COURT OF APPEALS OF WISCONSIN
DISTRICT NO. IV

Court of Appeals Case No. 2014AP2881
Circuit Court Case No. 2014CM001052

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

LAVARREN D. ETIENNE,
Defendant-Appellant.

ON NOTICE OF APPEAL FROM A JUDGMENT
OF CONVICTION ENTERED IN THE
CIRCUIT COURT OF DANE COUNTY,
THE HONORABLE JOHN W. MARKSON PRESIDING.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUES

1. WAS SUFFICIENT EVIDENCE PRESENTED AT TRIAL TO CONVICT THE DEFENDANT-APPELLANT BEYOND A RESONABLE DOUBT?

TRIAL COURT ANSWERED: YES

2. WAS THE FINDING OF GUILT BY THE JURY A VIOLATION OF THE DEFENDANT-APPELLANT'S RIGHT TO DUE PROCESS?

TRIAL COURT ANSWERED: NO

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Appellant submits that the legal issues are clearly set forth in the Briefs, and the factual situation is properly reflected in the Statements of Fact and Briefs. Therefore, oral argument is not necessary. Given the few opinions available on this issue, publication may be warranted.

STATEMENT OF THE CASE AND FACTS

Etienne tried both 14-CM-937 and 14-CM-1052 at the same time. 14-CM-937 relates to allegations that Etienne committed three misdemeanor counts on April 28, 2014. Count 1: Intimidate Victim/Dissuade Complaints contrary to Wis. Stat. § 940.44(2), Count 2: Battery contrary to Wis. Stat. § 940.19(1), and Count 3: Resisting or Obstructing an Officer contrary to Wis. Stat. § 946.41(1). 14-CM-1052 relates to Etienne being accused of violating the no-contact bond condition while on a misdemeanor bond under 14-CM-937 contrary to Wis. Stat. § 946.49(1)(a). He was acquitted of all counts in 14-CM-937 at trial and was found guilty of one count of bailjumping under 14-CM-1052, which is the subject of this appeal.

Most of the trial was dedicated to the three counts found in 14-CM-937, which Etienne was acquitted of. P.J., the alleged victim, during her entire testimony stated that Etienne was not at fault for anything. It seemed that neither side really asked her about the bailjumping allegation against Etienne. During the trial, P.J. was asked about speaking to an officer on April 29, 2014, the day after the allegations in 14-CM-937 occurred:

"Q: Do you remember talking to the officer about something called a no contact provision on the 29th?

A: Yes.

Q: And do you remember signing something saying that you wanted to continue to have contact with Mr. Etienne?

A: Yes.

Q: And did you sign that because Mr. Etienne forced you to sign that?

A: No.

Q: It was your genuine wish to continue to have contact with Mr. Etienne?

A: Yes.

Q: So you weren't scared of him on the 29th?

A: No.

Q: So you made a voluntary choice to continue associating with him, right?

A: Yes.

Q: And you did that because you're in a relationship with him?

A: Right.

Q: And you have feelings about him?

A: Yes.

Q: And you want to stay close to him?

A: Yes." (R53: 67-68).

None of P.J.'s testimony actually related to the facts on May 21, 2014. This no-contact was not the no-contact that Etienne was accused of violating.

The clerk Wayne Pfister informed the jury that Etienne signed the bond with the condition that he not have any contact with P.J. directly or indirectly. (R53:119-20).

On May 21, 2014 Michael Alvarez was dispatched to the scene from a 911 call alleging that there was a female kicking a car and she was creating a disturbance fighting with a man. (R53:128). When he came to the scene he saw a woman leaning up against the car, and a male was inside the car. (R53:124). He pulled up to contact them and as he did, the male got out of the car and began to approach him. (R53:124). Etienne said that perhaps the disturbance reported in the 911 call was a phone call that the woman was on (R53:124). Etienne gave his name to the officer. (R53:124). The officer asked him if he was on probation and parole and Etienne responded that he was not. (R53:125). Then the

officer asked him if he was on bond and whether he was violating any conditions of bond. (R53:125). Etienne stated that he was on bond and that he was not violating any conditions. (R53:125).

Officer Alvarez followed-up with Etienne who stated that he did not have contact with her, but that she had contacted him. (R53:126). They had both been visiting family on that street. (R53:126). Officer Alvarez noted that as far as he understood, this was merely a chance encounter. (R53:128). Etienne had told Officer Alvarez that there had been no disturbance. (R53:127). P. J. was interviewed by Officer Alvarez and she stated that there was no disturbance. (R53:127). P. J. admitted that she may have yelled Etienne's name. (R53:128). Officer Alvarez noted that Etienne was cooperative. (R53:129).

Etienne testified on his own behalf and stated that on May 21, 2014 he was at his sister's house. (R53:149). He was sitting in the car and P. J. came around and she was upset because he had followed the no-contact bond condition, "She really got really irritated with why are you not returning my phone calls." (R53:149-150). After she had advanced to him, Etienne told

her "that we not supposed to have contact with each other." (R53:150) He described to her that he could not even go near her house because of his electronic monitoring device. (R53:150).

