COURT OF APPEALS OF WISCONSIN
DISTRICT NO. IV

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

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LAVARREN D. ETIENNE,

Defendant-Appellant.

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

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# REPLY BRIEF OF DEFENDANT-APPELLANT

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## I. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT LAVARREN ETIENNE AT TRIAL

Under the standard of *State v. Poellinger*, 153 Wis.2d 493, 507, 451 N.W.2d 752 (1990), even with reasonable inferences against Mr. Etienne, there is not enough evidence to convict him of Misdemeanor Bailjumping.[1]

### A. Mr. Etienne never told Officer Alvarez that He Was Not Under Any Rules

The State mistakenly believes that Mr. Etienne told the officer that he was not under any "rules" and was therefore lying to Officer Alvarez. The State placed in its Statement of the Case section, "Officer Alvarez observed that Etienne appeared to think he was going to jail, (R53:125), so he asked Etienne if he had any open cases or was in violation of any rules. Id. Etienne answered no to these questions. Id." State's Br. pg 2. The State again brought this up in its Argument, stating "Secondly, Etienne lied to Officer Alvarez when Officer Alvarez asked Etienne if he had any open cases or

[1] The State in its brief on page 6 quoted *State v. Wyss*, 124 Wis. 2d 681, 693, 370 N.W.2d 745 (1985), which was overruled by *State v. Poellinger*, 153 Wis. 2d 493, 505, 451 N.W.2d 752 (1990), which stated, "We have likewise mistakenly stated that when a conviction is based on circumstantial evidence, an appellate court must uphold the conviction if a reasonable trier of fact could be convinced that the evidence is strong enough to exclude to a moral certainty every reasonable hypothesis of innocence. *State v. Wyss*, 124 Wis. 2d 681, 687-88, 691, 694, 370 N.W.2d 745 (1985)."

was in violation of any rules. (R53:125). A jury could reasonably infer from this fact that Etienne knew his actions did not comply with his nocontact provision, and hence he lied in a futile attempt to protect himself from being arrested."

The actual quote from the record is found on the same page that the State cited only its actual reading is completely different. The actual reading states, "So I spoke with him further, and he appeared to think that he was going to jail. And so I asked him if he was on any kind of probation and parole, and he said he was not. I asked him if he had any open cases with bail conditions, and he stated that he did. And I asked him if he was violating any of those, and he said that he was not." (R53:125). Mr. Etienne was not under any kind of probation or parole when he spoke to Officer Alvarez. He also admitted he had an open case, but denied that he was violating any of his conditions. None of that is a lie.

**B. Thinking that You are Going to Jail is Not Admitting to Violating the No-Contact**

The State argues that "A jury could reasonably infer from these facts that Etienne thought he was going to jail because he knew his actions did not comply with his no-contact provision, and he had been caught in the act." State's Br. pg 9. Mr. Etienne said that he did not violate his bond conditions as quoted above. Mr. Etienne

explained the reason why he thought he was going to jail was because he was told that there was a warrant for his arrest.

"On May 13, I had received a phone call from my aunt and [P.J.], and they told me that, hey, you got a warrant out for your arrest, because she told the police some bull and, you know, we don't care right now but we going to try to fix this. And I said, oh, well, let me just go turn myself in." (R53:152). Further, there was nothing in Officer Alvarez's testimony that would make a reasonable inference that Mr. Etienne thought he was going to jail because he knew he did something wrong.

### C. There Can be no Reasonable Inference that Mr. Etienne and P.J. Were in a Car Together

The State makes an argument that a jury can draw a reasonable inference that Mr. Etienne and P.J. were together in the car because of the 911 call and because they both have an incentive to lie about being in the car together. State's Br. pgs. 10-11. According to Officer Alvarez, the 911 call stated that two individuals were fighting in a car. (R53:123). The 911 call apparently also stated that P.J. was kicking a car.

"...I asked her why someone would call stating that she was, that a female was kicking her car, and that's when she laughed and said that it

was ridiculous that she would kick her own vehicle." (R53:128). It is unclear how someone could see P.J. kicking her vehicle if she was inside of it. The only reasonable conclusion that can be drawn is that the 911 call was that two people were arguing around a car and not inside the car. Further there was no testimony by anyone that the encounter between Mr. Etienne and P.J. was anything other than accidental. "[Attorney August]: So did you have any information that this was a pre-planned meeting, for example? [Officer Alvarez]: I did not." (R53:128). Officer Alvarez also stated that he never saw them both in the same vehicle. It is not reasonable to take the words of a contradictory 911 call over all of the witnesses in the case.

**D. The State Cannot Create Testimony Where None Exists to Create a Reasonable Inference Against Mr. Etienne**

According to the State, "Etienne travelled across town, to a location down the block from Jones' residence, became seated inside her car, with [P.J.] in his immediate vicinity, and remained present for a period of time while she was standing outside the car." State's Br. Pg. 10. The car is in P.J.'s name, but Mr. Etienne paid for it so he is the one that uses it. Mr. Etienne explained this by stating,

"The problem is, is that the car that I have, it's in [P.J.]'s name, but I paid for it, so we had a stipulation with that as well, so." (R53:149). The quote above from the State seems to indicate that Mr. Etienne walked or was dropped off a few doors from P.J. then either broke into her car or had his own key and "became seated" in P.J.'s car. That is not correct. The testimony from Mr. Etienne is that it is his car even though it is in her name and there is nothing to indicate that he did not drive to that location in his own car. There was no vehicle theft reported or any testimony that P.J. fought with Mr. Etienne over taking her car.

