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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

In addition to the following reply, the Defendant-Appellant, reaffirms the arguments presented in his brief-in-chief.

I. THE CIRCUIT COURT DID NOT PROPERLY ADVISE THE JURY OF THE JURY INSTRUCTION FOR BAIL JUMPING AND THEREFORE COMMUNICATED AN INCORRECT STATEMENT OF THE LAW.

This court will reverse and order a new trial if the jury instructions communicated an incorrect statement of the law. *State v. Wille*, 2007 WI App 27, ¶ 23, 299 Wis. 2d 531, 728 N.W.2d 343. The jury instructions in this case did communicate an incorrect statement of the law, and,

therefore, this Court must reverse the decision of the Circuit Court and order a new trial for Byrd.

As the State noted, in *Hauk,* the court looked to legislative intent to define crime as "conduct which is prohibited by state law and punishable by fine or imprisonment or both." Wis. Stat. § 939.12; *State v. Hauk*, 257 Wis. 2d 579, ¶ 17 n.3. (Resp. Br. p. 7). The definition of "state" under Wis. Stat. § 939.03(2) "includes areas within the boundaries of the state." The State argues that "the instruction [for bail jumping] does not articulate which jurisdiction the crime and its elements should come from," and therefore believes it can "pick and choose" what crimes to allege were committed, even if in another jurisdiction. (Resp. Brief P. 8). However, as Byrd noted in his brief-in-chief, in *State v. West*, 181 Wis. 2d 792, 797, 512 N.W.2d 207, 209 (Ct. App. 1993), the Court held that a conviction for theft in Ohio, by an Ohio court, was a sufficient violation of the no new crime provision of her bond. 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; and demonstrates that the crime in the other State must be the basis for the bail jumping charge.

Common sense also dictates that bail jumping cases can only be premised on new crimes as codified by the state that the individual is in at the time he or she commits the alleged crime. Application of the State's reasoning would result in absurd results. The best example of which is possession of marijuana. As Appellant described in his brief-in-chief, 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 by committing a new crime because possession of marijuana is legal in the jurisdiction that he is in. Under the State's reasoning, the individual could be charged with bail jumping in Wisconsin for partaking in something that is

completely legal in the State they were in at the time of the action.

The State argues, in footnote 2, that Byrd's hypothetical is irrelevant. (Resp. Br. p. 9, ft. 2). It is not. The hypothetical demonstrates the ludicrous nature of the State's position regarding which State's jury instruction is used in these cases. The State argues it can "pick and choose" what crimes to submit to the jury as a basis for a bail jumping charge, regardless of where the alleged new crime occurred, and regardless of what the criminal code of that State may be. This position would create absurd results.

In defending it's position, the State first argues that "Wisconsin law applies" and then argues that "[e]ven if Illinois law applies, the crimes are substantially similar, and the jury would have heard the same instruction." (Resp. Br. p. 7). As Byrd presented in his brief-in-chief, the Illinois crime of assault is *not* substantially similar to the Wisconsin or Illinois crimes of disorderly conduct or attempted battery.

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 State also argues that if it 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. (Resp. Br. p. 8-9).

The crimes are not identical. Illinois assault requires a person to be in reasonable apprehension, an element of fear. Wisconsin attempted battery (and the Illinois equivalent) does not require a person to be in fear; it only requires the defendant attempt to inflict unwanted bodily harm to another. In this case, the State of Wisconsin was, without a doubt, unable to prove reasonable apprehension because it did not have the alleged victim of the assault available to testify.

The jury instruction in this case did not properly articulate the law because it did not provide the proper instruction concerning element three. The instruction improperly used the Wisconsin jury instructions for disorderly conduct and attempted battery instead of the Illinois instruction for assault. The jury instruction communicated an incorrect statement of the law. *See Wille*, 299 Wis. 2d 531, ¶ 23. Therefore, this Court should reverse the circuit court's instructions and order a new trial.

The State also argues that "Byrd does not challenge the sufficiency of the evidence presented that he committed these crimes [disorderly conduct and attempted battery]." (Resp. Br. p. 8). This is incorrect. In Section I, subsection B of Byrd's brief-in-chief, Byrd specifically argues that the State produced insufficient evidence for both the Illinois assault charge, and the disorderly conduct and attempted battery charges (whether the Wisconsin or Illinois instructions for either were used).