The problem, as Etienne recounted, is that his sister, the person whose house he was visiting on May 21, 2014, lived right around the corner from P. J. and he was worried that at any given time P. J. may try to have contact with him. (R53:150-1). When he tried to explain the problem to bail monitoring, "They told me that, hey, that's on me...." (R53:151).

As he had predicted before, P. J. did indeed try to have contact with him. After he told her what the court had ordered, he tried to walk away from her, but she wouldn't let him. (R53:151). "She was furious, because I was not talking to her, I wasn't returning her phone calls, and just not having contact with her at all." (R53:151). Etienne told P. J. about the bond condition, but not only did she not let him walk away, but "she said she doesn't care." (R53:151). She told him that since she confessed to the officers that she had previously lied about what happened on April 28, 2014, therefore he would not be going to jail. (R53:151). She refused to believe

that he was on monitoring, that there was a no-contact, and that he was going to jail if they had contact with one another. (R53:151-152).

Etienne described the conscious effort that he made to avoid contact with P. J. stating, "She just would not leave me alone at the time. She just kept coming around. Everywhere I was going she would pop up, and I would try to be in different areas different times. And, you know, she knows where my sister stays. Her and my sister have a good relationship. So my sister said I am not going to tell her she can't come over here, you know, because me and her are going good times and, you know, was just creating a big problem for me." (R53:153).

This harassment caused Etienne to want to go back to jail. (R53:153). This is what caused Etienne to leave the vehicle when the police arrived and approach the officer. (R53:153). "...I just said I am just sick of it, just take me to jail." (R53:153).

On cross-examination, the state asked Etienne about confusion over allegations of other contact with P. J. outside of the May 21, 2014 date and are not relevant as to whether or what was the nature of any contact with P. J. on May 21, 2014. On re-direct Etienne explained why he came up with

the story about P. J. being on the phone and why he did not tell the officer about P. J. being aggressive and kicking his car. (R53:162). He said that he cared for her and did not want her to get into trouble, but wanted to protect her because "she totally lost it at one point in time." (R53:162).

On July 17, 2014, the Court sentenced Etienne to 8 months in jail as to Count 1. (R54). A Notice of Intent to Pursue Post-Conviction Relief was filed that same day. (R40). No post-conviction motion was filed with the trial court. Etienne now appeals from his judgment of conviction having filed a Notice of Appeal. (R47)

Having said the above it is appropriate to proceed to argument. Additional facts will be inserted and referenced as necessary in the argument portion of this brief.

ARGUMENT

I. THERE WAS NOT SUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT-APPELLANT AT TRIAL

Etienne is mindful of an Appellate Court's reluctance to overturn a jury's verdict and accepts the same. But in this

case, in the interest of justice, this Honorable Court should put its natural reluctance aside and view the argument made herein on the issue of overturning the jury's verdict.

When sufficiency of the evidence to support a conviction is raised on appeal, the law is well settled. Under *State v. Poellinger*, 153 Wis.2d 493, 507, 451 N.W.2d 752 (1990), the appellate courts cannot "substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the State 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." In this matter, Etienne submits that the jury should not have found guilt beyond a reasonable doubt of Misdemeanor Bail Jumping.

The Court instructed the jury that the State had to prove, "The defendant on or about Wednesday, May 21, 2014...did intentionally fail to comply with the terms of his bond to wit: Defendant shall not have any contact, direct or indirect, with [P.J.]...." (R35:9); (R53:24). In order to prove these facts the jury had to find the following three elements occurred on May 21, 2014:

1. The defendant was charged with a misdemeanor. A misdemeanor is a crime punishable by imprisonment in the county jail. Battery is a misdemeanor.

2. The defendant was released from custody on bond.

This requires that after being charged, the defendant was released from custody on bond under the conditions established by a court commissioner. In this case the conditions of Mr. Etienne's bond were that he have no contact, direct or indirect with P.J.

3. The defendant intentionally failed to comply with the terms of the bond. This requires that the defendant knew of the terms of the bond and knew that his actions did not comply with those terms. (R35:9, 10)

The defendant-appellant will concede that the state met the first two elements.

The above facts really outline the issue, could the jury have convicted Etienne based on the fact that he had recounted to P. J. the court's order that he not have any contact with her? The facts are clear that he tried to avoid P.J. He was aware that the chance encounter could occur and had made bail monitoring aware of it, which they disregarded. P.J. did not believe a no-contact order was still in place. He tried to remove himself from the situation after P. J. tried to make contact with him, but she would not let him leave. None of the facts are consistent with intentional, direct or indirect, contact with P. J.

P. J. on the stand stated that she wanted to contact Etienne, that she had recanted her story, and that she wanted the no-contact dropped. (R53:63). It is no wonder that she

believed that Etienne would not get into trouble and probably that the charges had been dismissed when she confronted him on May 21, 2014.

