (73:107). Even now, Byrd fails to explain why he does not trust police. He cannot prove that he suffered prejudice because he fails to explain why he does not trust police.

Byrd fails to meet his burden to prove either prong of ineffective assistance. His attorney's performance was not deficient for failing to move for a mistrial that the court would have denied, for failing to stipulate to something Byrd told him not to stipulate to, or for failing to obtain evidence that would not have helped his case. There is no reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694. The circuit court properly denied Byrd's motion (58). This court should affirm that conclusion.

CONCLUSION

The State respectfully requests this court affirm the circuit court's order denying postconviction relief and Byrd's judgment of conviction.

Dated this 15th day of September, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

CHRISTINE A. REMINGTON
Assistant Attorney General
State Bar #1046171

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8943
(608) 266-9594 (Fax)
remingtonca@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 4,379 words.

Dated this 15th day of September, 2015.

_____
Christine A. Remington
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 15th day of September, 2015.

_____
Christine A. Remington
Assistant Attorney General