The State also seems to be implying by its quote above that Mr. Etienne merely hung around with P.J. Whereas the testimony was far different. Mr. Etienne stated, "I was trying to walk away from her too. She wouldn't let me walk away either." (R53:151). The only other witness to the scene was P.J. who never stated anything about the bailjumping incident at all. Officer Alvarez never testified about asking P.J. about anything other than the allegation that she was kicking the car. Officer Alvarez also recounts that Mr. Etienne was

cooperative. (R53:129). Officer Alvarez also notes that Mr. Etienne "stated that she had had contact with him, not with her...." (R53:126).

The 911 call, as reported above, was contradictory, but even if the kicking incident happened it would seem to buoy Mr. Etienne's testimony that she was being very aggressive toward him and not merely hanging around. "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). This was not a situation where both P.J. and Mr. Etienne were merely "present" for a long period of time.

The State also drew an unreasonable inference from the phone call that was made between P.J. and an unknown 3rd party. "Etienne remained in Jones' presence for a sustained period of time, at least long enough for her to complete a phone call. If Etienne sought to avoid Jones, it does not make sense that he would hang around while she was on the phone." State Br. Pgs 11-12. There were two references regarding a phone call. On direct examination, Officer Alvarez stated that he asked Mr. Etienne if there was a disturbance. "He said that there was no disturbance, that possibly what had been described as a disturbance was a phone call

that the female was on." (R53:124). On Cross-Examination, Officer Alvarez again stated, "[Mr. Etienne] stated that what may have been interpreted as the disturbance was a conversation she was having on the phone." (R53:127).

From these two similar statements, the State wants this court to conclude that a reasonable jury could have inferred that, despite all the other testimony to the contrary, P.J. was on the phone speaking loudly and Mr. Etienne was waiting for her to get off the phone before speaking to her. This would contradict all of the testimony in the case. Her phone call may have been completed before she ran into Mr. Etienne or perhaps she got louder on the phone when she ran into him. It is unclear what happened with this phone call but there is no testimony at all from anyone or any reasonable inference that Mr. Etienne merely just waited for P.J. to finish a phone call before choosing to initiate a conversation with her. That evidence or testimony does not appear on the record and cannot be used to support the State's position.

The State makes frequent mention of the fact that Mr. Etienne happened to be at the vicinity where P.J. resided. He

was upfront with this at the trial and there is no testimony to contradict what he said about it. He said, "But my sister stayed right around the corner, and I explained that to the lady at the bail monitoring. They told me that, hey, that's on me, you know, whether or not, you know, the problem here, you know. So I just took a chance of going out on the bail monitoring, knowing that she could just walk around the corner and have contact at any given time she wanted to." (R53:150-51). He was allowed to go see his sister and P.J. lived nearby. This was not a stalking situation, but a family situation. He was not forbidden from visiting his sister.

## II A FINDING OF GUILT BASED ON THE FACTS WOULD VIOLATE MR. ETIENNE'S RIGHT TO DUE PROCESS

The State wants to make a distinction between a no-contact with a specific person and a no-contact with a class of individuals such as ex-cons or minors. No such distinction was made in any of the court cases cited by either side. There is no precedent for limiting the Due Process clause to only unavoidable contacts with a class of people instead of an individual. The Supreme Court has held that unavoidable contacts should not be punished under the Due Process

Clause. *Arciniega v. Freeman*, 404 U.S. 4, 5 (1971) (per curiam). The State wants this court to rule that unavoidable contacts with an individual should be treated as a strict liability crime, but is perfectly content with treating unavoidable contacts with a class of people as a non-criminal offense.

The State cited to *State v. Martin*, 171 Ariz. 159, 160, 829 P.2d 349 (Ct. App. Div. 1 1992) for the justification that there should be a dividing line between no-contacts with a specific individual and no-contacts with a group of people. State's Br. pg. 14.[2] In that case, a sex offender was ordered not to have contact with minors unless the probation officer gave written permission. The defendant, Mr. Martin, went to dinner at his foster home and his two nephews showed up and were under eighteen years old. Instead of going to his room, Mr. Martin chose to do chores around the house. He chose not to go into his room even though there was a no-contact in place. The Court in that case held that, "While the term understandably intends to prohibit potential sexual contact with minors,

[2] The specific quote that the State cites to is accidentally misquoted and not found in the case although the same point is made.

the language is so broad as to also prohibit Martin from merely being present with minors in conventional places such as schools, shopping malls, churches, sporting events, or social events." *Martin*, 171 Ariz. at 160, 829 P.2d 349.

The same result would have happened had there been a no-contact specific to Mr. Martin's nephews and the nephews came over anyway. There is no logic to the distinction when an unavoidable contact occurs. In a situation like our case, it may be more justified to have incidental contact when an ex-girlfriend is actively seeking out a person. If it is unavoidable then the Due Process Clause applies and it would violate Mr. Etienne's constitutional rights to find him guilty of a crime he could not have avoided. Mr. Etienne, like Mr. Martin, is not expected to avoid contact with the outside world, including his immediate family.

## CONCLUSION

For all the reasons stated herein, including the original brief, 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 18 day of April, 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 11 pages and 2368 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 30th day of April, 2015.

Signed:

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