No trier of fact, acting reasonably, could have found Etienne guilty beyond a reasonable doubt based on the facts above. Etienne never intentionally had contact with P. J. and the only statements that Etienne told P. J. were merely mentioning the judge's order.

II A FINDING OF GUILT BASED ON THE FACTS WOULD VIOLATE THE DEFENDANT-APPELLANT'S RIGHT TO DUE PROCESS

"The Due Process clause requires that 'Conditions of supervised release . . . give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'" *United States v. Balon*, 384 F.3d 38, 43 (2d Cir. 2004) (quoting *United States v. Simmons*, 343 F.3d 72, 81 (2d Cir. 2003)). The Supreme Court has also written-in exceptions to no-contact provisions where it is necessary under the Due Process Clause.

In *Arciniega v. Freeman*, 404 U.S. 4, 5 (1971) (per curiam), the Supreme Court was asked to look at a case where the defendant was ordered, as a condition of his parole, not to have contacts with ex-convicts. The Supreme Court held that it was a violation of Due Process to punish a defendant for incidental and unavoidable contacts in violation of a no-contact. *See Alonzo v. Rozanski*, 808 F.2d 637, 639 (7th Cir. 1986) (The deprivation of "liberty" in *Arciniega* was covered by the due process clause).

The *Arciniega* case applies to our situation because the evidence above is that Etienne was constantly approached by the victim and had to tell her that he could not have contact with her because she would not leave him alone. This was the type of incidental and unavoidable contact that the Supreme Court in *Arciniega* held would violate the Due Process. Etienne sought to avoid both direct and indirect contact with P. J. There is no fact in evidence that P. J. was aware that there even was a current no-contact in place when she approached Etienne. Etienne had to inform her of it or at least remind her of that fact. Repeating the judge's no-contact order in an unavoidable situation should not cause someone to be in violation of that same order.

The same conclusion was reached in *United States v. Loy*, where the court held that a no-contact with minors must include the exception for unavoidable and casual encounters. "Certainly accidental or unavoidable contact with minors in public places is not forbidden by the condition; however, should Loy deliberately seek out such contacts, they would cease to be 'casual' or 'unavoidable' and would fall within the condition's scope." *United States v. Loy*, 237 F.3d 251, 268-69 (3rd Cir. 2001). The 7th Circuit has cited approvingly the *Loy* case, but without speaking directly to this issue. *See United States v. Benhoff*, 755 F.3d 504, 506 (7th Cir. Ill. 2014); *United States v. Shannon*, 743 F.3d 496, 501 (7th Cir. Wis. 2014); *United States v. Adkins*, 743 F.3d 176, 194 (7th Cir. Ind. 2014).

The 5th, 10th, and D.C. Circuits have also held that no-contacts do not include accidental or unavoidable contacts. *United States v. Mike*, 632 F.3d 686, 697 (10th Cir. N.M. 2011); *United States v. Paul*, 274 F.3d 155, 166 (5th Cir. Tex. 2001); *United States v. Burroughs*, 613 F.3d 233, 246, 392 U.S. App. D.C. 68, 81 (D.C. Cir. 2010).

A finding that unavoidable and accidental contacts do not violate a no-contact would also be in the spirit and purpose of the crime of bailjumping. The plain purpose of a

bail jumping law is to deter those who have been released pending disposition of criminal charges from violating the conditions of their bonds. *State v. Nelson*, 146 Wis. 2d 442, 451-452, 432 N.W.2d 115, 119 (Wis. Ct. App. 1988). Because the offense "diminishes the power of a court to control those properly within its jurisdiction and afflicts the court with . . . detrimental effects," it is itself made a crime. *United States v. Roche*, 611 F.2d 1180, 1183 (6th Cir. 1980). It would seem that Etienne is actually trying to uphold the court's order and elevate rather than diminish the court's power by informing P. J. of the order's existence. To hold otherwise would be a violation of Etienne's Due Process right and against the spirit of why there even is such a crime as bailjumping.

CONCLUSION

For all the reasons stated herein and the arguments set forth in support thereof, Defendant-Appellant Lavarren Etienne respectfully asks that this Honorable Court vacate the conviction, or in the alternative, order a new trial, or grant such relief as the Court deems appropriate.

Dated this 2nd day of February, 2015.

Respectfully Submitted,

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CERTIFICATION AS TO FORM/LENGTH

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 of body text. The length of the brief is 6 pages and 2574 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

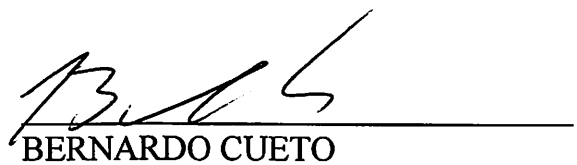
I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 2nd day of February, 2015.

Signed:



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