The State has neglected to respond to this argument. Arguments not refuted are deemed admitted. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). The proper remedy for an insufficiency of evidence is dismissal of the charges. Since the State did not produce sufficient evidence of any

underlying crime, the bail jumping convictions premised on the commission of a new crime must be dismissed.

II. TRIAL COUNSEL WAS INEFFECTIVE AND THEREFORE, BYRD IS ENTITLED TO A NEW TRIAL.

Byrd has met his burden to prove his attorney provided ineffective assistance of counsel as to three issues: (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.

The State first argues that "[t]he court would not have granted a motion for mistrial." (Resp. Br. p. 12). It argues that "Byrd fails to articulate any error, let alone a sufficiently prejudicial error," to claim ineffective assistance of counsel relating to counsel's failure to move for mistrial.

The State is mistaken. As Byrd presented in his brief-in-chief, Attorney Klaff should have moved for mistrial when it became clear the State was not going to be able to prove its case relating to case 1621. The State admitted that if the officer's testimony was not sufficient, it would have to dismiss. Knowing this, Attorney Klaff still permitted the Court to read the charges to the jury in the 1621 case and permitted the State to reference those charges in its opening statement.

The jury knowing there were additional charges against Byrd is, in and of itself, prejudicial to the defendant. The fact that the State said in its opening that he was charged with bail jumpings for incidents occurring on May 10 and July 4 prejudiced Byrd. Attorney Klaff specifically requested that the State not be permitted to give *any facts of the case* regarding the 1621 case, yet the State told the jury the alleged bail jumpings occurred on two different dates. Knowing the State was alleging multiple violations on

multiple dates is inherently prejudicial and Attorney Klaff should have prevented such information from ever reaching the jury, and, once it had, should have moved for mistrial on the other charges once the Court dismissed the 1621 case.

Second, the State argues that Attorney Klaff was not ineffective as it relates to failing to stipulate to bond conditions because "Byrd knew the risks associated with his aggressive trial strategy." (Resp. Br. p. 12).

While Byrd may not have been willing to stipulate that he was on bond at the time of the alleged incidents, Attorney Klaff 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 concerning the no contact order with Ms. P. 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.

Next, the State argues Attorney Klaff was not ineffective for failing to properly present the defense of necessity because "Byrd's attorney raised the defense of necessity and presented the facts to the jury...[t]he jury rejected the argument that Byrd's actions were necessary to protect his daughter."

While Byrd's attorney did argue necessity in his closing and did have the necessity instruction read to the jury, he did not properly present the defense of necessity to the jury. As was outlined in Byrd's brief-in-chief, Attorney Klaff failed to order the 911 recording. This would have clarified who caused the initial disturbance and what time the call was initiated. This is important because Byrd's necessity defense required the jury to believe he was not the person who initiated the disturbance.

The 911 call also directly relates to the second issue, the failure to rehabilitate Ms. Sykes. 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. This could have been done with the 911

call, with the police reports, or other sources which may have been used to refresh Ms. Sykes recollection of the timeline.

Finally, Attorney Klaff's failure to have Byrd explain in his testimony the reason he did not trust the police was deficient and affected his ability to properly prove a necessity defense. 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). It is Attorney Klaff's job to ask the questions needed to draw out necessary testimony. He completely failed to elicit *any* testimony from Byrd concerning why he did not trust the police.

The cumulative effect of all these deficiencies is prejudice to Byrd. There is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 688, 694. Therefore, this Court should reverse the decision of the Circuit Court and find that Byrd's trial counsel was ineffective.

CONCLUSION

For the reasons set forth above and those in his brief-in-chief, Defendant-Appellant respectfully asks this Court to reverse the decision of the Circuit Court and grant the appropriate remedies.

Dated this 15th day of October, 2015.

Respectfully Submitted,

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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 2,268 words.

Dated this 15th day of October, 2015.

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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 October, 2015.

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CERTIFICATION OF THIRD-PARTY
COMMERCIAL DELIVERY

I certify that on October 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: 10/15/15

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